[redacted]

NATIONAL UNIVERSITY
LIBRARY SAN DIEGO

NON CIRCULATING

Digitized by the Internet Archive
in 2023 with funding from
Kahle/Austin Foundation

https://archive.org/details/californiareport0000unse_i0e3

CALIFORNIA REPORTER

COVERING CASES REPORTED IN

PACIFIC REPORTER
SECOND SERIES

KEY NUMBER SYSTEM

65 P.2d – 66 P.2d

TO BE CITED BY VOLUME AND PAGE
OF THE
PACIFIC REPORTER
SECOND SERIES

ST. PAUL, MINN.
WEST PUBLISHING CO.
1941

COPYRIGHT, 1937, BY WEST PUBLISHING CO.
Pacific Reporter, Second Series, Vol. 65, Nos. 1-5;
Vol. 66, Nos. 1-4.

COPYRIGHT, 1941, BY WEST PUBLISHING CO.

CAL.REP.65–66 P.2d
5th Reprint—1974

CASES REPORTED

	Vol.		Page
Adams; Richter v., App.	66	P.2d	226
Adjustment Service v. Dutton, App.	66	P.2d	163
Aitchison v. Bank of America Nat. Trust & Savings Ass'n, Sup.	65	P.2d	890
Aitken v. Lowe, App.	65	P.2d	113
Albori v. Smith, App.	65	P.2d	81
Albori v. Sykes, App.	65	P.2d	84
Aldrich; City of Los Angeles v., Sup.	66	P.2d	647
Allen; People v., App.	65	P.2d	382
Alling; Ward v., App.	65	P.2d	902
Allum; Medical Finance Ass'n v., Super.	66	P.2d	761
Alta Bates, Inc.; Stevenson v., App.	66	P.2d	1265
Anderson v. Hagen, two cases, App.	66	P.2d	168
Anger; Dietzel v., Sup.	65	P.2d	803
Anger; Marble v., Sup.	65	P.2d	806
Angus; Brown Materials Co. v., App.	66	P.2d	470
Antonsen v. San Francisco Container Co., App.	66	P.2d	716
Archer v. Edwards, App.	65	P.2d	115
Aronson v. Bank of America Nat. Trust & Savings Ass'n, App.	65	P.2d	823
Associated Indemnity Corporation; Nelson v., App.	66	P.2d	184
Associated Oil Co.; Hall v., App.	65	P.2d	954
Aurenz v. Los Angeles R. Corporation, App.	65	P.2d	910
Bailey v. Pacific Greyhound Lines, App.	66	P.2d	1246
Bailey; Wilson v., Sup.	65	P.2d	770
Bailey's Estate, In re, App.	65	P.2d	102
Bank of America Nat. Trust & Savings Ass'n; Aitchison v., Sup.	65	P.2d	890
Bank of America Nat. Trust & Savings Ass'n; Aronson v., App.	65	P.2d	823
Bank of America Nat. Trust & Savings Ass'n v. Century Land & Water Co., App.	65	P.2d	109
Bank of America Nat. Trust & Savings Ass'n v. Century Land & Water Co., App.	65	P.2d	110
Bank of America Nat. Trust & Savings Ass'n v. Eldred, App.	65	P.2d	830
Bank of America Nat. Trust & Savings Ass'n v. Sparr Realty Corporation, App.	66	P.2d	476
Bank of California Nat. Ass'n; Smith v., App.	65	P.2d	1361
Banta-Carbona Irr. Dist.; Keyston v., App.	65	P.2d	371
Beck v. Shepherd Fruit Co., App.	66	P.2d	188
Bellesfield v. Le Favor, App.	65	P.2d	907
Benedict v. Calkins, App.	65	P.2d	831
Bennett v. Lane Mortg. Co., App.	65	P.2d	953
Berliner; Hall v., App.	66	P.2d	721
Bernstein v. Pacific States Savings & Loan Co., App.	66	P.2d	699
Berry v. Struble, App.	66	P.2d	746
Bevans; People v., App.	65	P.2d	92
Biggs; People v., App.	65	P.2d	75
Bishop v. Hayward Lumber & Investment Co., App.	65	P.2d	125
Bishop's School Upon Scripps Foundation v. Wells, App.	65	P.2d	102
Bishop's School Upon Scripps Foundation v. Wells, App.	65	P.2d	105
Bixler Vapor Dry Cleaning Co.; Travis v., App.	66	P.2d	1263
Blee v. Lead Mountain Mines, Sup.	66	P.2d	646
Blodgett v. Merritt Annex Oil Co., App.	65	P.2d	123

	Vol.		Page
Board of Administration of State Employees' Retirement System of California; Rudell v., Sup.	66	P.2d	1203
Board of Chiropractic Examiners; Hartman v., App.	66	P.2d	705
Board of Sup'rs of Los Angeles County; Brock & Co. v., Sup.	65	P.2d	791
Boggs v. North American Bond & Mortgage Co., App.	66	P.2d	1253
Boole, People ex rel., v. Northwestern Pac. R. Co., App.	66	P.2d	697
Bowlin; People v., App.	65	P.2d	840
Brock & Co. v. Board of Sup'rs of Los Angeles County, Sup.	65	P.2d	791
Brown Materials Co. v. Angus, App.	66	P.2d	470
Bruce's Estate, In re, App.	65	P.2d	380
Buckles; Harper v., App.	65	P.2d	947
Buckley; Strauss v., App.	65	P.2d	1352
Bueneman v. City of Santa Barbara, Sup.	65	P.2d	884
Burns; Strong v., App.	65	P.2d	845
Butcher; People v., App.	66	P.2d	466
Byer v. Canadian Bank of Commerce, Sup.	65	P.2d	67
California State Board of Optometry; Whitten v., Sup.	65	P.2d	1296
California Walnut Growers Ass'n; Mountain View Walnut Growers Ass'n v., App.	65	P.2d	80
California Western States Life Ins. Co.; Moriarty v., App.	65	P.2d	842
Calkins; Benedict v., App.	65	P.2d	831
Canadian Bank of Commerce; Byer v., Sup.	65	P.2d	67
Canal Oil Co. v. National Oil Co., App.	66	P.2d	197
Canvin v. General Brewing Corporation, App.	66	P.2d	691
Carpenter v. Pacific States Savings & Loan Co., Sup.	66	P.2d	656
Carpenter v. Park, App.	66	P.2d	224
Carpenter v. Peoples Mut. Life Ins. Co., App.	65	P.2d	827
Carter v. Murphy, App.	66	P.2d	1234
Castle Bldg. Co.; Vigen v., App.	65	P.2d	1340
Caulfield v. Market St. Ry. Co., App.	66	P.2d	752
Central Bank of Oakland v. Wells Fargo Bank & Union Trust Co., Sup.	65	P.2d	1301
Century Indemnity Co.; Sampson v., Sup.	66	P.2d	434
Century Land & Water Co.; Bank of America Nat. Trust & Savings Ass'n v., App.	65	P.2d	109
Century Land & Water Co.; Bank of America Nat. Trust & Savings Ass'n v., App.	65	P.2d	110
Chamberland v. Whitney, App.	66	P.2d	220
Chappell; Williams v., Sup.	66	P.2d	147
Cicurel v. Plaza Service Corporation of Canada, App.	66	P.2d	706
Citizens Nat. Trust & Savings Bank of Los Angeles; Union Bank & Trust Co. of Los Angeles v., Sup.	65	P.2d	355
City of Arcata; Raynor v., App.	65	P.2d	838
City of Long Beach; Robertson v., App.	66	P.2d	167
City of Los Angeles v. Aldrich, Sup.	66	P.2d	647
City of Los Angeles; Peccolo v., Sup.	66	P.2d	651
City of Los Angeles; Schrader v., App.	65	P.2d	374
City of Oakland; Durante v., App.	65	P.2d	1326
City of San Jose; San Jose Ice & Cold Storage Co. v., App.	65	P.2d	1324
City of Santa Barbara; Bueneman v., Sup.	65	P.2d	884
City of Santa Monica; Johnson v., Sup.	66	P.2d	433
City of Santa Rosa; La Franchi v., Sup.	65	P.2d	1301
City of Santa Rosa; Page v., Sup.	65	P.2d	775
City of Santa Rosa; Strath v., App.	65	P.2d	894
Claudius; Stewart v., App.	65	P.2d	933
Clausen; Pacific Coast Joint Stock Land Bank v., Sup.	65	P.2d	352
Clay v. Clay, App.	65	P.2d	1363
Clough v. Superior Court in and for Tehama County, App.	65	P.2d	831
Coates v. Lake View Oil & Refining Co., App.	66	P.2d	463

CASES REPORTED

	Vol.		Page
Coleng v. Ramsdell, App.	65	P.2d	365
Comey v. Comey, Sup.	66	P.2d	148
Commercial Standard Ins. Co. v. Margolis, App.	66	P.2d	726
Copp v. Millen, App.	65	P.2d	362
Cornaz' Estate, In re, three cases, Sup.	65	P.2d	784
Corona Foothill Lemon Co. v. Lillibridge, Sup.	66	P.2d	443
Couch v. McGregor, App.	66	P.2d	159
Cowles; Hillside Packing Ass'n v., App.	66	P.2d	451
Crescent Auto Co.; Whicker v., App.	66	P.2d	749
Curran v. Giometti, App.	66	P.2d	1260
Davidson v. De Sousa, App.	66	P.2d	740
Davis; Murphy v., App.	65	P.2d	917
Deasy; Emerick v., App.	66	P.2d	175
Deasy; Hinkley v., App.	66	P.2d	175
Deasy; Lee v., App.	66	P.2d	175
Del Bosque v. Kakoo Singh, App.	65	P.2d	951
Deming v. Smith, App.	66	P.2d	454
De Sousa; Davidson v., App.	66	P.2d	740
Dietzel v. Anger, Sup.	65	P.2d	803
Dilbeck; Mitchell v., App.	66	P.2d	1261
Dinsmore; Leach v., Super.	65	P.2d	1364
Donato v. Lopopolo, App.	66	P.2d	1256
Dudney v. State Bar of California, two cases, Sup.	66	P.2d	1199
Durante v. City of Oakland, App.	65	P.2d	1326
Dutton; Adjustment Service v., App.	66	P.2d	163
Dutton; People v., App.	65	P.2d	1339
Duttweiler v. Washburn, App.	66	P.2d	219
Dyson; Purinton v., Sup.	65	P.2d	777
Edwards; Archer v., App.	65	P.2d	115
Edwards; McKenna v., App.	65	P.2d	810
Eldred; Bank of America Nat. Trust & Savings Ass'n v., App.	65	P.2d	830
Eldred v. Tsheppe's Estate, App.	65	P.2d	88
Ellis v. Ellis, App.	66	P.2d	738
Emerick v. Deasy, App.	66	P.2d	175
Ensign; Ida May Co. v., App.	66	P.2d	727
Evans; Steinberg v., App.	66	P.2d	712
Fancher; Regoli v., App.	66	P.2d	214
Farmers Automobile Interinsurance Exchange; Votaw v., App.	65	P.2d	924
First Congregational Church of Glendale v. Los Angeles County, App.	65	P.2d	813
First Nat. Bank of Lamanda Park; Landis v., App.	66	P.2d	730
First Nat. Bank of Santa Ana v. Kinslow, Sup.	65	P.2d	796
First Nat. Bank in Santa Ana v. Lynch, App.	65	P.2d	70
First Nat. Trust & Savings Bank of San Diego; Ross v., App.	66	P.2d	193
Fleishbein v. Western Auto Supply Agency, App.	65	P.2d	928
Forer; Rapaport v., App.	66	P.2d	1242
Fretz; Kelly v., App.	65	P.2d	914
Fuller; Parsons v., Sup.	66	P.2d	430
Galloway; Sharick v., App.	66	P.2d	185
Geibel; Hollyfield v., App.	66	P.2d	755
Geisler v. Rugh, App.	66	P.2d	671
General Brewing Corporation; Canvin v., App.	66	P.2d	691
Gerontopoulos v. Gerontopoulos, App.	66	P.2d	724
Getty; Neblett v., App.	66	P.2d	473
Gibson; Morris v., App.	65	P.2d	956
Gibson; Morris v., App.	66	P.2d	704
Giometti; Curran v., App.	66	P.2d	1260
Goodspeed v. Great Western Power Co. of California, twenty-two cases, App.	65	P.2d	1342

	Vol.		Page
Goodwin v. Robinson, App.	66	P.2d	1257
Gorham; People v., App.	66	P.2d	1241
Great Western Distillery Products v. John A. Wathen Distillery Co., App.	66	P.2d	717
Great Western Power Co. of California; Goodspeed v., App.	65	P.2d	1342
Greenfield; Metropolitan Laundry Co. v., App.	66	P.2d	722
Greenwald's Estate, In re, App.	65	P.2d	70
Greenwell; People v., App.	66	P.2d	674
Griffin v. Industrial Accident Commission, App.	66	P.2d	176
Grivel v. Wardlaw, App.	65	P.2d	360
Grivel's Estate, In re, App.	65	P.2d	360
Guardian Life Ins. Co. of America; Meyers v., App.	66	P.2d	753
Guibbini; Tracy v., App.	66	P.2d	675
Hagen; Anderson v., App.	66	P.2d	168
Hagen v. O. J. Weber Co., App.	66	P.2d	168
Hales v. Snowden, App.	65	P.2d	847
Hall v. Associated Oil Co., App.	65	P.2d	954
Hall v. Berliner, App.	66	P.2d	721
Hamilton Diamond Co.; Raben v., App.	65	P.2d	98
Hammersley v. Superior Court in and for San Mateo County, App.	65	P.2d	359
Harkey v. Luckehe, App.	65	P.2d	77
Harper v. Buckles, App.	65	P.2d	947
Harrington v. Hoffmeyer, App.	65	P.2d	931
Harris v. Larter, App.	65	P.2d	117
Harris v. Larter, App.	65	P.2d	1334
Harris' Estate, In re, App.	65	P.2d	117
Harris' Estate, In re, App.	65	P.2d	1334
Hart; Miller v., App.	66	P.2d	755
Hartman v. Board of Chiropractic Examiners, App.	66	P.2d	705
Hasberg; Marble v., Sup.	65	P.2d	806
Haydel v. Morton, App.	66	P.2d	204
Hayward Lumber & Investment Co.; Bishop v., App.	65	P.2d	125
Hazel; Stewart v., App.	65	P.2d	373
Hedden v. Waldeck, App.	65	P.2d	376
Hedden; Wright v., App.	65	P.2d	376
Herbert M. Baruch Corporation; Kiernan v., App.	66	P.2d	748
Hillside Packing Ass'n v. Cowles, App.	66	P.2d	451
Hinkley v. Deasy, App.	66	P.2d	175
Hoffman v. Van Duzee, App.	65	P.2d	1330
Hoffmeyer; Harrington v., App.	65	P.2d	931
Hollyfield v. Geibel, App.	66	P.2d	755
Holmes v. Justice's Court of Oakland Tp., App.	65	P.2d	820
Hopper; People v., App.	66	P.2d	459
Howard v. Security Title Insurance & Guarantee Co., App.	66	P.2d	1247
Huntington Beach Elementary School Dist.; Phillips v., Sup.	66	P.2d	657
Ida May Co. v. Ensign, App.	66	P.2d	727
Industrial Accident Commission; Griffin v., App.	66	P.2d	176
Industrial Accident Commission; Massachusetts Bonding & Insurance Co. v., App.	65	P.2d	1349
Industrial Accident Commission; Maxfield Wilton & Associates v., App.	65	P.2d	1354
Industrial Accident Commission of California; National Automobile Ins. Co. v., App.	65	P.2d	128
James; People v., App.	66	P.2d	461
John A. Wathen Distillery Co.; Great Western Distillery Products v., App.	66	P.2d	717
Johnson v. City of Santa Monica, Sup.	66	P.2d	433
Johnson; M. G. West Co. v., App.	66	P.2d	1211

	Vol.		Page
Johnson v. Taft School Dist., App.	65	P.2d	912
Johnson Corporation v. Pacific Electric R. Co., App.	65	P.2d	368
Jones v. Wilton, App.	65	P.2d	1357
Joseph; People v., App.	66	P.2d	675
Justice's Court of Oakland Tp.; Holmes v., App.	65	P.2d	820
Kakoo Singh; Del Bosque v., App.	65	P.2d	951
Kelly v. Fretz, two cases, App.	65	P.2d	914
Kemp v. Lynch, Sup.	65	P.2d	1316
Keyston v. Banta-Carbona Irr. Dist., App.	65	P.2d	371
Kiernan v. Herbert M. Baruch Corporation, App.	66	P.2d	748
Kindred v. Pacific Automobile Ins. Co., App.	66	P.2d	1252
Kinslow; First Nat. Bank of Santa Ana v., Sup.	65	P.2d	796
Knouse v. Nimocks, Sup.	66	P.2d	438
Konda v. Lamkin, App.	66	P.2d	164
Kovacevich; People v., App.	65	P.2d	807
Lady v. Smith, App.	65	P.2d	76
La Franchi v. City of Santa Rosa, Sup.	65	P.2d	1301
Lake View Oil & Refining Co.; Coates v., App.	66	P.2d	463
Lamkin; Konda v., App.	66	P.2d	164
Lampton; Tomlinson v., Sup.	66	P.2d	151
Landis v. First Nat. Bank of Lamanda Park, App.	66	P.2d	730
Lane Mortg. Co.; Bennett v., App.	65	P.2d	953
Larter; Harris v., App.	65	P.2d	117
Larter; Harris v., App.	65	P.2d	1334
Leach v. Dinsmore, Super.	65	P.2d	1364
Lead Mountain Mines; Blee v., Sup.	66	P.2d	646
Lee v. Deasy, App.	66	P.2d	175
Leek v. Western Union Tel. Co., App.	66	P.2d	1232
Le Favor; Bellesfield v., App.	65	P.2d	907
Lewis v. Nance, App.	66	P.2d	708
Liles v. Superior Court in and for Los Angeles County, App.	65	P.2d	920
Lillibridge; Corona Foothill Lemon Co. v., Sup.	66	P.2d	443
Limpert v. Walker, App.	65	P.2d	955
Lionberger; People v., App.	65	P.2d	99
Lopopolo; Donato v., App.	66	P.2d	1256
Los Angeles, City of, v. Aldrich, Sup.	66	P.2d	647
Los Angeles County; First Congregational Church of Glendale v., App.	65	P.2d	813
Los Angeles County v. Payne, Sup.	66	P.2d	658
Los Angeles County v. Ransohoff, App.	65	P.2d	815
Los Angeles Mountain Park Co.; Traylor v., App.	65	P.2d	921
Los Angeles Mountain Park Co.; Traylor v., App.	66	P.2d	736
Los Angeles R. Corporation; Aurenz v., App.	65	P.2d	910
Lowe; Aitken v., App.	65	P.2d	113
Lowe's Estates, In re, App.	65	P.2d	113
Low Ying; People v., App.	66	P.2d	211
Luckehe; Harkey v., App.	65	P.2d	77
Luscombe; Weiner v., App.	66	P.2d	151
Lynch; First Nat. Bank in Santa Ana v., App.	65	P.2d	70
Lynch; Kemp v., Sup.	65	P.2d	1316
McAlvay; Stockwell v., Sup.	65	P.2d	781
McArthur v. Wellman, App.	66	P.2d	1226
McClelland; Niccoli v., Super.	65	P.2d	853
McConnell; People v., App.	66	P.2d	720
McCracken; Occidental Life Ins. Co. v., App.	65	P.2d	130
McGregor; Couch v., App.	66	P.2d	159
Mackay v. State Bar of California, Sup.	66	P.2d	1199
McKenna v. Edwards, App.	65	P.2d	810

	Vol.		Page
McKeown v. Northwestern Pac. R. Co., App.	66	P.2d	1250
Mallett v. Southern Pac. Co., App.	65	P.2d	93
Malone; People v., App.	66	P.2d	216
Marble v. Anger, Sup.	65	P.2d	806
Marble v. Hasberg, Sup.	65	P.2d	806
Margolis; Commercial Standard Ins. Co. v., App.	66	P.2d	726
Marin County; Tax Factors v., App.	66	P.2d	666
Marion; People v., App.	66	P.2d	1232
Market St. Ry. Co.; Caulfield v., App.	66	P.2d	752
Marshall; Mundy v., Sup.	65	P.2d	65
Martinez; People v., App.	66	P.2d	161
Maryland Casualty Co. of Baltimore; Wilson v., App.	65	P.2d	903
Massachusetts Bonding & Insurance Co. v. Industrial Accident Commission, App.	65	P.2d	1349
Mattingly's Estate, In re, App.	65	P.2d	1338
Maurice Mercantile; Walsh v., App.	66	P.2d	181
Maxfield Wilton & Associates v. Industrial Accident Commission, App.	65	P.2d	1354
May Co. v. Ensign, App.	66	P.2d	727
Medical Finance Ass'n v. Allum, Super.	66	P.2d	761
Merritt Annex Oil Co.; Blodgett v., App.	65	P.2d	123
Metropolitan Laundry Co. v. Greenfield, App.	66	P.2d	722
Metropolitan Life Ins. Co.; Woodard v., Sup.	65	P.2d	353
Meyers v. Guardian Life Ins. Co. of America, App.	66	P.2d	753
M. G. West Co. v. Johnson, App.	66	P.2d	1211
Millen; Copp v., App.	65	P.2d	362
Miller v. Hart, App.	66	P.2d	755
Miller; People v., App.	66	P.2d	448
Miller & Lux v. San Joaquin Light & Power Corporation, Sup.	65	P.2d	1289
Miller & Lux v. Superior Court in and for Stanislaus County, App.	66	P.2d	680
Miller & Lux v. Superior Court in and for Stanislaus County, two cases, App.	66	P.2d	689
Mills v. Superior Court in and for Fresno County, App.	66	P.2d	1207
Mitchell v. Dilbeck, App.	66	P.2d	1261
Mohun v. Timm, App.	66	P.2d	701
Moore; Thompson v., Sup.	65	P.2d	809
Morgan v. Somervell, App.	65	P.2d	820
Moriarty v. California Western States Life Ins. Co., App.	65	P.2d	842
Morris v. Gibson, App.	65	P.2d	956
Morris v. Gibson, App.	66	P.2d	704
Morton; Haydel v., App.	66	P.2d	204
Mountain View Walnut Growers Ass'n v. California Walnut Growers Ass'n, App.	65	P.2d	80
Mundy v. Marshall, Sup.	65	P.2d	65
Municipal Court, City of Los Angeles, Los Angeles County; Western Surety Co. v., App.	66	P.2d	1236
Murdock; Treat v., Sup.	65	P.2d	881
Murphy; Carter v., App.	66	P.2d	1234
Murphy v. Davis, App.	65	P.2d	917
Murphy; People v., App.	66	P.2d	451
Mutual Oil Co.; Union Oil Co. of California v., App.	65	P.2d	896
Nance; Lewis v., App.	66	P.2d	708
National Automobile Ins. Co. v. Industrial Accident Commission of California, App.	65	P.2d	128
National Oil Co.; Canal Oil Co. v., App.	66	P.2d	197
Neblett v. Getty, App.	66	P.2d	473
Nelson v. Associated Indemnity Corporation, App.	66	P.2d	184
Niccoli v. McClelland, Super.	65	P.2d	853
Nielsen, Ex parte, App.	65	P.2d	360

	Vol.		Page
Nimocks v. Knouse, two cases, Sup.	66	P.2d	438
North American Bond & Mortgage Co.; Boggs v., App.	66	P.2d	1253
Northwestern Pac. R. Co.; McKeown v., App.	66	P.2d	1250
Northwestern Pac. R. Co.; People ex rel. Boole v., App.	66	P.2d	697
Oakland High School Dist. of Alameda County; Weldy v., App.	65	P.2d	851
O'Brien v. Thomas, Super.	65	P.2d	1370
Occidental Life Ins. Co. v. McCracken, App.	65	P.2d	130
O'Connor; Security-First Nat. Bank of Los Angeles v., Sup.	65	P.2d	1299
Odom; People v., App.	66	P.2d	206
O. J. Weber Co.; Hagen v., App.	66	P.2d	168
O. T. Johnson Corporation v. Pacific Electric R. Co., App.	65	P.2d	368
Overton v. White, App.	65	P.2d	99
Pacific Automobile Ins. Co.; Kindred v., App.	66	P.2d	1252
Pacific Coast Joint Stock Land Bank v. Clausen, Sup.	65	P.2d	352
Pacific Eastern Corporation; Robbins v., Sup.	65	P.2d	42
Pacific Electric R. Co.; O. T. Johnson Corporation v., App.	65	P.2d	368
Pacific Greyhound Lines; Bailey v., App.	66	P.2d	1246
Pacific States Savings & Loan Co.; Bernstein v., App.	66	P.2d	699
Pacific States Savings & Loan Co.; Carpenter v., Sup.	66	P.2d	656
Pacific States Savings & Loan Co. v. Workman, App.	65	P.2d	1356
Page v. City of Santa Rosa, Sup.	65	P.2d	775
Page; Willis v., App.	65	P.2d	944
Palin v. Sweitzer, Sup.	65	P.2d	351
Park; Carpenter v., App.	66	P.2d	224
Parrish v. Thurman, App.	65	P.2d	932
Parsons v. Fuller, Sup.	66	P.2d	430
Payne; Los Angeles County v., Sup.	66	P.2d	658
Payne; Robison v., App.	66	P.2d	710
Peccolo v. City of Los Angeles, Sup.	66	P.2d	651
People v. Allen, App.	65	P.2d	382
People v. Bevans, App.	65	P.2d	92
People v. Biggs, App.	65	P.2d	75
People v. Bowlin, App.	65	P.2d	840
People v. Butcher, App.	66	P.2d	466
People v. Dutton, App.	65	P.2d	1339
People v. Gorham, App.	66	P.2d	1241
People v. Greenwell, App.	66	P.2d	674
People v. Hopper, App.	66	P.2d	459
People v. James, App.	66	P.2d	461
People v. Joseph, App.	66	P.2d	675
People v. Kovacevich, App.	65	P.2d	807
People v. Lionberger, App.	65	P.2d	99
People v. Low Ying, App.	66	P.2d	211
People v. McConnell, App.	66	P.2d	720
People v. Malone, App.	66	P.2d	216
People v. Marion, App.	66	P.2d	1232
People v. Martinez, App.	66	P.2d	161
People v. Miller, App.	66	P.2d	448
People v. Murphy, App.	66	P.2d	451
People v. Odom, App.	66	P.2d	206
People v. Perez, App.	65	P.2d	1319
People v. Perkins, Sup.	66	P.2d	631
People v. Rilarcosa, App.	65	P.2d	1325
People v. Rosen, App.	66	P.2d	1208
People v. Rowland, App.	65	P.2d	1333
People v. Schenk, App.	65	P.2d	895
People v. Searing, App.	66	P.2d	696
People v. Sweet, App.	65	P.2d	899

	Vol.		Page
People v. Van Skander, App.	66	P.2d	1228
People v. Wahnish, App.	66	P.2d	677
People v. Waters, App.	65	P.2d	852
People v. Wier, App.	66	P.2d	703
People v. Wilson, App.	65	P.2d	834
People v. Woods, App.	65	P.2d	940
People v. Woods, Sup.	65	P.2d	1315
People v. Zadro, App.	66	P.2d	1204
People ex rel. Boole v. Northwestern Pac. R. Co., App.	66	P.2d	697
Peoples Mut. Life Ins. Co.; Carpenter v., App.	65	P.2d	827
Perez; People v., App.	65	P.2d	1319
Perkins; People v., Sup.	66	P.2d	631
Phillips v. Huntington Beach Elementary School Dist., Sup.	66	P.2d	657
Pillsbury v. Superior Court in and for Orange County, Sup.	66	P.2d	149
Plaza Service Corporation of Canada; Cicurel v., App.	66	P.2d	706
Purinton v. Dyson, Sup.	65	P.2d	777
Raben v. Hamilton Diamond Co., App.	65	P.2d	98
Ramsdell; Coleng v., App.	65	P.2d	365
Ransohoff; Los Angeles County v., App.	65	P.2d	815
Rapaport v. Forer, App.	66	P.2d	1242
Raymond v. Staples, App.	66	P.2d	153
Raynor v. City of Arcata, App.	65	P.2d	838
Reconstruction Oil Co.; Union Oil Co. of California v., App.	66	P.2d	1215
Regoli v. Fancher, App.	66	P.2d	214
Retailers' Credit Ass'n of Sacramento v. Superior Court in and for Glenn County, App.	65	P.2d	937
Richter v. Adams, App.	66	P.2d	226
Rilarcosa; People v., App.	65	P.2d	1325
Robbins v. Pacific Eastern Corporation, Sup.	65	P.2d	42
Robertson v. City of Long Beach, App.	66	P.2d	167
Robinson; Goodwin v., App.	66	P.2d	1257
Robison v. Payne, App.	66	P.2d	710
Rogers, Ex parte, App.	66	P.2d	1237
Roof; Weiner v., App.	65	P.2d	1335
Rosen; People v., App.	66	P.2d	1208
Ross v. First Nat. Trust & Savings Bank of San Diego, App.	66	P.2d	193
Rowland; People v., App.	65	P.2d	1333
Rudell v. Board of Administration of State Employees' Retirement System of California, Sup.	66	P.2d	1203
Rugh; Geisler v., App.	66	P.2d	671
Sampson v. Century Indemnity Co., Sup.	66	P.2d	434
San Francisco Container Co.; Antonsen v., App.	66	P.2d	716
San Joaquin Light & Power Corporation; Miller & Lux v., Sup.	65	P.2d	1289
San Joaquin Light & Power Corporation v. Superior Court in and for Stanislaus County, App.	66	P.2d	737
San Joaquin Valley Securities Co.; Tharp v., App.	66	P.2d	230
San Jose Ice & Cold Storage Co. v. City of San Jose, App.	65	P.2d	1324
Sapkin; Security-First Nat. Bank of Los Angeles v., Sup.	66	P.2d	656
Sawyer v. Sunset Mut. Life Ins. Co., Sup.	66	P.2d	641
Schenk; People v., App.	65	P.2d	895
Schrader v. City of Los Angeles, App.	65	P.2d	374
Searing; People v., App.	66	P.2d	696
Security-First Nat. Bank of Los Angeles v. O'Connor, Sup.	65	P.2d	1299
Security-First Nat. Bank of Los Angeles v. Sapkin, Sup.	66	P.2d	656
Security-First Nat. Bank of Los Angeles; Union Bank & Trust Co. of Los Angeles v., Sup.	65	P.2d	355
Security Title Insurance & Guarantee Co.; Howard v., App.	66	P.2d	1247

CASES REPORTED

	Vol.		Page
Security Title Insurance & Guarantee Co.; Western Fruit Growers v., App.	66	P.2d	742
Security Trust & Savings Bank v. Southern Pac. R. Co., App.	65	P.2d	818
Servaes, Ex parte, App.	66	P.2d	759
Sharick v. Galloway, App.	66	P.2d	185
Shepherd Fruit Co.; Beck v., App.	66	P.2d	188
Smith; Albori v., App.	65	P.2d	81
Smith v. Bank of California Nat. Ass'n, App.	65	P.2d	1361
Smith; Deming v., App.	66	P.2d	454
Smith; Lady v., App.	65	P.2d	76
Snowden; Hales v., App.	65	P.2d	847
Somervell; Morgan v., App.	65	P.2d	820
Southern Pac. Co.; Mallett v., App.	65	P.2d	93
Southern Pac. R. Co.; Security Trust & Savings Bank v., App.	65	P.2d	818
Sparr Realty Corporation; Bank of America Nat. Trust & Savings Ass'n v., App.	66	P.2d	476
Stanislaus County; Stanislaus County Dairymen's Protective Ass'n v., Sup.	65	P.2d	1305
Stanislaus County Dairymen's Protective Ass'n v. Stanislaus County, Sup.	65	P.2d	1305
Staples; Raymond v., App.	66	P.2d	153
State Bar of California; Dudney v., Sup.	66	P.2d	1199
State Bar of California; Mackay v., Sup.	66	P.2d	1199
Steinberg v. Evans, App.	66	P.2d	712
Stevenson v. Alta Bates, Inc., App.	66	P.2d	1265
Stewart v. Claudius, App.	65	P.2d	933
Stewart v. Hazel, App.	65	P.2d	373
Stitt v. Stitt, Sup.	65	P.2d	1297
Stockton Independent Pub. Co.; United Press Ass'ns v., App.	65	P.2d	893
Stockwell v. McAlvay, Sup.	65	P.2d	781
Strath v. City of Santa Rosa, App.	65	P.2d	894
Strauss v. Buckley, App.	65	P.2d	1352
Strong v. Burns, App.	65	P.2d	845
Strong's Estate, In re, App.	65	P.2d	845
Struble; Berry v., App.	66	P.2d	746
Sunset Mut. Life Ins. Co.; Sawyer v., Sup.	66	P.2d	641
Superior Court in and for Fresno County; Mills v., App.	66	P.2d	1207
Superior Court in and for Glenn County; Retailers' Credit Ass'n of Sacramento v., App.	65	P.2d	937
Superior Court in and for Los Angeles County; Liles v., App.	65	P.2d	920
Superior Court in and for Orange County; Pillsbury v., Sup.	66	P.2d	149
Superior Court in and for San Mateo County; Hammersley v., App.	65	P.2d	359
Superior Court in and for San Mateo County; Wittman v., App.	66	P.2d	180
Superior Court in and for Solano County; Vallejo Bus Co. v., App.	65	P.2d	86
Superior Court in and for Stanislaus County; Miller & Lux v., App.	66	P.2d	680
Superior Court in and for Stanislaus County; Miller & Lux v., App.	66	P.2d	689
Superior Court in and for Stanislaus County; San Joaquin Light & Power Corporation v., App.	66	P.2d	737
Superior Court in and for Stanislaus County; Woolley v., App.	66	P.2d	680
Superior Court in and for Tehama County; Clough v., App.	65	P.2d	831
Sweet; People v., App.	65	P.2d	899
Sweitzer; Palin v., Sup.	65	P.2d	351
Sykes; Albori v., App.	65	P.2d	84
Taft School Dist.; Johnson v., App.	65	P.2d	912
Tax Factors v. Marin County, App.	66	P.2d	666
Tharp v. San Joaquin Valley Securities Co., App.	66	P.2d	230
Thomas; O'Brien v., Super.	65	P.2d	1370

	Vol.		Page
Thompson v. Moore, Sup.	65	P.2d	800
Thurman; Parrish v., App.	65	P.2d	932
Timm; Mohun v., App.	66	P.2d	701
Tomlinson v. Lampton, Sup.	66	P.2d	151
Tracy v. Guibbini, App.	66	P.2d	675
Travis v. Bixler Vapor Dry Cleaning Co., App.	66	P.2d	1263
Traylor v. Los Angeles Mountain Park Co., App.	65	P.2d	921
Traylor v. Los Angeles Mountain Park Co., App.	66	P.2d	736
Treat v. Murdock, Sup.	65	P.2d	881
Tsheppe's Estate; Eldred v., App.	65	P.2d	88
Tsheppe's Estate, In re, App.	65	P.2d	830
Union Bank & Trust Co. of Los Angeles v. Citizens Nat. Trust & Savings Bank of Los Angeles, Sup.	65	P.2d	355
Union Bank & Trust Co. of Los Angeles v. Security-First Nat. Bank of Los Angeles, Sup.	65	P.2d	355
Union Oil Co. of California v. Mutual Oil Co., App.	65	P.2d	896
Union Oil Co. of California v. Reconstruction Oil Co., App.	66	P.2d	1215
United Press Ass'ns v. Stockton Independent Pub. Co., App.	65	P.2d	893
Vallejo Bus Co. v. Superior Court in and for Solano County, App.	65	P.2d	86
Van Duzee; Hoffman v., App.	65	P.2d	1330
Van Skander; People v., App.	66	P.2d	1228
Vigen v. Castle Bldg. Co., App.	65	P.2d	1340
Votaw v. Farmers Automobile Interinsurance Exchange, App.	65	P.2d	924
Wahnish; People v., App.	66	P.2d	677
Waldeck; Hedden v., App.	65	P.2d	376
Walker; Limpert v., App.	65	P.2d	955
Walker v. Wells Fargo Bank & Union Trust Co., Sup.	65	P.2d	1299
Walsh v. Maurice Mercantile, App.	66	P.2d	181
Ward v. Alling, App.	65	P.2d	902
Wardlaw; Grivel v., App.	65	P.2d	360
Washburn; Duttweiler v., App.	66	P.2d	219
Waters; People v., App.	65	P.2d	852
Weiner v. Luscombe, App.	66	P.2d	151
Weiner v. Roof, App.	65	P.2d	1335
Weldy v. Oakland High School Dist. of Alameda County, App.	65	P.2d	851
Wellman; McArthur v., App.	66	P.2d	1226
Wells; Bishop's School Upon Scripps Foundation v., App.	65	P.2d	102
Wells; Bishop's School Upon Scripps Foundation v., App.	65	P.2d	105
Wells Fargo Bank & Union Trust Co.; Central Bank of Oakland v., Sup.	65	P.2d	1301
Wells Fargo Bank & Union Trust Co.; Walker v., Sup.	65	P.2d	1299
West Co. v. Johnson, App.	66	P.2d	1211
Western Auto Supply Agency; Fleishbein v., App.	65	P.2d	928
Western Fruit Growers v. Security Title Insurance & Guarantee Co., App.	66	P.2d	742
Western Surety Co. v. Municipal Court, City of Los Angeles, Los Angeles County, App.	66	P.2d	1236
Western Union Tel. Co.; Leek v., App.	66	P.2d	1232
Whicker v. Crescent Auto Co., App.	66	P.2d	749
White; Overton v., App.	65	P.2d	99
Whitney; Chamberland v., App.	66	P.2d	220
Whittaker, In re, App.	65	P.2d	373
Whitten v. California State Board of Optometry, Sup.	65	P.2d	1296
Wier; People v., App.	66	P.2d	703
Williams v. Chappell, Sup.	66	P.2d	147
Willis v. Page, App.	65	P.2d	944
Wilson v. Bailey, Sup.	65	P.2d	770

	Vol.		Page
Wilson v. Maryland Casualty Co. of Baltimore, App.	65	P.2d	903
Wilson; People v., App.	65	P.2d	834
Wilton; Jones v., App.	65	P.2d	1357
Wilton & Associates v. Industrial Accident Commission, App.	65	P.2d	1354
Wittman v. Superior Court in and for San Mateo County, App.	66	P.2d	180
Woodard v. Metropolitan Life Ins. Co., Sup.	65	P.2d	353
Woods; People v., App.	65	P.2d	940
Woods; People v., Sup.	65	P.2d	1315
Woolley v. Superior Court in and for Stanislaus County, App.	66	P.2d	680
Workman; Pacific States Savings & Loan Co. v., App.	65	P.2d	1356
Wright v. Hedden, App.	65	P.2d	376
Wynne v. Wynne, App.	66	P.2d	467
Zadro; People v., App.	66	P.2d	1204

CALIFORNIA REPORTER

IN VOLUME

65 PACIFIC REPORTER

SECOND SERIES

8 Cal.2d 241

ROBBINS et al. v. PACIFIC EASTERN CORPORATION et al., and six other cases.

S. F. 15616–15622.

Supreme Court of California.

Feb. 10, 1937.

Rehearing Denied March 11, 1937.

1. Licenses 🔑39

Chairman of board of directors of California corporation who, without authority from stockholders, communicated to stockholders an offer of foreign investing company to exchange investing company's stock for stock of corporation, was not acting as investing company's agent, notwithstanding that chairman had no legal relation to stockholders in respect of their individual holdings of stock, where chairman occupied position adverse to that of investing company and got nothing out of exchange transaction that every other stockholder who desired it did not get, as respects whether exchange was void as violative of California Corporate Securities Act (St.1917, p. 673, as amended).

2. Licenses 🔑39

Evidence that vast majority of stockholders of California corporation owning California bank were residents of California and that bank had branches throughout the state *held* to show that bank was agent of corporation's stockholders and not agent of investing company when bank acted as depositary for corporation's stock which was to be excharged for foreign investing company's stock, notwithstanding that investing company first suggested that bank act as such depositary, as respects whether exchange was void as violative of California Corporate Securities Act (St.1917, p. 673, as amended).

3. Licenses 🔑39

Evidence *held* to show that it was contemplated when foreign investing company, whose principal office was in New York, offered to exchange its stock for stock of California corporation, that exchange of stock would take place in New York and not in California, as respects whether exchange was void as violative of California Corporate Securities Act (St.1917, p. 673, as amended).

4. Exchange of property 🔑1

In law, an "exchange" is two sales (Civ. Code 1929, §§ 1804, 1806).

[Ed. Note.—For other definitions of "Exchange," see Words & Phrases.]

5. Licenses 🔑18½

California Corporate Securities Act in 1929 did not apply to persons or corporations selling privately owned stock of which they were not issuer or underwriter, at least where such owners were not in the business of selling such stock (St.1917, p. 673, as amended).

6. Licenses 🔑39

Contract for exchange of stock of California corporation deposited with California bank owned by corporation, for stock of foreign investing company whose principal office was in New York, was intended to provide for New York delivery of investing company's stock with title thereto passing only on such delivery, as respects whether exchange was invalid under California Securities Act because investing company had not secured permit to issue stock in California (St.1917, p. 673, as amended).

7. Licenses 🔑39

Where contract for exchange of stock of California corporation deposited with California bank owned by corporation, for stock of foreign investing company whose principal office was in New York, was silent as to place of performance, Supreme Court seeking to determine place of performance must rely on presumptions based on general experience and practice in such transactions.

8. Sales 🔑79

At common law, personal property sold was deliverable at place where it was at time of sale or agreement to sell, or if property was not then in existence, it was deliverable at place where it was produced.

9. Sales 🔑79

Rule that contract which does not provide to contrary is presumed to be performable where it is made, or where part performance is to be had, does not modify statutory and common-law rule that personal property is normally deliverable at place where it is located at time contract of sale is entered into (Civ.Code 1929, § 1754).

10. Licenses 🔑39

Evidence *held* to show that New York, which parties to contract for exchange of stock of California corporation for stock of foreign investing company, contemplated should be place of delivery of stock of foreign investing company, had a normal and reasonable connection with transaction, where investing company's principal office and place of business was in New York and investing company's shares of stock had their situs in New York, as respects whether exchange was void as violative of California Corporate Securities Act (St.1917, p. 673, as amended).

11. Contracts 🔑101(1)

Important factor in passing on validity of contracts is whether place at which contract is entered into, or at which performance thereof is stipulated, has a normal and reasonable connection with transaction.

12. Contracts 🔑153, 154

Contract which is capable of two interpretations should be given that interpretation which will make contract lawful, operative, definite, reasonable, and capable of being carried into effect (Civ.Code §§ 1643, 3541).

13. Licenses 🔑39

Contract for exchange of stock must be given an interpretation which establishes a contract which is valid under California Corporate Securities Act unless contrary construction is compelled by terms of contract, notwithstanding strong public policy behind Corporate Securities Act (St.1917, p. 673, as amended).

14. Licenses 🔑39

Question when title passed to stock which foreign investing company whose principal office was in New York, was exchanging for stock of California corporation deposited with California bank owned by corporation, was primarily question of intention of parties, as respects whether exchange was void as violative of California Corporate Securities Act (St.1917, p. 673, as amended).

15. Licenses 🔑39

Agreement for exchange by certain date of shares of stock of California corporation deposited by certain date with California bank owned by corporation, for stock of foreign investing company whose principal office was in New York, was intended to pass title only on mutual exchange of certificates and not immediately upon deposit of certificates, as respects whether exchange was void as violative of California Corporate Securities Act (St.1917, p. 673, as amended).

16. Corporations 🔑125

Under some circumstances, title to shares of stock may pass without delivery of the certificates.

17. Corporations 🔑118

Usual and ordinary course of business is that contract for sale of shares of stock is executed by indorsement and delivery of the certificates.

18. Contracts 🔑143

In construing contract between businessmen, due weight must be given to the businessman's view.

19. Corporations 🔑119

In absence of expressed intent to contrary, contract for exchange of stock would be construed as intended by parties to be consummated in usual and ordinary manner of having title pass on delivery of certificates.

20. Contracts 🔑24

Acceptance is required to be identical with offer and must be unconditional and not add any new terms thereto, and if terms of offer are changed or added by the acceptance there is no meeting of the minds and no contract.

21. Licenses 🔑18½

Prohibitions and penalties of California Securities Act are leveled against seller and not against buyer (St.1917, p. 673, as amended).

22. Contracts 🔑101(1)

Contracts which are illegal only because of place or time of their making may be later adopted at places or times when or where they are not unlawful.

23. Contracts 🔑138(2)

Mere act of performing in accordance with terms of original offer or executory contract may amount to a lawful contract.

24. Sales 🔑48

Validity of sale when made is not impaired by fact that prior contract to make sale was illegal, since sale or executed contract can legally stand on its own feet, independent of prior executory contract.

25. Licenses 🔑39

Stockholders who accepted offer of foreign investing company whose principal office was in New York, to exchange their stock in California corporation for stock of investing company, could appoint California bank owned by California corporation as their agent for delivery in New York of shares of investing company, notwithstanding that contract for exchange of stock may have been entered into in California and may have been illegal as in violation of California Securities Act (St.1917, p. 673, as amended).

26. Licenses 🔑39

Stock issued and delivered in New York by foreign investing company whose principal office was in New York, in exchange for stock of California corporation deposited with California bank owned by California corporation, was not rendered invalid under California Corporate Securities Act by failure of investing company to secure permit from California corporation commissioner, and hence bank was not liable to exchanging stockholders for value of their stock in California corporation on ground that bank violated its duty to such stockholders by accepting invalid stock in investing company, notwithstanding that contract for exchange of stock may have been entered into in California and may have been illegal as in violation of California Corporate Securities Act (St. 1917, p. 673, as amended).

27. Banks and banking 🔑90

Bank appointed by stockholders of California corporation as agent to procure stock which foreign investing company was exchanging for stock of California corporation had authority to do all that was necessary or appropriate to bring about such exchange (Civ.Code, § 2319).

28. Banks and banking 🔑90

Bank appointed by stockholders of California corporation as agent to procure stock which investing company whose principal office was in New York was exchanging for stock of California corporation, had authority to obtain stock by entering into a legally sufficient transaction in New York (Civ.Code, § 2319).

29. Principal and agent 🔑99

Construction of agency by agent and principal to include particular power would be of considerable weight in determining whether agent had such power.

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Actions by Reuel D. Robbins, Jr., and others, as executors, etc., and by John Archer and others, against the Pacific Eastern Corporation and others, and by B. F. Halliday against the American Trust Company and six consolidated actions, and by Rodette Securities Company against the American Trust Company and others and 13 consolidated actions, and by Reuel D. Robbins, Jr., and others against the American Trust Company and others and 43 consolidated actions, and by Ralph Asher against the American Trust Company and others and 104 consolidated actions, and by Chichizola Estate Company against the American Trust Company and others. From the judgments, the plaintiffs appeal.

Judgments affirmed.

Arthur B. Dunne, Lloyd M. Robbins, and Carey Van Fleet, all of San Francisco, for appellant Robbins and others in case No. 15616.

Kenneth R. McDougall, of Palo Alto, and Treadwell, Laughlin & Treadwell, of San Francisco, for appellant Archer and others in case No. 15617.

Harold Caulfield and Edward D. Keil, both of San Francisco, for appellant Halliday and others in case No. 15618.

Robert T. Devlin and Devlin & Devlin & Diepenbrock, all of San Francisco, for appellant Rodette Securities Co., and others in case No. 15619.

Lloyd M. Robbins, Dunne & Dunne, Derby, Sharp, Quinby & Tweedt, and Heller, Ehrman, White & McAuliffe, all of San Francisco, for appellant Robbins and others, in case No. 15620.

Arnold C. Lackenbach and John W. Preston, both of San Francisco, Clifford A. Russell, of Sacramento, Golden W. Bell, of Washington, D. C., and Joseph J. Webb, Dinkelspiel & Dinkelspiel, and Ralph McGee, all of San Francisco, for appellant Asher and others in case No. 15621.

Arnold C. Lackenbach and Ralph McGee, both of San Francisco, for appellant Chichizola Estate Co. and others in case No. 15622.

Robert T. Devlin and Devlin & Devlin & Diepenbrock, all of San Francisco, amici curiæ for appellants in case No. 15616.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., amici curiæ for Commissioner of Corporations in the seven appeals.

Brobeck, Phleger & Harrison and John Francis Neylan, all of San Francisco, for respondent American Trust Co. in the seven appeals.

Stephen R. Duhring, of San Francisco, for respondent American Co. in some of the above appeals.

Chickering & Gregory and Garret W. McEnerney, all of San Francisco, for respondents Pacific Eastern Corporation and Pacific American Co. on some of the above appeals.

Brobeck, Phleger & Harrison and Garret W. McEnerney, all of San Francisco, for respondents John D. McKee, C. O. G. Miller, F. T. Elsey, R. B. Henderson, G. M. Bowles, and William Cavalier on some of the above appeals.

WASTE, Chief Justice.

Plaintiffs instituted 173 actions in the court below for the purpose of having declared void a stock transaction in which they, together with many others, not parties here, participated. The trial court classified the actions into seven groups, and consolidated the cases within each group for trial. All of the cases were tried below substantially on the evidence introduced in S. F. No. 15616, the so-called Robbins rescission action. From judgments adverse to plaintiffs, these appeals have been taken.

The dispute arises out of an exchange, or purported exchange, whereby plaintiffs and many others, as owners of stock in American Company, exchanged, or purported to exchange, their stock for stock in the Goldman Sachs Trading Corporation. Although the theories of the various complaints differ radically, and although the defendants are not the same in all the actions, it is fundamentally the theory of the plaintiffs that the exchange was void as to them for the reason that it was in violation of the Corporate Securities Act of California (St.1917 p. 673, as amended), the Trading Corporation having secured no permit to offer to sell, to sell, or to issue its stock in this state. The principal defendant, named in all 173 actions, is the American Trust Company, which company all plaintiffs seek to hold for the value of their American Company stock because of its activities, hereinafter described, in connection with the exchange. The alleged liability of this defendant exceeds $70,000,000. The Trading Corporation, the other party to the exchange, is named as defendant in only the Robbins rescission action (S.F. No. 15616) and the Archer rescission action (S.F. No. 15617), involving but two of the original 173 actions. As will later appear, other individuals and corporations are named as defendants in some of the actions.

The plaintiffs, prior to the exchange, collectively owned or represented approximately 46,000 shares of American Company stock, a part of approximately 516,000 shares that participated in the exchange.

Before discussing the factual background of this controversy some reference should be made to the principal corporate and individual actors in the transaction. All references, except where otherwise specified, are to the status of the parties described in the year 1929, and particularly in July, August, and September of that year.

American Trust Company, defendant in all 173 actions, was and is a California banking corporation, with its head office and principal place of business in San Francisco, and with branch offices throughout the state. It had a capital stock of $10,000,000, divided into 100,000 shares of the par value of $100 each. This company never has had an office in New York or New Jersey, and never has qualified to do business in either of those states.

American Company, defendant in the Robbins and Archer recission actions (S.F. No. 15616 and S.F. No. 15617) and in three of the 44 Robbins conversion actions (S.F. No. 15620), was organized under California law in 1927, and had its principal place of business in San Francisco. In 1928 the American Company acquired all but 177 of the issued and outstanding shares of the American Trust Company (five qualifying shares of each of the thirty-five directors and two other shares were not presented for exchange), so that for all practical purposes the American Company, after 1928, was the owner of the American Trust Company. At the time of the transaction here involved the American Company had 649,292 outstanding shares, owned by about 8,500 stockholders, the vast majority of whom were California residents.

The Goldman Sachs Trading Corporation (name changed to Pacific Eastern Corporation in 1933), as already stated, is a defendant in but two of the 173 actions here involved. It was incorporated under the laws of Delaware in December, 1928, to do the business of an investing company. Its statutory office was Wilmington, Del., and its principal office and place of business was New York City. The trial court found in each of the actions, and such finding is not challenged, that this corporation "never had an office or place of business in the state of California." At incorporation its authorized capital was 2,500,000 shares without par value, later, in 1929, increased to 10,000,000 shares without par value. Upon its incorporation the Trading Corporation sold 1,000,000 of its shares at $100 each, and received into its treasury $100,000,000. The Goldman Sachs Trading Corporation is to be distinguished from Goldman Sachs & Co., a copartnership doing business in New York as private bankers. This latter company is not a party to any of these actions. The copartnership, however, organized and to a large extent controlled the Trading Corporation.

Pacific Coast Trust Company, not a party to these actions, but mentioned during the negotiations later discussed, was incorporated in New York in 1927. In 1929 its name was changed to Pacific Trust Company. Until August 12, 1929, the entire capital stock of this company was owned by the Trading Corporation. On August 13, 1929, the outstanding capital stock of the Pacific Trust Company was doubled, and one-half thereof sold to the public; the other one-half being held by the Trading Corporation.

Pacific American Company, Limited, defendant in the Robbins and Archer rescission actions and in three of the Robbins conversion actions, was incorporated in Delaware in 1928 as an investment holding company. In November of 1928 this company qualified to do business in California, and since that time its principal place of business has been California. By July of 1929 the Trading Corporation had acquired all of the stock of the Pacific American Company. At the time of the transaction here in dispute the latter company, directly or indirectly, owned about 115,000 shares (approximately 17 per cent.) of the stock of the American Company.

John D. McKee, defendant in 166 of the actions (all but the seven Halliday conversion actions, S.F. No. 15618) was a director and chairman of the board of directors of both the American Company and the American Trust Company. He had been connected with the banking business, and with the American Trust Company, and its predecessors, for many years. It was he who was the moving spirit in and who managed the details of the exchange.

Defendants C. O. G. Miller (defendant in the fourteen Devlin conversion actions, S.F. No. 15619), F. T. Elsey and R. B. Henderson (defendants in six of the Devlin conversion actions) were directors and officers of the American Trust Company and the American Company.

Frank L. Taylor was president of the Pacific American Company, Limited, and a director of American Company, American Trust Company, and the Goldman Sachs Trading Corporation. In the transactions about to be discussed the trial court found that Taylor "acted in said interviews on behalf of the Trading Corporation."

Bradley Brown was the secretary of American Trust Company and of American Company.

C. J. Bertheau was president of Pacific Trust Company, and a vice-president of American Trust Company. At the time of the transaction here in dispute Bertheau was a resident of New York.

Herman Phleger was and is a San Francisco attorney and a partner in the legal firm that represented the American Trust Company and the American Company.

Donald Lamont was and is a San Francisco attorney, and a member of the law firm that represented in San Francisco the Trading Corporation.

Sullivan and Cromwell were a firm of attorneys in New York City, and represented the Trading Corporation there.

With this brief introduction to the cast of characters, we turn now to a résumé of the facts involved in these actions; they are not substantially in dispute. As here recounted, the facts have been taken largely from the findings in the Robbins and Archer rescission actions, substantially identical findings having been made in the other actions, but they are not here set forth in the same order as they appear in the findings. In the present recital an attempt has been made to recount the facts, as far as possible, chronologically.

John S. Drum had been connected with the American Trust Company, or its predecessors, for many years. In 1927 he became president of that company. In that same year he became president of the American Company upon its organization. He resigned from both positions June 7, 1929, and went to New York. Late in June of 1929, in New York, Drum, on his own behalf, and on behalf of the members of his family, exchanged with the Trading Corporation approximately 7,000 shares of stock of the American Company for shares of the Trading Corporation. In that exchange the American Company stock was valued at $145 per share and the Trading

Corporation stock was valued at $102 per share.

Late in June or early in July of 1929 the Drum exchange came to the knowledge of John D. McKee, C. O. G. Miller, Milton H. Esberg, Fred T. Elsey, Alexander Hamilton, and Robert B. Henderson. These men were stockholders in the American Company, directors of both that company and of the American Trust Company, and some of them were officers in either or both companies. They owned or controlled about 25,000 shares of American Company stock. These men decided to try to secure from the Trading Corporation an exchange of their stock on substantially the same terms secured by Drum. Accordingly, in San Francisco, they had several interviews with Frank L. Taylor "who acted in said interviews on behalf of said Trading Corporation, and through him solicited from the said Trading Corporation an offer to exchange stock in the said Goldman Sachs Trading Corporation for the stock of American Company, and discussion was had between them and said Frank L. Taylor as to the basis of the exchange." In the Archer Case (S.F. No. 15617) it also found that these negotiations were on behalf of all the stockholders. The actual evidence on this point in the transcript indicates that at the commencement of their negotiations McKee and his associates were mainly interested in their own stock, but that it soon developed that the Trading Corporation was not interested in any exchange unless it could acquire at least the majority of the outstanding stock of the American Company. Thereafter McKee and his associates became interested in securing such an exchange. It is found in all the cases (and the finding is amply supported) that these interviews between Taylor and McKee and his associates "were without the knowledge of or any precedent authority from" the various plaintiffs—in fact, the record shows that the stockholders of the American Company, as a group, including the plaintiffs, knew nothing of these preliminary negotiations.

The first tangible result of these interviews between Taylor and McKee and his associates, came in the form of a document delivered by Taylor to McKee in San Francisco. This instrument had been prepared by attorney Donald Lamont at the request of Taylor. Referred to in the transcript as the "Lamont form," it was a proposed form of deposit addressed to the American Trust Company, and intended by Taylor to be used by those stockholders of the American Company who desired to enter into the exchange with the Trading Corporation. It provided that the proposed exchange would only be effectual in the event 51 per cent. of the then outstanding stock of the American Company was deposited by August 1, 1929 (or August 15, 1929, if the Trading Corporation elected at its option to extend the period); that the proposed exchange was to be on the basis of seven shares of American Company stock for nine shares of Trading Corporation stock; that fractional shares could be issued by the Trading Corporation, or, at its election, could be paid for in cash on the basis of $105 per share for Trading Corporation stock (thus evaluating American Company stock at $135 per share). By this document the Trading Corporation was not bound, but the depositing American Company stockholders would have been bound. Thus the Trading Corporation, had the document been executed, would have had what was in legal effect an option.

This proposal was not satisfactory to McKee and his associates; they wanted a binding offer from the Trading Corporation. On July 17, 1929, Taylor left San Francisco for the state of Washington. On July 19, 1929, James K. Lochead, vice president of the American Trust Company and of American Company, at the request of McKee, telegraphed to Taylor at Bellingham, Wash., as follows: "Lamont out of town until Monday in meantime can you send wire to John D. McKee Chairman Board which will be firm commitment on part Trading Corporation to effect exchange in event fifty-one percent stock is deposited. Committee feels we should have firm proposition before Board Directors makes official recommendation to stockholders for exchange. From conversation with one or two large holders today probably be no difficulty in securing necessary amount. James K. Lochead."

On the same day Taylor replied by night letter as follows: "John D. McKee, Chairman of Board of Directors American Trust Co. and American Co.—San Francisco, Calif. You may consider exchange of nine shares of G S C (Goldman Sachs Trading Corporation) for seven shares of A R C (American Company) as binding upon the Trading Corporation in the event the amount of stock deposited exceeds fifty one per cent of total amount of American Company stock outstanding. I have this authority from the Trading Corporation. Frank L. Taylor."

Upon the receipt of this night letter McKee and his associates met with Herman Phleger, attorney, in San Francisco, to discuss its contents. McKee and Phleger, at the request of the others present, then telegraphed to Taylor, who, they thought, was then in Seattle, Washington, as follows: "Your telegram nineteenth received Saturday (Stop) Owing to absence from City on Saturday of most of my associates had conference with them this morning (Stop) Elsey Esberg Hamilton Henderson Miller myself agree to exchange in accordance with the offer your said wire and will use best efforts with other stockholders (Stop) As we contemplate sending circular statement to stockholders we think it advisable to have a written or telegraphic offer from Trading Corporation which we suggest be substantially as follows Quote To the Black (American) Company and its stockholders In consideration of the sum of ten dollars paid to the undersigned receipt of which is hereby acknowledged the undersigned hereby irrevocably agrees to exchange nine shares of its present capital stock for each seven shares of the present capital stock of Black (American) Company deposited with Black (American) Trust Company for the purpose of such exchange provided that if a majority of the outstanding shares of Black (American) Company are not deposited for such exchange on or before August 20, 1929, then the undersigned at its option shall be relieved from its obligation; said exchange to be made as of August 31, 1929, Blue (Goldman Sachs Trading) Corporation Unquote Am glad to learn from Lochead that the associates stock will be deposited for exchange if necessary. John D. McKee, Chairman of the Board."

Immediately after sending that telegram and on the same date, and knowing of the need for haste, and knowing that the Trading Corporation was not interested in an exchange unless 51 per cent. of the American Company stock could be secured, McKee and his associates took steps to ascertain the desires of the stockholders of American Company. McKee requested Phleger, attorney for both the American Company and American Trust Company, to prepare a document to be circulated among the stockholders of American Company. This document is referred to as the "Round robin," and was in part as follows:

"San Francisco, July 22, 1929. The undersigned stockholders of American Company (each holding the number of shares set opposite his name) irrevocably agree among themselves and with The Goldman Sachs Trading Corporation that if substantially the attached offer shall be made by The Goldman Sachs Trading Corporation within ten (10) days from date that the undersigned will deposit their said stock with American Trust Company for the purpose of said exchange on or before August 20, 1929.

"Name No. of Shares"

(There then followed a copy of the suggested offer quoted supra in the telegram from McKee to Taylor.)

The round robin, at McKee's orders, was circulated among the stockholders of the American Company by the officers and employees of the American Trust Company. This was the first time that the stockholders of American Company, generally, had any knowledge of the proposed exchange. McKee testified that the purpose of the round robin was to acquaint the stockholders with the expected offer and to secure their decision in advance in the interest of time. The circularization took place between July 22 and July 30, 1929, and by that time considerably over 50 per cent. of the stockholders had signed it. Included within this number were many of the plaintiffs in these actions. The round robin was not presented to the Trading Corporation for execution, it never having been intended that that company should execute it.

In the meantime, after sending the telegram of July 22nd, McKee learned that Taylor, from whom no reply had been received, had left Seattle for Victoria, British Columbia. On July 25, 1929, McKee sent to Taylor at Victoria another telegram substantially similar to the telegram of July 22nd above quoted. McKee received no immediate answer from Taylor to either telegram. On July 31, 1929, McKee received from Taylor in San Francisco the original of a telegram to Taylor from the Trading Corporation. This telegram was as follows:

"New York, July 31, 1929. Frank L. Taylor, Hunter Dulin and Co. Hunter Dulin Bldg. You are authorized on our behalf to make the following offer to the stockholders of the American Company Quote The undersigned agrees to exchange nine shares of its capital stock for each seven shares of the present outstanding capital stock of American Company deposited with American Trust Company with transfer stamps attached for purpose of such exchange under terms of Deposit Agreement now on file with American Trust Company subject to the following: One if majority of outstanding stock not deposited by August fifteenth we may withdraw and no stock be deposited after that date without our consent Two we have until September fourteenth to deliver our stock in exchange Three undersigned to receive all dividends declared hereafter on deposited American stock to stockholders of record prior to exchange and depositors shall have same right with respect to our stock deliverable to them Unquote The Goldman Sachs Trading Corp."

The reference in the above telegram to the "Deposit Agreement now on file with American Trust Company" was to the deposit agreement prepared by Lamont, above referred to. McKee was not satisfied with the telegram of July 31, 1929—it was a mere authorization to Taylor and McKee wanted a direct offer. He thereupon prepared a form of letter to be signed by Taylor, and had it delivered to him. This document was dated in San Francisco, July 31, 1929, and is as follows:

"To the Stockholders of American Company: I have received today from Goldman Sachs Trading Corporation a telegram reading as follows: (here Taylor set forth an exact copy of the July 31st telegram to him from the Trading Corporation) * * * Pursuant to the authority contained in the above telegram, and on behalf of the Goldman Sachs Trading Corporation, I hereby make to the stockholders of American Company the offer contained in the said telegram. Frank L. Taylor."

After receiving this last-quoted document from Taylor, McKee drafted a letter and caused the same to be sent to all the stockholders of record of the American Company, including all of the plaintiffs, and including the Trading Corporation, that company owning some American Company stock. These circular letters were dated August 1, 1929, and were prepared in and sent from San Francisco, written on the letterhead of the American Company and read as follows:

"To the Stockholders of American Company: The Goldman Sachs Trading Corporation has offered to exchange shares of its capital stock for shares of stock of American Company upon terms substantially as follows: 1. The ratio of exchange will be nine shares of capital stock of The Goldman Sachs Trading Corporation for seven shares of American Company. 2. No fractional shares of The Goldman Sachs Trading Corporation will be issued, but American Company stockholders will receive settlement for fractional shares thereof in cash at the rate of $105 for a full share. 3. The offer is open to all American Company stock that may be deposited for exchange with American Trust Company, 464 California Street, San Francisco, by August 15, 1929. Stock cannot be deposited subsequently without the consent of The Goldman Sachs Trading Corporation. Stock for deposit must be accompanied by the enclosed Assignment and Authorization forms filled out and executed. 4. Unless a majority of the outstanding shares of American Company shall have been deposited for exchange by August 15, 1929, The Goldman Sachs Trading Corporation may at its option withdraw the offer. 5. The exchange of stock will take place not later than September 14, 1929; certificates for capital stock of The Goldman Sachs Trading Corporation will be delivered as soon thereafter as practicable. The holders of a large number of shares of American Company, including all the members of the Board of Directors and the officers of the Company, believe that the proposed exchange will be beneficial to the stockholders, and have signified their acceptance of this offer as to their own stock. Since the offer expires August 15, 1929, prompt action is necessary. Stock should be sent immediately to American Trust Company, 464 California Street, San Francisco, or any of its branches, accompanied by the enclosed Assignment and Authorization forms properly filled out and executed. Yours very truly, John D. McKee, Chairman of the Board."

Inclosed with this letter were two other documents. One was a form of stock assignment, worded in the present tense, whereby the stockholder "sells, assigns and transfers unto The Goldman Sachs Trading Corporation" the designated number of shares owned and deposited by the stockholder, and "irrevocably" appoints the "Secretary or an Assistant Secretary of said American Company Attorney to transfer the said stock on the books of said American Company." The second inclosed document was entitled "Authorization to Exchange." The balance of this document reads as follows:

"——— 1929 American Trust Company, 464 California Street, San Francisco, California. Gentlemen: I herewith deposit with you certificates for stock of American Company described below, to be held by you subject to the terms of the offer of exchange made by The Goldman Sachs Trading Corporation, as expressed in the letter adressed to the stockholders of American Company dated August 1, 1929, signed by John D. McKee, Chairman of the Board. I agree irrevocably that the stock represented by such certificates may be exchanged for stock of The Goldman Sachs Trading Corporation subject to all the terms of said offer. I authorize you to affix the revenue stamps necessary for the transfer of the enclosed certificates of stock of American Company, and agree to reimburse you for the cost thereof. Certificate Number ——— for ——— Shares Certificate Number ——— for ——— Shares Certificate Number ——— for ———Shares Total ——— Shares.

——— Stockholder's Signature ——— Address"

As already stated, the great majority of the stockholders of the American Company, including most of the plaintiffs, were residents of California, and so, of course, in due course of post, received the circular letter, with its inclosures, in California. The trial court found that this letter was "written and mailed without the knowledge or precedent authority" of the plaintiffs.

[1] Before continuing with this factual recital, certain comments are here called for. In the first place, plaintiffs never saw the telegram of July 31st. All they saw or knew about was the round robin and the letter of August 1st, with its inclosures. In the second place, McKee had, as the trial court found, no precedent authority to act for the stockholders in sending the letter of August 1st. Appellants strenuously contend that McKee, in transmitting the offer, was the agent of the Trading Corporation. The trial court found that he was not, and in our opinion such finding, whether it be considered a finding of fact or a conclusion of law, correctly fixes McKee's status. From the very first negotiations McKee and his associates occupied a position adverse to that of the Trading Corporation. McKee and his associates admittedly got nothing out of the deal later consummated that every other stockholder who desired it did not get, and on exactly the same terms. Obviously McKee's interests were tied up with those of the other stockholders of American Company. While it is true, as a legal proposition, that McKee as president and chairman of the board of directors of American Company, owed no legal duty towards and had no legal relation to the stockholders in respect of their individual holdings of stock (Ryder v. Bamberger, 172 Cal. 791, 158 P. 753; McCord v. Martin, 47 Cal.App. 717, 191 P. 89; Bacon v. Soule, 19 Cal.App. 428, 126 P. 384), and therefore owed them no duty to disclose the offer to them, it is also true that McKee as president of the American Company and as chairman of its board of directors, took it upon himself as one of the offerees to communicate the offer to those similarly situated. In doing this he was in no sense acting as the agent of the Trading Corporation.

[2] Appellants also contend that the American Trust Company was the agent of the Trading Corporation, or at least an escrow holder. These contentions will be discussed more fully later in this opinion, but at the present time it should be mentioned that appellants' contention in this regard is partially predicated upon the fact that the first time that the correspondence mentions the American Trust Company, and the first suggestion that that company should act for the depositing stockholders is to be found in the deposit agreement prepared by Lamont, which suggestion was carried into the July 31st and August 1st documents. Based upon this fact, the appellants contend that since the attorney for the Trading Corporation first suggested the American Trust Company as depositary, that company must have been the agent of the Trading Corporation. In this connection the trial court found that "the suggestion that the American Trust Company should so act was prompted by the fact that it was natural to expect that the stockholders of the American Company would wish it so to act inasmuch as in effect the stockholders of that company owned the American Trust Company. In no other

sense did the Trading Corporation designate the American Trust Company as a depositary or the depositary of any of the stock of American Company, and the only action taken by American Trust Company with respect to the stock of American Company was as agent of the depositing stockholders. * * *"

The above finding correctly states the facts. The American Trust Company, the principal defendant in these cases, for all practical purposes was owned by the American Company, and that company was owned by its stockholders. The August 1st offer was sent by McKee to considerably over 8,000 stockholders. Obviously, some agency had to act as a depositary for the certificates, and some agency had to represent this large group in carrying out the details of the exchange. Inasmuch as the vast majority of the offerees were resident in California, and since the American Trust Company had branches throughout the state, it was quite natural that the Trading Corporation should assume, and therefore suggest, that the stockholders would desire the Trust Company to act as their agent in the matter. The suggestion was in accord with common sense and practical business practice.

Immediately after August 1st various stockholders of the American Company brought or sent their stock to the American Trust Company. By August 13, 1929, over 50 per cent. of the 649,292 outstanding shares had been deposited for exchange. It should be here added that the Trading Corporation later extended the time for deposit, and as to some other stockholders even after the expiration of the extension the Trading Corporation exchanged on the basis of the above offer. By September 30, 1929, over 523,000 shares and over 18,000 certificates had been deposited for exchange. This involved deposits by some 8,386 stockholders, only 235 of whom were nonresidents of California. In the present 173 actions there are involved 45,994 shares of American Company stock deposited for exchange by the plaintiffs.

As each stockholder deposited his stock with the American Trust Company, he likewise delivered to that company, fully executed, the stock assignment and the authorization to exchange above quoted. Upon the deposit he received from the American Trust Company, a document entitled "Deposit Receipt," by the terms of which the American Trust Company acknowledged the receipt of a designated number of shares of American Company stock from the named depositor. The balance of this document reads as follows: "* * * and agrees to hold said certificates and to exchange the same for certificates of stock of The Goldman Sachs Trading Corporation pursuant to the offer of said corporation as expressed in the letter addressed to the Stockholders of American Company dated August 1, 1929, signed by John D. McKee, Chairman of the Board. A copy of said letter appears upon the back hereof. If on or before August 15, 1929, there have not been deposited with the Depositary, certificates representing, in the aggregate, a majority of the outstanding shares of American Company then this escrow may be terminated at the option of The Goldman Sachs Trading Corporation and its offer withdrawn, whereupon the shares represented hereby will be delivered to the Depositor upon presentation of this receipt. The deposit of said certificates and the acceptance of this receipt by the Depositor constitutes the irrevocable agreement of the Depositor to the exchange of the shares deposited hereunder upon all the terms and conditions herein recited, and the agreement of the Depositor to pay the stamp taxes and any other charges incident thereto." On the back of the deposit receipt was printed an exact copy of McKee's letter of August 1, 1929.

Immediately after the certificates began to be deposited with the American Trust Company, the officers of that company began to give thought to the details of the exchange, that is, as to the method to be used. During the week of August 4, 1929, Phleger had several conferences with McKee in reference to this matter. During the course of these conversations Phleger warned McKee that if the stock of the Trading Corporation was issued in such a manner as to constitute a sale in California, within the meaning of the Corporate Securities Act, the stock so issued and sold would be void unless a permit from the corporation commissioner was secured. He also pointed out to McKee that if the Trading Corporation forwarded its certificates to the American Trust Company in San Francisco in such a way as to constitute the trust company its agent for delivery, it might be claimed that this constituted a sale in California in violation of the Corporate Securities Act. McKee told Phleger that he had always assumed and had in contemplation that the exchange would take place in New York and not in California. He asked Phleger to write him a letter in line with these conversations. Under these circumstances Phleger, on August 9, 1929, wrote to McKee in the latter's capacity as chairman of the board of directors of American Company as follows:

"Dear Mr. McKee: In connection with the proposed exchange of stock of American Company for stock of The Goldman Sachs Trading Corporation, we wish to call your attention to the fact that if the stock of The Goldman Sachs Trading Corporation to be received by the stockholders of American Company is issued in such manner that a 'sale' thereof, within the meaning of the Corporate Securities Act, takes place in California, the stock so issued will not be valid unless a permit to issue the same is secured from the Commissioner of Corporations of California. If the certificates representing the stock of The Goldman Sachs Trading Corporation are forwarded to American Trust Company, in San Francisco, with instructions to deliver them to the stockholders of American Company, such delivery of the certificates by American Trust Company might be held to constitute a sale thereof in California by The Goldman Sachs Trading Corporation through its agent American Trust Company. We therefore suggest that the certificates representing the stock of The Goldman Sachs Trading Corporation be delivered by that corporation in New York to Pacific Trust Company, as agent of the stockholders of American Company. The certificates may be mailed by Pacific Trust Company to the stockholders of American Company. If this procedure is followed, it is our opinion that no 'sale' of the stock within the meaning of the Corporate Securities Act will take place in California, and therefore it will not be necessary for The Goldman Sachs Trading Corporation to secure a permit to issue the stock from the Commissioner of Corporations of California. Very truly yours, Brobeck, Phleger & Harrison, by Herman Phleger." McKee delivered this letter to Maddux, trust officer of the American Trust Company who was handling the transaction.

[3] Appellants rely on the letter as indicating that at the time the offer was made the original plan was to have a California delivery of the Trading Corporation certificates, and that the New York delivery (later described) constituted a complete change of plan to "evade" or to "avoid" the California Corporate Securities Act. In this connection the trial court found: "From the initiation of the transaction referred to herein, McKee assumed that the transaction would be performed and completed in New York and there was no change of plan consequent upon the conversation between Phleger and McKee preceding August 9, 1929, or consequent upon the said letter from Phleger to McKee dated August 9, 1929."

This finding is supported by the testimony of both McKee and Phleger. The construction sought to be placed on this letter by appellants is not warranted. The transaction under discussion was one of large proportions, involving many millions of dollars. When the letter is read in connection with its factual background it is obvious that Phleger was simply seeking to avoid any future attack on the transaction. There is nothing in the letter to suggest that Phleger ever contemplated that it ever had been intended that the Trading Corporation certificates should be issued or delivered in California; he had been told that such was not the fact. Obviously, out of an abundance of caution, he was simply seeking to protect the transaction from the appearance of a California delivery.

After the American Company shares began to be deposited, McKee kept Taylor and the Trading Corporation informed of the number of certificates turned in. On August 14, 1929, McKee informed Taylor, by letter, that a majority of the outstanding stock had been deposited. On August 19, 1929, McKee again wrote to Taylor at his office in San Francisco. In this letter McKee quoted the Phleger letter in its entirety and concluded: "I understand from Mr. Phleger that there may be some question as to whether or not the delivery of the stock of the Trading Corporation constitutes a sale thereof; but it would seem desirable to avoid this issue, which might be a serious one, particularly as it can be arranged otherwise easily. The stock of American Company deposited can be transferred into one or more certificates in the name of The Goldman Sachs Trading Corporation, and sent to Pacific Trust Company, New York, for exchange either in New York or other States, such as New Jersey, as may be desired. * * *"

McKee at this time, according to this letter, was contemplating adopting the Phleger plan, outlined in his letter, of using the Pacific Trust Company in New York as the medium through which the exchange was to be consummated in New York. Phleger had in fact prepared a form to be sent to the Pacific Trust Company to be used in connection with this plan. It will be noticed that this plan called for the Pacific Trust Company mailing the Trading Corporation certificates directly to the American Company stockholders. McKee objected to this phase of the plan because of the outstanding deposit receipts issued by the American Trust Company. McKee asked Phleger if it would affect the transaction to have the Pacific Trust Company, instead of mailing the certificates directly to the American Company stockholders, mail the Trading Corporation certificates to the American Trust Company, and have the latter company distribute them to the stockholders, and at this time cancel the deposit receipts. Under date of September 3, 1929, Mr. Phleger wrote to Mr. McKee in his capacity as president of the American Trust Company, as follows:

"Dear Mr. McKee: Pursuant to our telephone conversation, I write to advise you that in our opinion it is immaterial whether the certificates for stock of The Goldman Sachs Trading Corporation, issued to the stockholders of American Company in exchange for their shares of stock in American Company, and delivered by The Goldman Sachs Trading Corporation in New York to Pacific Trust Company as agent of American Trust Company, are mailed directly to the former stockholders of American Company by Pacific Trust Company or are sent to American Trust Company in San Francisco by Pacific Trust Company, and distributed by American Trust Company here to the former stockholders of American Company. In our opinion whichever method is more convenient to you and to the stockholders of American Company can be adopted without affecting the attainment of the objects set forth in our letter of August 9, 1929. Very truly yours, Herman Phleger."

Also, under date of September 3, 1929, Maddux wrote to the Trading Corporation in New York, informing that company of Phleger's plan, and inclosing a copy of Phleger's September 3d letter and of the proposed letter of instructions addressed to the Pacific Trust Company.

In the meantime the Trading Corporation was somewhat perturbed over the fact that if the American Company certificates deposited for exchange were delivered in New York, this would require the sending of over 17,000 certificates from San Francisco to New York. On September 5, 1929, a meeting was held in San Francisco at which McKee, Phleger, and Lamont were present. At that meeting Lamont stated that the Trading Corporation would prefer to have the American Company certificates delivered to some local agent of the Trading Corporation in San Francisco to obviate the necessity of transmitting the deposited certificates (which he estimated at 17,000; actual number was 18,087) to and from New York. Phleger stated he would not consent to the delivery of the American Company certificates in San Francisco. He insisted that they be delivered in New York. Lamont informed McKee and Phleger that he had talked the matter over with a deputy in the state corporation department and had been informed that the certificates could be delivered legally in San Francisco without a permit. Phleger stated that nevertheless he insisted on a New York delivery. Lamont was then informed that his fears as to the transmittal of the certificates were unfounded—that it was not intended that the thousands of deposited certificates should be transported across the country; that the plan was to send to New York a small number of unexecuted certificates made out in the name of the Trading Corporation covering the number of shares deposited; that these incomplete certificates were then to be executed by the American Trust Company's officers in New York, and delivered to the Trading Corporation there; that then the deposited certificates were to be canceled in San Francisco. This removed all of Lamont's objections, and he stated he would wire the New York attorneys for the Trading Corporation, Sullivan and Cromwell, the details of the plan. During this conference it was suggested that since C. J. Bertheau was a vice president of the American Trust Company and was a resident of New York, he could not only deliver the American Company certificates but could also accept delivery of the Trading Corporation certificates, and that therefore the Pacific Trust Company need not be involved at all. After this conference and on September 5, 1929, Lamont wired Sullivan and Cromwell informing them of the result of the conference and generally outlining to them the details of the plan.

On September 6, 1929, McKee wrote to Taylor in San Francisco setting forth full details of the plan. After informing Taylor that 509,995 shares of American Company stock had been deposited with American Trust Company prior to August 15th, and 4,615 shares deposited subsequent thereto, and after informing him that the American Trust Company contemplated partially executing 31 certificates evidencing these shares, the letter continued as follows:

"These certificates will be signed by the writer as President, and will be taken to New York by Mr. Bradley B. Brown, Secretary of our company, leaving Saturday night. When Mr. Brown arrives in New York he will in cooperation with Mr. C. J. Bertheau, ascertain if all of the details of the transaction are satisfactory. He then will advise us by telephone or wire, and we will cancel all of the certificates against which the said new certificates are to be issued. Mr. Brown then will complete the new certificates by signing the same as Secretary and affixing the Corporate Seal. Mr. Bertheau as Vice President of American Trust Company, then will sign the certificates as Registrar, after checking with the Registry Officer in San Francisco for clearance. Completed certificates then will be handed to Mr. Bertheau, as our representative or agent, to be exchanged for stock of The Goldman Sachs Trading Corporation. The latter stock, upon receipt, will be delivered to Pacific Trust Company to be forwarded to American Trust Company, San Francisco. Mr. Brown will carry with him a detailed letter of instructions addressed to Mr. Bertheau, for his guidance. Very truly yours, American Company, J D M (J D McKee) Chairman of the Board."

The plan as thus outlined was carried out, except in one detail later mentioned. On September 7, 1929, 39 certificates for stock of the American Company, totaling $514,610 shares were made out in the name of the Trading Corporation and signed by the president and transfer agent of the American Company, but not signed by the secretary or registrar of that company. These 39 incomplete certificates were then delivered on that date in San Francisco to Bradley Brown, secretary of the American Trust Company and of American Company, with instructions to deliver the same to Bertheau in New York. There was also delivered to Brown for delivery to Bertheau a letter from McKee. So far as pertinent here that letter stated:

"These certificates have not as yet been signed by Mr. Brown as the Secretary of American Company nor has the corporate seal of that company been affixed. Furthermore, these certificates have not as yet been signed by anyone upon behalf of American Trust Company as Registrar. In accordance with later telephonic authorization and direction from us (that is, either John D. McKee, Parker S. Maddux or James K. Lochead), you are to have Mr. Bradley B. Brown as such Secretary, sign and affix the corporate seal to such of these certificates as we may indicate in such direction, and you are further authorized and instructed to register said certificates so signed by Mr. Brown, by signing your name to such certificates as Vice President of American Trust Company. Over the face of the balance of these certificates, if any, you are to write the word 'cancelled.' When this has been done you are directed to deliver the certificates which have not been marked 'cancelled' to The Goldman Sachs Trading Corporation in exchange for certificates of The Goldman Sachs Trading Corporation issued in the names of the respective stockholders of American Company, shown on the lists of said stockholders heretofore furnished you and for the respective number of shares thereon indicated, and upon receipt by you from The Goldman Sachs Trading Corporation of checks payable to the respective stockholders of American Company for the sums shown on said lists of stockholders. In delivering the foregoing certificates of American Company to The Goldman Sachs Trading Corporation and in receiving stock certificates of The Goldman Sachs Trading Corporation and checks in return, you will be acting as Vice President of American Trust Company—American Trust Company in turn acting as the agent of the stockholders of American Company, shown on said lists. You are to receipt for the stock of The Goldman Sachs Trading Corporation and for the above mentioned checks in the capacity indicated. You are hereby expressly authorized to take any and all other steps that may be necessary to complete such exchange in the City of New York. This exchange must be entirely completed not later than September 14, 1929. At the time of the exchange above mentioned you are to exhibit to The Goldman Sachs Trading Corporation the certificates, if any, which have been marked 'cancelled' so that that corporation may be apprised that these certificates, if any, have not been otherwise used. Upon receipt of such certificates for stock of The Goldman Sachs Trading Corporation issued in the names of the respective stockholders of American Company, and said checks payable to the respective stockholders of American Company, you are authorized and directed to deliver said certificates and checks to Pacific Trust Company, 51 Broadway, New York City, with instructions to forward the same to us at San Francisco. Very truly yours, American Trust Company John D. McKee Chairman of the Board."

Brown arrived in New York on September 11, 1929, and delivered the various documents to Bertheau. On September 10th the American Trust Company had forwarded to Brown two additional incomplete certificates representing some 1558 shares deposited for exchange after Brown's departure.

Upon his arrival in New York Brown discovered that if the American Company certificates were delivered to the Trading Corporation in the state of New York they would be subject to a New York state transfer tax. He immediately telegraphed McKee informing him of this fact, and stating among other things: "Can avoid however by accepting delivery Trading Corporation stock here but going to New Jersey to deliver American Company stock." He asked for instructions and informed McKee that the "stage all set for exchange" and that the plan was to consummate the exchange on the morning of September 13, 1929. McKee immediately telegraphed to Bertheau: "You are authorized to consummate exchange * * * either in New Jersey or New York as appears best to you."

In the meantime, on September 12, 1929, the American Trust Company canceled the 18,000 plus certificates deposited with it for exchange and subsequently these canceled certificates were delivered to the American Company. These facts were telegraphed to Bertheau.

On September 13, 1929, the physical exchange took place. Brown and Bertheau completed the execution of the American Company certificates in their possession and physically delivered them to the Trading Corporation in Jersey City, N. J. In New York, Bertheau, on behalf of the American Trust Company, accepted delivery from the Trading Corporation of 660,303 shares of Trading Corporation stock and $350,865 in checks for fractional shares, both made out in the names of the stockholders of American Company, who had deposited their stock for exchange. Brown, in New Jersey, on behalf of the American Trust Company, received a receipt for the certificates delivered by him, and Bertheau, in New York, gave a receipt for the certificates and checks received by him. After the exchange had been consummated and pending the arrival of the checks and the Trading Corporation certificates in San Francisco, on September 17, 1929, McKee sent the following letter to the depositing stockholders:

"To the Holders of Deposit Receipts for Stock of American Company: The exchange of stock of American Company for stock of The Goldman Sachs Trading Corporation in accordance with the plan of exchange set forth in the letter to the stockholders of American Company dated August 1, 1929, has been completed as of September 13, 1929, and our officers in New York have received for the account of the stockholders of American Company who deposited their stock for exchange, certificates evidencing the number of shares of stock of The Goldman Sachs Trading Corporation to which such stockholders are entitled under the plan of exchange, and checks for the sums payable on account of any fractional shares to which such stockholders otherwise would be entitled. Substantially all of the stock of American Company was deposited for exchange. The certificates for stock of The Goldman Sachs Trading Corporation and the checks in payment for fractional shares are being forwarded to us by mail and we expect to be in a position to make delivery to the depositors on October 3, 1929, upon the surrender to American Trust Company of the deposit receipts issued to the depositing stockholders, and upon payment to American Trust Company of the sum of one cent (1c) per share of stock of American Company so deposited, to cover the cost of revenue stamps and other expenses incidental to the exchange. A stock dividend has been declared by The Goldman Sachs Trading Corporation at the rate of one and one-half shares per one hundred shares, (with cash settlement for fractions), payable October 1, 1929, to stockholders of record September 13, 1929, including those who are entitled to receive stock exchanged as stated above. Yours very truly, American Trust Company, John D. McKee Chairman of the Board." Note particularly that by this letter the depositing stockholders were fully informed that the exchange had been consummated in New York.

On and after October 3, 1929, the depositing stockholders presented their deposit receipts to the American Trust Company in California, and upon signing a receipt they received the Trading Corporation certificates and checks for fractional shares to which they were entitled. After the Trading Corporation stock materially depreciated in value, these actions were instituted.

This constitutes the entire factual background of these cases. It is this transaction that plaintiffs challenge in the 173 actions, and the seven appeals here involved. Although the form of the actions brought by the various groups of appellants differs, they all proceed on the theory that the exchange was invalid, and the Trading Corporation shares received by them were void and valueless for the reason that the Trading Corporation did not secure a permit from the California corporation commissioner. As already stated, the issuing corporation (the Trading Corporation) is defendant in only two of the 173 actions. All of the appellants, however, seek to hold the American Trust Company liable. The basic contention upon which appellants seek to impose liability on this defendant seems to be that this company is supposed to have violated its duty to the depositing stockholders in accepting these void certificates and is therefore liable in damages to these stockholders for the value of their American Company stock.

A discussion of the law applicable to these cases naturally divides itself into two main parts. First, what was the contract between these parties; where was it entered into; where was it performable; where did title pass to the Trading Corporation stock? Once these points are determined, then, secondly, did the contract so construed violate the terms of the Corporate Securities Act? The first problem is largely one of construction; the second mainly a question of law. Involved within both of these problems is the question as to whether the American Trust Company was the agent of the depositing stockholders, and, if so, whether it acted in the course and scope of its agency in consummating the exchange as it did.

The voluminous briefs of counsel discuss all phases of the above legal problems (and many other more or less related points) in great detail; in fact, counsel have gone far afield in seeking arguments and authorities to support or refute one or the other of the above points. We have no intention of taking up each contention found in the briefs. Giving due consideration to every argument raised by appellants, we are convinced that the transaction as above outlined did not result in appellants' receiving void stock.

Appellants strenuously argue that a contract of sale was entered into in California; that the contract became complete in California; that the Trading Corporation made its offer in California which was accepted by the deposit of the certificates in California; that upon the deposit the stockholders of American Company parted with all control of their stock; that title passed in California; that the contract was performable in California; that the deposit of the American Company stock constituted the acceptance of an offer of a unilateral contract, subject only to the condition that a majority of the outstanding stock be deposited by August 15, 1929.

The lengthy discussion in the briefs as to whether the contract of exchange was entered into in California, or New York (or New Jersey) seems to us to be beside the point. Even if it be assumed that a contract was entered into in California (a conclusion subject to some doubt for reasons later appearing), that would not necessarily be decisive. As we view the problem, the real question is as to the nature and interpretation of that contract; that is, was it an executed or an executory contract? Did legal or equitable title to the Trading Corporation stock pass on August 13, 1929, when a majority of the American Company stock was deposited with the American Trust Company? Did title pass on that date regardless of the lack of delivery of the certificates? Was the contract performable in New York or in California? These are the questions which seem to us decisive of this part of the case.

Our conclusions on this phase of the case are as follows: At most the transaction in California amounted to an executory contract to buy and sell the Trading Corporation stock; in so far as the Trading Corporation is concerned, this contract was performable in New York; title to the Trading Corporation stock passed in New York.

[4] Before setting forth the reasoning supporting these conclusions some reference should be made to the legal nature of an exchange. In law, an exchange is two sales. At the time of the transaction here involved, the Civil Code (1929) provided: Section 1804: "Exchange is a con-

tract by which the parties mutually give, or agree to give, one thing for another, neither thing, or both things, being money only." Section 1806: "The provisions of the title on sale apply to exchanges. Each party has the rights and obligations of a seller as to the thing which he gives, and of a buyer as to that which he takes."

[5] Without consideration at present of any question of agency, or power of the American Trust Company, the only sale (as one of the two sales constituting the exchange) we are here interested in, is the sale of the Trading Corporation stock. The American Company stock was outstanding under a valid California permit, and was owned by individuals or corporations. As the law existed at the time of this transaction, the Corporate Securities Act did not apply to persons or corporations selling privately owned stock of which they were not the issuer or underwriter, at least where such owner was not in the business of selling such stock (Pollak v. Staunton, 210 Cal. 656, 293 P. 26; People v. Pace, 73 Cal.App. 548, 238 P. 1089).

It is appellants' theory (stated in different ways) that under the terms of the offer as accepted, the Trading Corporation certificates were deliverable in California; that after acceptance there was a change of plan to avoid or evade the Corporate Securities Act; that even if the certificates were deliverable in New York title to the shares of stock in the Trading Corporation (legally or equitably) passed upon the deposit in California.

[6] As to both the question of place of performance and place of passage of title, we are dealing with a question of intention of the parties. After a careful consideration of the various documents we are convinced that, to say the least, they are susceptible of the interpretation that they called for a New York delivery of the Trading Corporation certificates, and that they indicate that the parties intended title to pass only upon such delivery.

[7] As to the place of performance, the documents are entirely silent. Under such circumstances, we must rely on presumptions based upon the general experience and practice in such transactions. Section 1754 of the Civil Code as it read in 1929 provided: "Personal property sold is deliverable at the place where it is at the time of the sale or agreement to sell, or if it is not then in existence, it is deliverable at the place where it is produced." In Mattingly v. Roach, 84 Cal. 207, 23 P. 1117, 1119, this section was held applicable to a sale of stock. In that case defendant was the administrator of Blythe, who resided in San Francisco. Blythe agreed with Mattingly to pay him a commission if the latter found a purchaser for certain stock. Mattingly went to London, found a purchaser, and notified Blythe. Blythe refused to make the sale. One of the points involved was whether the stock was deliverable in San Francisco. On this point the court stated: "The Code provides that personal property is deliverable at the place where it is at the time of the sale, or agreement to sell, unless the seller has agreed to deliver it elsewhere, or an option as to the place of delivery is provided for. Civil Code, § 1754 et seq. The stock of the Blue Jacket Mining Company was personal property, and was in San Francisco at all the times named in the complaint. Blythe never agreed to send the stock to Mattingly, or gave him any option as to the place of delivery. It was therefore to be delivered and paid for in San Francisco, and the instructions upon that subject were proper." See, also, Russell v. Ruffcorn, 132 Cal.App. 215, 231, 22 P.(2d) 597, 23 P.(2d) 1014, where it was also held that section 1754 of the Civil Code was applicable to the sale of stock.

[8] The rule embodied in old section 1754 of the Civil Code is the rule of the common law (Gray v. Walton, 107 N.Y. 254, 14 N.E. 191) and is also the rule under the Uniform Sales Act, adopted in this state in 1931—see section 1763, Civil Code. See, also, 2 Williston on Sales (2d Ed.) pp. 1117, 1118; Gruen v. George A. Ohl & Co., 81 N.J.Law, 626, 80 A. 547.

An interesting application of these principles to the sale of stock is to be found in Neer v. Lang (C.C.A.) 252 F. 575. This was an action to recover damages for the breach of an alleged contract to sell shares of stock. The case turned upon whether a contract to sell had been made. As here, the correspondence, so far as the offeror was concerned was silent as to the place of performance. The offeror of the shares in Fort Leavenworth, Kan., telegraphed his offer to sell to the offeree in Detroit. Nothing was said in the offer as to place of delivery. The offeree sent a purported acceptance in which he stated in part, "ship with draft attached, and wire when you have done this." Thus, by the purported acceptance, the buyer tried to provide that the stock was deliverable at Detroit. The court held that the law implied the stock was deliverable at the residence of the seller, that the buyer thus sought to inject a new item into the offer and therefore his purported acceptance was invalid. The court stated at page 577 of 252 F.: "Every trade or business has its usages, and persons who make offers relating thereto assume that all the customary incidents of such callings shall be part of the agreement, and they do not need to be expressly stated in the written or oral offer, as the law implies them. The law implies that the place of delivery of the stock shall be at the place of the seller, nothing appearing to the contrary; that is to say, in this case the place of delivery under the offer as made was Ft. Leavenworth, Kan. But under the acceptance delivery was to be made at Detroit, Mich., where plaintiff resided * * * there was no contract."

[9-11] Appellants cite many cases, of which Burr v. Western States Life Ins. Co., 211 Cal. 568, 296 P. 273; Ivey v. Kern County Land Co., 115 Cal. 196, 46 P. 926; Tuller v. Arnold, 93 Cal. 166, 28 P. 863, and Hammond v. Ocean Shore Dev. Co., 22 Cal.App. 167, 133 P. 978, are typical, which deal mainly with the question of venue and which hold generally that unless a contract provides to the contrary it is presumed to be performable where it is made, or where part performance is to be had. This is, of course, a well-settled rule of law, but those cases do not modify the statutory and common-law rule that personal property is normally deliverable at the place where it is located at the time the contract of sale or to sell is entered into. In the instant cases the trial court found, and the finding is amply supported, that at all times prior to September 13, 1929, the Trading Corporation shares were located and had their situs in New York; that New York was the natural place for the delivery of such stock; and that New York had a natural relation to the transaction. This last-mentioned finding is of importance. New York was not unrelated to the transaction; the least that can be said is that New York had a normal and reasonable connection with the transaction. New York was not seized upon as a subterfuge to evade the law of California; it was, to say the least, one of the states where delivery reasonably could be made. This has always been considered an important factor by the courts in passing on the validity of contracts. Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 47 S.Ct. 626, 71 L. Ed. 1123.

[12] Aside from these considerations, there is another rule of law applicable to these facts which leads to the same conclusion. It must be assumed, of course, that the parties hereto intended to enter into a legal and binding contract. Neither of the contracting parties was deliberately intending to mislead or defraud the other. The trial court found that at the time of the transaction, and for a considerable time thereafter, none of the plaintiffs gave any thought or consideration to the existence or nonexistence of a permit; in other words, they intended and hoped by this transaction to enter into a valid contract of exchange. If the contract be construed as providing for a California delivery, and passage of title, it would be invalid, but if construed as providing for a New York delivery, and passage of title, as will later appear, it is valid. Certainly the New York delivery construction is equally reasonable with the California delivery construction. Under such circumstances, the courts are bound to give the contract "such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties" (Civ.Code, § 1643; see, also, Civ. Code, § 3541). The California courts have applied this rule of construction to a variety of situations. Supported by many authorities, the rule is stated as follows in 6 California Jurisprudence, page 268, § 168: "As between two permissible constructions, that which establishes a valid contract is preferred to that which does not, since it is reasonable to suppose that the parties meant something by their agreement, and were not engaged in an attempt to do a vain and meaningless thing. The parties are deemed to have intended a lawful, rather than an unlawful, act, and their agreement is to be construed, if possible, as intending something for which they had the power to contract. All intendments being against fraud and in favor of fair dealing, it will not be presumed against a writing that it contemplated a violation of the law, unless that conclusion becomes irresistible from the very reading of the instrument." This rule is not limited to California, but is one of general application. Gilbert v. Fosston Mfg. Co., 174 Minn. 68, 216 N.W. 778, 218 N.W. 451; Brierley v. Commercial Credit Co. (D.C.) 43 F.(2d) 724, certiorari denied 282 U.S. 897, 51 S.Ct. 182, 75 L.Ed. 790.

[13] It is no answer to point out, as do appellants, the strong public policy behind the Corporate Securities Act. That statute is undoubtedly a salutary law. The same can be said of the usury law, the statutes restricting corporation action, and the many other statutes to which the rule of construction here being discussed has been applied. This rule of interpretation must be applied by the courts, unless a contrary construction is compelled by the terms of the contract. It is peculiarly applicable in the present case where the plaintiffs, and the other stockholders, got exactly what they wanted and what they bargained for—where no fraud or imposition has been proved—and where they are now trying to recoup their losses, by a strained and technical construction of the contract, from what turned out to be a bad bargain.

In our opinion, not only did the contract, reasonably construed, call for a New York delivery of the certificates, but it also evidences an intent that title to the Trading Corporation stock was to pass at the time and upon the delivery of those certificates. In the first place, if we apply to the contract the same presumptions and same rules of construction discussed in reference to delivery of the certificates, this conclusion is inescapable. To have title to the Trading Corporation stock pass in California would be to so interpret the contract as to render it violative of the Corporate Securities Act; to hold that title passed in New York is to so interpret the contract as to render it valid. Under such circumstances, even if the contract were silent on the point, we would be compelled, under the rules discussed above, to uphold the contract.

[14, 15] The question as to when title passes is, of course, primarily one of intention. The documents here involved, reasonably interpreted, indicate an intention to have title pass upon delivery of the certificates, and not upon the deposit of the American Company stock. In his letter of August 1, 1929, McKee informed the stockholders that the offer was "to exchange shares" for "shares"; that the "offer is open to all American Company stock that may be deposited for exchange with American Trust Company * * * by August 15, 1929"; that "the exchange of stock will take place not later than September 14, 1929; certificates for capital stock of The Goldman Sachs Trading Corporation will be delivered as soon thereafter as practicable." The authorization to exchange, addressed to American Trust Company, was just what the words express, an authority to exchange. It stated in part: "I agree irrevocably that the stock represented by such certificates may be exchanged for stock of The Goldman Sachs Trading Corporation subject to all terms of said offer." The deposit receipt acknowledges receipt of the deposited certificates, and the American Trust Company "agrees to hold said certificates and to exchange the same for certificates of stock of The Goldman Sachs Trading Corporation." Other references could be made to somewhat similar language contained in the round robin, the Lamont form, the offer of July 31, 1929, and in other documents. It is certainly true that the quoted language does not indicate an intent of the parties that title to the American Company shares should pass immediately and ipso facto upon the deposit of the certificates. Although ambiguous, such language can reasonably be interpreted to mean the parties intended title to pass only upon the mutual exchange of the certificates.

[16, 17] That the language should be so construed is also indicated by the fact, frequently noted in the cases, that to business men certificates and the shares represented thereby are inseparable. It is, of course, true, as urged by appellants, that in all cases physical delivery of the certificates is not necessary to effectuate the transfer of title to shares of stock. Hughes Mfg. & Lumber Co. v. Elliott, 178 Cal. 181, 172 P. 584; Provident Gold Min. Co. v. Manhattan Securities Co., 168 Cal. 304, 142 P. 884; Young v. New Pedrara Onyx Co., 48 Cal. App. 1, 192 P. 55; Cuthill v. Peabody, 19 Cal.App. 304, 125 P. 926. These cases correctly hold that certificates are only the evidence of ownership of shares of stock, and that shares may be issued, held, and dealt with under some circumstances without certificates. Cases so holding are collected in great numbers and commented upon by appellants at length. It hardly needs citation of authority to state that under some circumstances title to shares of stock may pass without delivery of the certificates. On the other hand, respondents cite many cases, and discuss them at equal length, holding that certificates are a species of property and not mere evidence of ownership. These cases are of little help in the present actions. What we are here considering is not what could have been done, but what these parties, as reasonable men and women, intended to do. The authorities are numerous to the effect that the usual and ordinary course of business is that a contract for the

sale of shares is executed by the indorsement and delivery of the certificates (6A Cal.Jur., p. 657, § 367). So widespread is the custom of treating certificates as property and passing title to stock by the delivery and indorsement of the certificate, that the United States Supreme Court in National Safe-Deposit, Savings & Trust Co. v. Hibbs, 229 U.S. 391, 395, 33 S.Ct. 818, 819, 57 L.Ed. 1241, stated: "These principles are well known to business men and are constantly acted upon by them. This circumstance should be given due weight in determining the rights of the parties in this case."

[18, 19] Various courts have emphasized that the business man's view is that ownership of the certificate is necessarily coupled with ownership of the shares. Cummings v. Clark (D.C.) 282 F. 300; Powers v. Pac. Diesel Engine Co., 206 Cal. 334, 274 P. 512, 73 A.L.R. 1398; McNeil v. Tenth National Bank, 46 N.Y. 325, 7 Am.Rep. 341. Due weight, in construing a contract between business men must be given to the business man's view. National City Bank of Chicago v. Wagner (C.C.A.) 216 F. 473; see, also, DeGanay v. Lederer, 250 U.S. 376, 39 S.Ct. 524, 63 L.Ed. 1042. In the absence of an expressed intent to the contrary, we must construe this transaction as one intended by the parties to be consummated in the usual and ordinary manner; that is, title to pass upon delivery of the certificates.

[20] So far the discussion has proceeded on the theory that an executory contract to buy and sell the Trading Corporation shares was entered into in California. This is to interpret the transaction most favorably to appellants. Respondents contend that no contract was entered into until September 13, 1929, when the physical exchange took place. This contention is based upon the fact that the Trading Corporation's offer as transmitted to Taylor on July 31, 1929, and by him transmitted to McKee, was materially changed by the latter when he communicated it or transmitted it to the American Company stockholders. It is elementary that an acceptance is required to be identical with the offer, and must be unconditional and not add any new terms thereto. If the terms of the offer are changed or added to by the acceptance, there is no meeting of the minds and no contract.

The stockholders of American Company saw and acted upon McKee's letter of August 1st; prior to September 13, 1929, none of them saw the Trading Corporation's telegram to Taylor of July 31, 1929. A reference to the July 31st telegram and the August 1st letter will indicate the material variations. The offer of July 31st states that the exchange was to be made in accordance with the "terms of Deposit Agreement now on file with the American Trust Company"; the so-called Lamont form. By that agreement the Trading Corporation reserved to itself the option to issue fractional shares, or to pay for them in cash. McKee's letter of August 1st states that "No fractional shares * * * will be issued, but American Company stockholders will receive settlement for fractional shares thereof in cash." This was a material variance—the actual cash paid by the Trading Corporation for fractional shares amounted to over $350,000. There are other variations of a more or less material nature.

Based on these facts, and the further fact that the trial court found that McKee in transmitting the offer was not the agent of the Trading Corporation (and as already held, that finding is amply supported), respondents contend that the minds of the parties did not meet at the time of deposit, and that no contract was in fact entered into until September 13, 1929. The correctness of this contention need not now be passed upon, for the reason that, it is our opinion, that even if a contract to sell was entered into in California, and even assuming such contract was illegal as being in violation of the Corporate Securities Act, such illegality did not affect the validity of the Trading Corporation stock, issued and delivered in New York—a state where such issuance and delivery were admittedly legal. At most, interpreting the transaction most favorably to appellants, we have a situation where a foreign corporation makes, in California, an offer to sell its stock, delivery and passage of title to take place in a state reasonably connected with the transaction—New York; this offer we will assume was accepted in California. The validity of the stock when so issued, in our opinion, was not affected even if the prior contract to sell it was illegal.

As already indicated, even if it be assumed that the Corporate Securities Act did apply to the negotiations had in this state, and even if it be assumed that the executory contract, so far as the seller—the Trading Corporation—is concerned, was illegal, nevertheless, the performance and execution of the contract in New York, being legal there, and being complete in themselves, stand independently of the prior illegality.

[21] Before discussing this conclusion it should be pointed out that we are here interested only in the acts of the Trading Corporation, the prospective seller of its stock, and are not interested in the acts of the prospective buyers. In spite of the general language found in some of the cases that stock issued in violation of the Corporate Securities Act is "void," it is well settled that that act belongs to that type of statute which is aimed at one class for the protection of another class. In other words, the prohibitions and penalties of the Corporate Securities Act are leveled against the seller and not against the buyer. This is well settled. Domestic & Foreign Pet. Co., Ltd. v. Long, 4 Cal.(2d) 547, 51 P. (2d) 73; Western Oil, etc., Co. v. Venago Oil Corp., 218 Cal. 733, 784, 24 P. (2d) 971, 977, 88 A.L.R. 1271; Security-First National Bank v. J. G. Ruddle Properties, Inc., 218 Cal 435, 23 P.(2d) 1016; Braunstein v. Title Guarantee & Trust Co., 216 Cal. 780, 17 P.(2d) 104; Eberhard v. Pacific Southwest L. & M. Corp., 215 Cal. 226, 9 P.(2d) 302. We have already pointed out that an exchange constitutes two sales, and that the sale of the American Company shares is not questioned. It therefore follows that the only activities that can be questioned under the Corporate Securities Act are the activities of the Trading Corporation.

[22-24] We now turn to a discussion of our conclusion that, assuming the activities of the Trading Corporation in California violated the Corporate Securities Act, nevertheless the subsequent performance in New York was legal, and the shares issued there were valid in all respects. This conclusion is predicated on the point already discussed that the contract called for the issuance of the Trading Corporation shares in New York, the contract was performable there, and title passed there. Contracts which are illegal only because of the place or time of their making may be later adopted at places or times when or where they are not unlawful. Appellants' argument would visit upon the Trading Corporation a species of judicial outlawry; it would lead to the conclusion that whenever a foreign corporation desired to sell some of its stock to California residents, and, in California, through one of its representatives, entered into negotiations looking toward such object, assuming such negotiations to be illegal, it never could legally complete the deal, either in this state after it secured a permit, or elsewhere without one. The preliminary illegal transactions would, under this theory, so far affect the transaction, that it never could free itself from the taint of illegality. Such is not the law. If the offer of July 31st or August 1, 1929, was illegal, and if the other activities of the Trading Corporation in California were illegal, in fact, even if the executory contract to sell was illegal, that would not prevent the parties from later making another legal contract in New York dealing with the same subject matter. The authorities are quite uniform in holding that the mere act of performing in accordance with the terms of the original offer or executory contract may amount, in itself, to a lawful contract. Stated another way, it does not impair the validity of a sale when made that the prior contract to make it was illegal. This is so because the sale or executed contract may legally stand on its own feet, independent of the prior executory contract.

These principles are well settled. An excellent illustration of the applicability of these principles to the sale of stock is found in Bauer v. Bond & Goodwin, Inc. (1934) 285 Mass. 117, 188 N.E. 708. The so-called blue sky law of Massachusetts G.L.(Ter. Ed.) Mass., c. 110A, § 2(d) prohibited "an agreement whereby a person transfers or agrees to transfer an interest in securities" or "an attempt to sell, an option of sale, a solicitation of a sale, a subscription or an offer to sell" "unless or until" a notice of intention to sell was first filed with the department of public utilities. Violations of the act were made public offenses. In a prior case, Kneeland v. Emerton, 280 Mass. 371, 183 N.E. 155, 87 A.L.R. 1, the Supreme Judicial Court of Massachusetts had held that an innocent purchaser who had purchased his shares from a seller who had not filed his notice could rescind the purchase. The Bauer Case was predicated on the rule of the Kneeland Case. The facts were that the defendant solicited the sale, and received from the prospective buyer an offer to buy on February 6, 1928, before the required notice was filed. The statutory notice was filed February 8, 1928, and subsequently the contract was executed. Upon discovering the facts the purchaser brought an action to rescind. The court stated the problem involved as follows (285 Mass. 117, 188 N.E. 708, at page 709): "We have, therefore, a case of a contract of sale and an actual sale wholly in conformity to law, unless they are invalidated by the fact that the preliminary transactions were unlawful."

In holding that the prior admittedly illegal negotiations did not affect the validity of the subsequently executed sale, the court reasoned as follows: "Where a contract or a sale grows out of illegal conduct, its affirmative validity depends upon its completeness as a source of rights apart from illegal conduct participated in by the party who seeks to enforce it against the other. Hall v. Corcoran, 107 Mass. 251, 253, 9 Am.Rep. 30; Cranson v. Goss, 107 Mass. 439, 441, 9 Am.Rep. 45; Stewart v. Thayer, 170 Mass. 560, 49 N.E. 1020; Horn v. Dorchester Mutual Fire Ins. Co., 199 Mass. 534, 85 N.E. 853; Pelosi v. Bugbee, 217 Mass. 579, 105 N.E. 222; Higgins v. Fitzgerald, 266 Mass. 176, 164 N.E. 812; McMullen v. Hoffman, 174 U.S. 639, 19 S.Ct. 839, 43 L. Ed. 1117. Many of the decided cases arose, under the statute forbidding "labor, business or work" on the Lord's day. G.L.(Ter. Ed.) c. 136, § 5. Such cases do not furnish a perfect analogy in all respects. Under that statute the parties commonly are in pari delicto, and are equally within its prohibition; executed transactions stand and executory contracts are invalid, because neither party can obtain affirmative relief. Myers v. Meinrath, 101 Mass. 366, 3 Am. Rep. 368; Clapp v. Hale, 112 Mass. 368, 17 Am.Rep. 111; Gordon v. Levine, 197 Mass. 263, 83 N.E. 861, 15 L.R.A.(N.S.) 243, 125 Am.St.Rep. 361; Horn v. Dorchester Mutual Life Ins. Co., 199 Mass. 534, 85 N.E. 853. Under the statute here involved, the parties are not in pari delicto, and a buyer who does not participate in wrongdoing may rescind even a completely executed purchase in which the seller violated the statute. Kneeland v. Emerton, 280 Mass. 371, 183 N.E. 155 [87 A.L.R. 1]. But the two statutes have features in common. In both, the prohibition, as applied to a sale, is not limited to a transfer of title but extends as well to an executory contract to sell and to other preliminary steps. Pattee v. Greely, 13 Metc. 284; Bennett v. Brooks, 9 Allen, 118, 120; Tuckerman v. Hinkley, 9 Allen, 452, 454; Bradley v. Rea, 14 Allen, 20; Id., 103 Mass. 188, 4 Am.Rep. 524; Kryzminski v. Callahan, 213 Mass. 207, 100 N.E. 335, 43 L.R.A.(N.S.) 140. We need not consider whether the contract made on February 9 by the acceptance of the plaintiff's offer of February 6 was tainted by the illegal conduct of the defendant's salesman. Compare Tuckerman v. Hinkley, 9 Allen, 452; Dickinson v. Richmond, 97 Mass. 45; Gibbs & Sterrett Manuf. Co. v. Brucker, 111 U.S. 597, 4 S.Ct. 572, 28 L.Ed. 534. We pass to the actual sale. The payment of the consideration and the transfer of the shares both took place after the defendant was free to sell. Those acts fixed completely the rights of the parties, without reliance upon the executory contract or any earlier transaction. For that reason, the actual sale was not tainted by the earlier illegal conduct of the defendant."

The point here under discussion is exhaustively discussed in accordance with the views herein expressed in 3 Williston on Contracts, §§ 1707, 1758. See, also, Brocalsa Chemical Co. v. Langsenkamp (C.C.A.) 32 F.(2d) 725, and Los Angeles Fisheries Inc. v. Crook (C.C.A.1931) 47 F.(2d) 1031, in cases somewhat similar to the facts involved in the instant appeals.

We are not without authority in this state on the same point. In Waring v. Pitcher, 135 Cal.App. 493, 27 P.(2d) 397, 398, the defendant subscribed and paid for shares of stock before a permit was secured. The stock was delivered to the purchaser after a permit had been obtained. The purchaser accepted the stock and acted as a stockholder for a period of time. This action was brought to enforce the old statutory stockholders' liability. Appellant contended that she never was a stockholder because of the violation of the Corporate Securities Act. It was conceded that the subscription and payment "prior to the issuance of a permit were void and could not be validated by ratification or estoppel." The court held, however, that the execution of the illegal contract, after it had become legal, constituted a new and independent contract as of the time of performance. The court stated: "Under the authorities it appears entirely clear that prior to the time of receiving and accepting the certificate appellant could have demanded the return of her money. Respondent contends, however, that as the corporation was in existence when the certificate was delivered to plaintiff and held a valid permit to issue stock at that time, appellant's act of accepting and retaining the certificate had the same legal effect as a new and independent contract for the sale of the stock as of the time of such delivery. Respondent's contention finds ample support in Moore v. Moffatt, 188 Cal. 1, 204 P. 220, and must be sustained. Appellant was therefore a stockholder and subject to the provisions of the law then in force relating to stockholders' liability."

Moore v. Moffatt, 188 Cal. 1, 204 P. 220, 223, cited in the Pitcher Case, supra, is a leading case. There an agreement for a stock subscription was entered into at a time when the corporation had no permit. The stock was issued and accepted after a permit was obtained. This action was brought by the trustee of the issuing corporation, it having become bankrupt, to recover the difference between the sums paid by the purchasers and the par value of the stock. The defense was that the contract to subscribe was illegal and therefore defendants were not stockholders. The court held: "Conceding, for the purposes of discussion and decision, as is contended in support of the judgment, that the subscription agreement was in its inception void and incapable of acceptance by the corporation because executed, in contravention of the provisions of the Investment Company's Act (Stats.1913, p. 715), prior to the procurement of a permit from the corporation commissioner authorizing a sale of the corporation's stock, and therefore could not have been legally made the basis of an action against the defendants upon the theory that they were stockholders in the corporation, still we have the admitted fact in the plaintiff's case that no stock of the corporation was in fact issued in response to any agreement of the parties until after an admittedly regular and valid permit had been granted by the corporation commissioner. This being so, the subscription agreement, even though it may have been void and incapable of acceptance in the first instance, should, in the light of the subsequent conduct of the parties to the transaction, be considered and construed as a continuing offer to subscribe for the stock in question, pending the procurement of a permit from the corporation commissioner, which ultimately became the embodiment and expression of a new agreement to purchase the stock entered into at a time when the only legal obstacle in the way of a valid agreement had been overcome. The agreement, so considered, and having been in fact ultimately accepted by the corporation after the required permit had been procured—as evidenced by the issue of the stock upon the order of the defendants—the validity of its making and acceptance must be measured and tested by its character as revealed by the circumstances and conduct of the parties with relation thereto at the time of its ultimate acceptance rather than by the circumstances attending its mere physical making in the first instance. That is to say, the conduct of the parties to the transaction, the defendants on the one hand and the corporation on the other, with reference to the subject-matter of the agreement, at a time when the only legal obstacle to the making of a valid subscription agreement had been overcome by compliance with the statutory requirement, was tantamount to an adoption by them of the terms and conditions of the subscription agreement as of the date of its ultimate acceptance, thereby in effect making it finally effectual as the expression of a new agreement, even though in its original making it may have been void and ineffectual for any purpose. Of course, the parties to the transaction could not, nor did they, as a matter of law, by their adoption of the agreement ratify and thereby validate as of the time of its original making or any time thereafter an agreement which may have been void in the first instance. But the parties could, and we think they did, when the bar of the statute to the making and acceptance of a valid agreement had been removed, elect to adopt and accept and stand upon the subscription agreement already signed as embodying—even though it may have been ineffectual at the time it was signed--the terms and conditions of a new agreement by which their future dealings were to be governed."

The Moffatt Case has been frequently cited and on occasion distinguished. The cases distinguishing it, however, are not cases where there was an independently sufficient transaction after the transaction became legal.

The doctrine of the cases referred to and quoted from supra is not based on the ratification of a prior illegal contract, or upon estoppel, but upon the rule that the validity of a sale when made is not affected by a prior illegal contract to make such sale. The sale, itself, stands independently of the prior illegal contract to make it.

[25] The application of these principles to the present appeals would be quite obvious had the stockholders of American Company, after having received the offer from the Trading Corporation (which offer is assumed to have been illegal) gone to New York themselves and accepted delivery of the Trading Corporation certificates, instead of doing so by agent. Then, obviously, the New York transaction would

stand independently of the prior negotiations in California. The stockholders of American Company, however, did not go personally to New York but did so through their agent, the American Trust Company. In the closing brief of appellants it is strenuously urged that, admitting the correctness of the principles above discussed, they are not applicable here for the reason that the New York transaction is not severable from the California negotiations. The appellants state their contention as follows: "There is an insurmountable difficulty to the application of the doctrine defendants urge. In the cases relied upon, the parties themselves participated in the latter transaction at a time and place where it was legal and that transaction had all the elements of legal completeness. That is not true in this case. The parties themselves did not participate in any dealings in New York. The parties to the dealings in New York were the Trading Corporation on one side and American Trust Company on the other side. Those dealings can be attributed to the depositors only by showing that American Trust Company was their agent. To show that agency, it is necessary to show the prior illegal dealings in California." This argument is not sound. As already pointed out, so far as the Trading Corporation stock was concerned, the American Company stockholders, including the plaintiffs, were buyers. Also, as already pointed out, the prohibitions of the Corporate Securities Act are aimed at sellers and not buyers. Stated another way, the actions of the buyers in California were not illegal. Since this is so, the appointment of the agent in California by the buyers was legal. No illegal California transaction need be drawn on to give vitality to the New York transaction.

[26] It, therefore, follows that even if it be assumed that the negotiations in California were illegal, nevertheless the validity of the sale in New York was not affected. This conclusion makes it unnecessary to pass upon the contention of respondents, that the Corporate Securities Act, properly interpreted, has no application at all to negotiations had in California that contemplate the issuance and sale of stock in a foreign jurisdiction. Nor, in view of this conclusion, need we discuss the proper interpretation of Pollak v. Staunton, 210 Cal. 656, 293 P. 26; Hohn v. Peters, 216 Cal. 406, 14 P.(2d) 519, and Gillis v. Pan American, etc., Co., 3 Cal.(2d) 249, 44 P.(2d) 311.

[27] Little more need be said. The authority of the American Trust Company, as agent for the American Company stockholders, was not limited to this state. The findings of the trial court that there was no change in plan, and the further finding (whether it be considered a finding of fact or conclusion of law) that the American Trust Company was the agent of the depositing stockholders and had full authority to do everything it did, including the authority to go to New York and accept the Trading Corporation's certificates there, are amply supported and legally justified. What the depositing stockholders wanted and what the documents indicate they instructed their agent to get, and what, as held in this opinion, they received, was nine valid Trading Corporation shares for every seven shares of American Company stock deposited by them. In other words, the transaction is simply one where the American Trust Company was appointed by the American Company stockholders to get certain stock for them. The trust company had authority to do all that was necessary or appropriate to bring about this result. This principle is elementary, and is clearly stated in 1 Mechem on Agency (2d Ed.) page 560, § 789, as follows: "As has already been pointed out, every delegation of authority, whether it be general or special, express or implied, unless the contrary be made known, carries with it, as an incident, the power to do all those acts, naturally and ordinarily done in such cases, and which are necessary and proper to be done in the case in hand in order to effectuate the purpose for which the authority in question was created. It embraces all the necessary and appropriate means to accomplish the desired end. This principle is founded on the manifest intention of the party creating such authority and is in furtherance of such intention."

The principle is codified in section 2319 of the Civil Code in the following language: "An agent has authority: 1. To do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency." See Stephens v. Ahrens, 179 Cal. 743, 178 P. 863; Arcade Realty Co. v. Bank of Commerce, 180 Cal. 318, 181 P. 66, 12 A.L.R. 102.

[28] The application of these principles to the present case is obvious. The Trading Corporation certificates were located in New York. That state was reasonably connected with the transaction. If the exchange were consummated in California it would violate the California Corporate Securities Act. The only way valid Trading

Corporation stock could be obtained was by entering into a legally sufficient transaction in New York. Obviously, this was within the agent's authority.

[29] If there were any doubt as to whether the agent had authority to consummate the exchange in New York (which, in our opinion, there is not), the fact that both the agent and the principals construed the agency as including this power, would be of considerable weight. Obviously the agent construed its authority as including the power to go to New York to obtain the stock, by actually going there and obtaining it. The principals were informed by letter from the agent dated September 17 that, "The exchange of stock of American Company for stock of The Goldman Sachs Trading Corporation * * * has been completed as of September 13, 1929, and our officers in New York have received for the account of the stockholders of American Company * * * certificates evidencing the number of shares of the stock, * * *" etc. With this information in their hands, informing them that the deal had been consummated in New York, the American Company stockholders, several weeks later, accepted from their agent the Trading Corporation certificates. The effect of such construction by the agent and acquiescence by the principal is well illustrated in LeRoy v. Beard, 8 How.(49 U.S.) 451, 12 L.Ed. 1151, and McNeil v. Shirley, 33 Cal. 202.

For the foregoing reasons, it is apparent that the judgments appealed from should be, and each of them is, affirmed.

We concur: SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; THOMPSON, J.; SPENCE, Justice pro tem.

---

8 Cal.2d 294

MUNDY v. MARSHALL et al.

L. A. 16033.

Supreme Court of California.

Feb. 18, 1937.

1. Automobiles 🔑217(7)

Pedestrian, who was struck by automobile while diagonally crossing street near well-lighted intersection with his back partly turned to approaching traffic, was contributorily negligent as a matter of law.

2. Automobiles 🔑244(50)

In action for death of pedestrian struck by automobile while diagonally crossing street near well-lighted intersection with his back partly turned to approaching traffic, statutory presumption that pedestrian was using due care *held* insufficient to sustain a verdict for plaintiff, since pedestrian was obviously not exercising vigilance the law required of him (Code Civ.Proc. § 1963, subd. 4).

3. Appeal and error 🔑110

Order denying motion for new trial is not appealable.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Lou Mundy against Marion C. Marshall and others. From a judgment entered in pursuance of a directed verdict for the defendants, and from an order denying plaintiff's motion for a new trial, the plaintiff appeals.

Affirmed.

For prior opinion, see 59 P.(2d) 413.

Moses C. Davis, of Los Angeles (W. Thomas Davis, of Los Angeles, of counsel), for appellant.

Walter S. Coen and Donald E. Ruppe, both of Los Angeles (Horace W. Danforth, of Los Angeles, of counsel), for respondents.

THOMPSON, Justice.

This is an appeal by the plaintiff in an action for damages for the wrongful death of her husband and is taken from a judgment entered in pursuance of a directed verdict for the defendants and from an order denying her motion for a new trial. The case was taken over on petition for hearing after decision by the District Court of Appeal for the purpose of giving further consideration to the question of whether the testimony of the plaintiff's witness Nix overcomes the presumption, established by subdivision 4 of section 1963 of the Code of Civil Procedure, that "a person takes ordinary care of his own concerns." There was no witness to the actions of the decedent immediately preceding the accident, which occurred near the intersection of Wardlow road (running east and west) and Long Beach boulevard (running north and south). Just prior to the accident Mundy had been in a café on the southeast corner with his wife and a third person. An argument arose as to who should pay for the beer. Mundy paid, but apparently unwillingly, and left the café alone, ahead of his companions, started toward his car, which was parked on the opposite side of the street and a short distance south of the intersection, and was seen by Nix to reach the center of the street. From there on he was unobserved. He was struck by the Marshall car, which was approaching from the north, at a point about twelve feet from the west curb of Long Beach boulevard and just south of the driveway of a service station, which occupied the southwest corner of the intersection.

[1] The testimony of Russell J. Nix is that the traffic was "about medium" on Long Beach boulevard on the night of the accident; that the light was good both at the place where he made his observations and at the point of impact; that the street was well lighted and the view unobstructed for 200 feet south of the place of the accident and for about nine blocks to the north; that he had been in the Happy Days Café with two other men; that as they left the deceased came out the door behind them, "cussing" somebody in the restaurant; that one of the witness' companions asked if he meant them; that Mundy walked to the center of the street, then turned around, and said to Nix and the two men with him, "not you"; that the witness then proceeded to the center of Wardlow road; that he did not see Mundy again; that the next time he turned around the car which hit him obscured his view of Mundy, but he saw the car swerve and heard the crash; and that the car was not traveling at an excessive rate of speed. Nix also testified that Mundy "swayed as he walked"; that, as he stepped off the curb, a car nearly hit him and he "wobbled one or two steps"; that he looked straight ahead and neither to the right or left as he left the curb; and that he made a complete turn to the right in the center of the street when he spoke to them. From the points indicated by Nix on the chart of the intersection as being those at which he observed Mundy when he left the café, when he spoke to them, and when he was hit, it appears that he was crossing Long Beach boulevard not in a crosswalk, or even at right angles after he reached the center of the street, but on a diagonal with his back at least partly turned to traffic approaching from the north. This is admitted in appellant's opening brief, her own statement being "deceased walked twenty-eight feet west and about thirty feet south from the place last seen, before he was hit." It is clear that, upon these facts, the trial court was justified in concluding that the decedent was contributorily negligent as a matter of law and was correct in taking the case from the jury (Horton v. Stoll, 3 Cal.App.(2d) 687, 40 P.(2d) 603) unless the statutory presumption that the decedent was using due care was sufficient to create a conflict in the evidence and sustain a verdict for the plaintiff.

[2] There is only one reasonable conclusion to be drawn from the facts established by the testimony of the plaintiff's own witness. A pedestrian who crosses a well-lighted thoroughfare other than on a crosswalk, in a diagonal line and with his back partly turned to approaching traffic and is struck by a car approaching from the quarter from which traffic was to be expected is obviously not exercising the vigilance the law requires of him. Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493; Atkins v. Bouchet, 65 Cal.App. 94, 223 P. 87; Moss v. Boynton Co., 44 Cal. App. 474, 186 P. 631; Thompson v. White, 56 Cal.App. 173, 204 P. 561. The manner in which the decedent was crossing the street having been covered by the plaintiff's own evidence, there is no room for the operation of the presumption that he was exercising due care [Paulsen v. McDuffie, 4 Cal.(2d) 111, 47 P.(2d) 709], and it cannot be relied upon to establish a conflict in the evidence.

[3] An order denying a motion for new trial is not an appealable order. The appeal therefrom is therefore dismissed, and the judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; EDMONDS, J.; LANGDON, J.

8 Cal.2d 297

BYER v. CANADIAN BANK OF COMMERCE.

L. A. 15966.

Supreme Court of California.

Feb. 18, 1937.

1. Bailment 🔑16

Misdelivery by one intrusted with property of another constitutes a conversion of property, though such person acted innocently and by mistake.

2. Trover and conversion 🔑4

Foundation of action for conversion rests on unwarranted interference by defendant with dominion over property of plaintiff from which injury to plaintiff results, and does not rest on good or bad faith or care or negligence, knowledge or ignorance of defendant.

3. Bailment 🔑16

Neither sincere and apparently well-founded belief of bailee, even though gratuitous bailee, that tortious act was right, or the exercise of any degree of care constitutes defense to action for conversion.

4. Principal and agent 🔑100(1)

Where owner of securities gave power of attorney to third person to act for him and in his behalf on all matters, especially collection of certain securities in possession of brokerage company and to accept and receipt for them, power of attorney *held* not to authorize third person to deal with bank or to receipt for any securities from it, since when authority is given partly in general and partly in specific terms, general authority gives no higher powers than those specifically mentioned (Civ.Code, § 2321).

5. Banks and banking 🔑153

That owner of securities gave third party information that securities were being held for him by bank would not estop owner from recovering value of securities which third party had fraudulently obtained by sending for them by telegram signed with owner's name (Civ.Code, § 3543).

6. Principal and agent 🔑150(2)

That owner of securities gave third party limited power of attorney would not preclude owner from recovering value of securities, which third party fraudulently obtained through acts which did not come within power of attorney granted, by sending for securities by telegram signed with owner's name.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Action by Jacob Byer against the Canadian Bank of Commerce. From a judgment in favor of the plaintiff, the defendant appeals.

Affirmed.

Prior opinion, 57 P.(2d) 985.

Meserve, Mumper, Hughes & Robertson and Shirley Meserve, all of Los Angeles (William Larrabee, of Los Angeles, of counsel), for appellant.

Mark S. Feiler, of Beverly Hills, and Roy W. Colegate and Guy Richards Crump, both of Los Angeles, for respondent.

EDMONDS, Justice.

The Canadian Bank of Commerce has appealed from a judgment against it in an action for the conversion of certain bonds which were deposited with it for safekeeping. An imposter secured the bonds from the bank by means of a forged telegram.

The respondent Byer is a former resident of Canada, but has resided in California from time to time since 1914. During that period he has dealt with the bank through its branch at Granum, in the province of Alberta, and has maintained bank accounts there since 1907. At the time of the occurrence of the events in controversy in this case he also had a safe deposit box at the Granum branch of the bank.

In 1931 respondent had certain securities in the possession of Buchan & Co., a brokerage house at Calgary, Canada, and being concerned about them, he communicated with an attorney at Calgary and authorized him to procure the bonds and send them to the appellant bank to be placed in his safe deposit box. The attorney was able to secure three $1,000 bonds, which he sent to the bank with instructions to "place these bonds in safekeeping and hold the same to the order of Jacob Byer of 604 California Bank Building, Beverly Hills, California." The bank on December 31, 1931, acknowledged the receipt of the bonds "to be held for safekeeping on account of Jacob Byer."

During this time respondent had been doing some business with R. T. O'Brien & Co. at Beverly Hills. He told Robert T. O'Brien of the difficulty he was having with the brokerage firm in Canada. Under date of December 18, 1931, he gave to Mr. O'Brien a power of attorney "to act for me and in my behalf on all matters, especially to that particular transaction involving the collection of certain securities belonging to me and which said securities are now in the possession of the Buchan Company, Brokers, located in the Imperial Bank Building at Calgary, Alberta, Canada. And I herewith grant to Robert T. O'Brien full power of attorney to act for me, to accept and receipt for, in my name any and all documents pertaining to the collection of the securities above mentioned, and to do all that may be necessary in the premises." On January 4, 1932, O'Brien sent the bank a telegram reading: "Please forward immediately to this address the bonds and stock forwarded to you by Harold E. Crowle, Barrister, Calgary, namely three thousand Alberta bonds sixty preferred shares and sixty common shares Associated Holdings Corporation stock." This telegram was signed "Jacob Byer 604 California Bank Building, Beverly Hills, Calif."

Upon receipt of the telegram, the bank at Granum sent the bonds by registered mail addressed to respondent at the address given in the telegram. The package arrived at Beverly Hills on January 8th, and, as the bank had not restricted delivery to the addressee, the package was delivered to an employee of O'Brien, who signed the delivery receipt, "Jacob Byer, by C. Clow." Byer never received the bonds, and brought this action to recover their reasonable value as of January 4, 1932, which he alleged was $2,010. He recovered judgment for this amount.

[1] Appellant insists that an action for conversion will not lie because the facts do not show a tortious detention of the property or an act in exclusion or defiance of the owner's rights. But it has been held that the misdelivery of one intrusted with the property of another constitutes a conversion of it even though he acted innocently and by mistake. 26 R.C.L. p. 1112. In the early case of Cerkel v. Waterman, 63 Cal. 34, plaintiff was allowed to recover in an action for conversion of wheat which had been sold by the defendants, who were commission merchants, and the proceeds paid by mistake to one Williams.

Smith v. Miller, 5 Cal.App.(2d) 564, 43 P.(2d) 347, was an action in conversion brought to recover from a warehouseman the value of certain items of household furniture stored with him and delivered to a corporation which claimed to be the owner thereof. This, it was held, constituted a conversion of the goods. No element of negligence was involved. The claimant of the goods convinced the warehouseman that it was the true owner. Thereupon delivery of the goods was made to it. The warehouseman was held liable for a conversion.

[2] The rule has been succinctly stated in the leading case of Poggi v. Scott, 167 Cal. 372, 375, 139 P. 815, 816, 51 L.R.A.(N.S.) 925, where it is said: "The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action. 'The plaintiff's right of redress no longer depends upon his showing, in any way, that the defendant did the act in question from wrongful motives, or, generally speaking, even intentionally; and hence the want of such motives, or of intention, is no defense. Nor, indeed, is negligence any necessary part of the case. Here, then, is a class of cases in which the tort consists in the breach of what may be called an absolute duty; the act itself (in some cases it must have caused damage) is unlawful and redressible as a tort.' 1 Bigelow on Torts, p. 6."

[3] But appellant insists that, being a gratuitous bailee, it is liable only for gross negligence. The rule is to the contrary. In Baer v. Slater, 261 Mass. 153, 154, 158 N.E. 328, 54 A.L.R. 1329, the court said: "It is contended, however, by the defendant, that he was a gratuitous bailee, and in the absence of bad faith or of gross negligence, of which there is no evidence, the action cannot be maintained. The plaintiffs directed that the merchandise should be returned 'by express,' and no contention is made by them that delivery for transportation to an employee of the American Railway Express Company would not have been a sufficient compliance with their order. But the defendant, while intending to make, and believing that he had made delivery to the express company, in fact gave possession of the merchandise to a stranger. 'A delivery to an unauthorized person is as much a conversion as would be a sale of the property, or an appropriation of it to the bailee's own use. In such cases neither a sincere

and apparently well founded belief that the tortious act was right, nor the exercise of any degree of care, constitutes a defense even to a gratuitous bailee.' Hall v. Boston & W. R. Corp., 14 Allen, 439, 443, 92 Am. Dec. 783; Jenkins v. Bacon, 111 Mass. 373, 376, 15 Am.Rep. 33 [37, 38, 1 Am.Neg. Cas. 781]; Murray v. Postal Teleg.-Cable Co. [210 Mass. 188, 195, 96 N.E. 316, Ann. Cas.1912C, 1183]." See, also, 3 R.C.L. p. 104.

The appellant's liability is not founded upon negligence, but because as a bailee it was under the duty to keep the property and not dispose of it without the authority of the depositor. A somewhat similar situation was presented in the case of Jenkins v. Bacon, supra. In that case, the defendant was a gratuitous bailee of a bond which had been left with it by the plaintiff. Without the direction of the plaintiff and by mistake the defendant sent the bond by mail to plaintiff's wife, who never received it. The court held that by delivery of the property to a person not authorized to receive it the defendant was responsible for its value without regard to the question of negligence. The court said: "The complaint against him is, not that he kept it negligently, or lost it by gross carelessness, but that he intentionally disposed of it in a manner not authorized by the terms of the trust. For the purposes of this case, it is wholly immaterial whether the post-office furnishes a reasonably safe mode of transmission, in the case of valuable papers of such a description, or not."

A case more nearly in point is that of Kowing v. Manly, 49 N.Y. 192, 10 Am.Rep. 346. The defendants as brokers had purchased bonds for plaintiff who had left them in the possession of the defendants under instructions not to deliver them except upon a written order. Plaintiff's wife presented a forged order and secured the property. The defendants were held liable. The court decided that the delivery of the bonds without the bailor's order did not operate as a discharge of the defendant's obligation and that it was incumbent upon the defendants to prove that the order was in the handwriting of the plaintiff. In the instant case, even though the bonds were addressed to the respondent, the appellant subjected them to a risk which the bailor did not contemplate. It is consequently liable for the loss resulting therefrom. 3 R.C.L. p. 104.

[4] The appellant seeks to avoid liability upon the ground that O'Brien was authorized to deal with the bonds under the power of attorney which he held even though the bank did not know that it was in existence. But this instrument, while authorizing O'Brien to act for respondent "on all matters," contained a specific provision concerning the collection of the securities from Buchan Company. "When an authority is given partly in general and partly in specific terms, the general authority gives no higher powers than those specifically mentioned." Section 2321, Civ.Code. The power of attorney in question was, therefore, a limited one and did not authorize O'Brien to deal with the bank nor to receipt for any securities from it. See Billings v. Morrow, 7 Cal. 171, 68 Am.Dec. 235; Quay v. Presidio & F. R. Co., 82 Cal. 1, 22 P. 925; Moore v. Gould, 151 Cal. 723, 91 P. 616.

[5, 6] Appellant attempts to rely upon the doctrine of estoppel as a defense to plaintiff's claim upon the principle that "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Section 3543, Civ.Code. There is no basis for the application of this rule. To adopt the principle claimed by the respondent would mean that any person who had given another information concerning his property which would afford an opportunity to forge an instrument concerning it, would be without a remedy. Nor can the fact that the respondent gave a limited power of attorney preclude a recovery against one whose acts do not come within the power granted. It was the act of appellant which made it possible for O'Brien to secure respondent's property. Had it complied with the terms of the contract of bailment and not exposed the property to the risk of loss, there would have been no loss. Appellant cannot complain of what respondent did in his dealings with O'Brien. See Tafft v. Presidio & F. R. Co., 84 Cal. 131, 24 P. 436, 11 L.R.A. 125, 18 Am.St.Rep. 166.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.

19 Cal.App.2d 291

In re GREENWALD'S ESTATE.

FIRST NAT. BANK IN SANTA ANA v. LYNCH.

Civ. 1664.

District Court of Appeal, Fourth District, California.

Feb. 18, 1937.

Hearing Denied by Supreme Court April 19, 1937.

1. Wills 🔑759(2)

Where devisee was given bequest of $15,000 less amount of notes of devisee held by testator, notes signed by devisee as joint maker *held* chargeable against bequest of $15,000, since devisee was primarily liable for full amount of principal and interest.

2. Corporations 🔑1

Mere fact that one or two individuals or corporations own all of stock of another corporation is not sufficient to cause courts to disregard corporate entity of corporation and treat it as the alter ego of the individual or corporation that owns its stock, but it must also be shown that there is such unity of interest and ownership that individuality of corporation and owners of stock has ceased and that observance of fiction of separate existence would sanction fraud or promote injustice.

3. Corporations 🔑1

Fact that, under stipulation, individual was owner of all but qualifying shares of corporation, *held* not to authorize inference that individual used corporation as conduit for his own private business so as to authorize court to disregard corporate entity.

4. Wills 🔑440

Where will is clearly expressed and free from ambiguity, it must be held to speak intention of maker, and courts cannot rewrite it nor by interpretation change expressed intention.

5. Wills 🔑488

Latent ambiguity may be removed by extrinsic evidence, since it is disclosed only by extrinsic evidence.

6. Wills 🔑439

Will should be so construed as to carry out desire and intention of testator, if it is possible to do so from words used.

7. Wills 🔑448

Court will interpret will, if reasonably possible, so as to prevent intestacy.

8. Wills 🔑439

In determining intention of testator, court must take, not only the will, but its entire scheme, the property disposed of, the persons named as devisees or legatees, the words used, and the context.

9. Wills 🔑457

Technical import of words should not prevail over obvious intent of testator.

10. Wills 🔑441

Words used by testator should be construed with reference to the surroundings.

11. Wills 🔑488

Where latent ambiguity exists in a will, testimony of attorney who drafted will concerning conversations he had with testator and instructions given him by testator during course of preparation of will is admissible.

12. Wills 🔑488

Where will left to individual, who was owner of all but qualifying shares of corporation, $15,000 less amount of notes of individual held by testator, fact that testator held notes signed by individual for corporation gave rise to latent ambiguity, which was cured by extrinsic evidence of testator's attorney which showed that testator intended such notes to be charged against bequest so as to require that notes be so charged.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Proceeding by the First National Bank in Santa Ana, executor of the last will and testament of Norman Greenwald, deceased, to probate the will of deceased, which was contested by E. A. Lynch, trustee in bankruptcy of the estate of Preston Duncan, bankrupt. From an adverse decree of the superior court sitting in probate, the contestant appeals.

Affirmed.

Hearing denied by Supreme Court; THOMPSON and EDMONDS, JJ., dissent.

Derthick, Cusack & Ganahl, of Los Angeles, and Roland Thompson, of Santa Ana, for appellant.

Forgy, Reinhaus & Forgy and R. M. Crookshank, all of Santa Ana, for respondent.

MARKS, Justice.

Harry H. Ball died during the pendency of this appeal. The First National Bank in Santa Ana has been appointed in his place and substituted in his stead.

This is an appeal from a decree of the superior court, sitting in probate, directing that there be charged against a bequest of $15,000 to Preston Duncan, made in the will of Norman Greenwald, deceased, the sum of $12,100 evidenced by a series of promissory notes payable to deceased, some executed by Preston Duncan, and others by Preston Duncan Studios, Ltd., a corporation. The proceeding in the probate court was brought under the provisions of section 588 of the Probate Code.

The paragraph of the will which is here involved is as follows:

"To Preston Duncan, of Hollywood, California, the sum of Fifteen Thousand Dollars ($15,000.00), and such notes of the said devisee held by me at the time of my death shall be credited against this bequest, and should the said Preston Duncan not survive the distribution of my estate but leave a wife surviving the distribution of my estate, I devise and bequeath said sum on the same conditions to his said wife."

For convenience, we have divided into three classes the seven promissory notes which the court below ordered charged against the bequest. Their respective principal amounts, dates, and signatures are as follows: Class 1—$3,000, May 1, 1930, signed Preston Duncan; $1,100, December 1, 1930, signed Preston Duncan. Class 2—$2,000, September 25, 1930, signed Preston Duncan Stu*dois*, Ltd., Preston Duncan. S. Duncan Hyde; $1,000, October 20, 1930, signed Preston Duncan Stu*dois*, Preston Duncan. S. Duncan Hyde. Class 3—$3,000, September 6, 1930, signed Preston Duncan Studios Ltd. By Preston Duncan. S. Duncan Hyde; $1,000, October 31, 1930, signed Preston Duncan Stu*dois* Ltd. By Preston Duncan. By S. Duncan Hyde; $1,000, November 14, 1930, signed Preston Duncan Studios Ltd. By Preston Duncan. By S. Duncan Hyde.

No question is raised here of the correctness of that portion of the decree charging against the bequest to Preston Duncan the notes listed in class 1, the principals of which total $4,100.

[1] No valid objection can be urged against that portion of the decree charging against the bequest to Preston Duncan the notes included in class 2, the principal sums of which total $3,000. Each of these two notes is signed by Preston Duncan in his individual capacity. He is a joint maker and primarily liable for the full amount of the principal and interest on each note. These notes, therefore, clearly come within the definition contained in the quoted paragraph of the will as "such notes of the said devisee held by me at the time of my death" which must be charged against the bequest under the clear and unequivocal language of the will.

The notes in class 3 present a more difficult question. None of them appear to be signed by Preston Duncan in his individual capacity. On their faces they appear to be notes of Preston Duncan Studios (or Studois) Ltd. These notes have a total principal face value of $5,000.

The theory of the probate court in charging all the notes against the bequest clearly appears in the following findings of fact:

"III. That the said Norman B. Greenwald had loaned Preston Duncan the sum of $12,100.00 prior to his death and had received from the said Preston Duncan notes executed by the said Preston Duncan individually in the principal sum of $7100.00 and notes executed by Preston Duncan Studios Ltd., in the principal sum of $5000.00.

"IV. That Preston Duncan Studios, Ltd., a corporation was the alter-ego of the said Preston Duncan, and the said Preston Duncan owned all of the capital stock of said corporation and all of it stood in his name with the exception of two qualifying shares issued to two directors; that the said corporation transacted the business of the said Preston Duncan.

"V. That it was the intention of the said Norman B. Greenwald that there be credited against the bequest of Preston Duncan not only the notes executed by Preston Duncan individually but the notes executed by Preston Duncan Studios, Ltd., a corporation; that the said Norman Greenwald never made any distinction between the individual and the corporation which was his alter ego, and that the said Norman B. Greenwald considered the notes executed by the said Preston Duncan Studios, Ltd., as the notes of said Preston Duncan an individual.

"VI. That because of the condition of the bequest herein set forth and the fact that Preston Duncan Studios, Ltd., was in fact the alter ego of the said Preston Duncan a latent ambiguity has arisen in the construction of said will."

Appellant is the duly appointed, qualified, and acting trustee in bankruptcy of the estate of Preston Duncan, bankrupt. He attacks as not supported by the evidence those parts of the findings which find that the Preston Duncan Studios, Ltd., was the alter ego of Preston Duncan. This contention must be sustained.

The only evidence in the record supporting this portion of the findings is contained in the following stipulation: "Preston Duncan if present would testify that he owned all but the qualifying shares of the Preston Duncan corporation; that he never discussed the form of the notes or the bequest with Mr. Greenwald; that he never made any objection to the form of the notes; that Preston Duncan never paid any interest and never noted or considered the form of the execution of the notes and that he did not change the form of the execution of the notes for the purpose of defrauding creditors of either Preston Duncan himself or Norman B. Greenwald?"

[2] In Hollywood Cleaning, etc., Co. v. Hollywood Laundry Service, 217 Cal. 124, 17 P.(2d) 709, 711, it is said: "Whatever may be the rule in other jurisdictions, the rule is well settled in this state that the mere fact one or two individuals or corporations own all of the stock of another corporation is not of itself sufficient to cause the courts to disregard the corporate entity of the last corporation and to treat it as the alter ego of the individual or corporation that owns its stock. In addition it must be shown that there is such a unity of interest and ownership that the individuality of such corporation and the owner or owners of its stock has ceased; and it must further appear that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice."

To the same effect is Davis v. Perry, 120 Cal.App. 670, 8 P.(2d) 514, 516, where it is said: "In any event, the rule of law regarding a so-called 'one man corporation' or as sometimes called a 'corporate alter ego' is now definitely announced. The law is well settled that, in order to cast aside the legal fiction of a distinct corporate existence, it must appear that the corporation is the business conduit and alter ego of its stockholders, and that to recognize it as a separate entity would aid in the consummation of a wrong. In other words, not only must it appear that one man or two men own the stock and control the policies, but it must also be shown that there is such a unity of interest and ownership that the individuality of such corporation and such person or persons has ceased; and it must further appear from the facts that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice."

[3] The evidence supports the necessary element that to fail to recognize the alter ego doctrine might work an injustice. But the evidence does not supply the necessary element that Preston Duncan merely used the corporation as a conduit through which to conduct his private business. No such inference can reasonably be drawn from the stipulation.

The finding that there is a latent ambiguity in the will must be examined, and, if such defect exist, we must determine whether the latent ambiguity was cured by the evidence, and whether the finding of a latent ambiguity with the finding of the intention of the testator will support the decree without the aid of the finding that the corporation was the alter ego of Preston Duncan.

[4, 5] It is well settled that it is a testator who makes his will, and, when the will is clearly expressed and free from ambiguity and uncertainty, it must be held to speak the intention of its maker. The courts cannot rewrite it nor by interpretation can they change the expressed intention of the testator. While this rule is firmly established, cases arise where a will, clear on its face, may present difficulties of interpretation usually developed during the process of administration. Such cases ordinarily present uncertainties as to a beneficiary or of the property bequeathed and are classified as latent ambiguities. "It is settled doctrine that as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence." Patch v. White, 117 U.S. 210, 6 S.Ct. 617, 619, 710, 29 L.Ed. 860; Taylor v. McCowen, 154 Cal. 798, 99 P. 351.

[6-10] Further rules for construction of wills are thus set forth in Re Estate of Koch, 8 Cal.App. 90, 96 P. 100: "A will should be so construed as to carry out the desire and intention of the testator, if it is possible to do so from the words used. It is also the rule in the construction of a will to interpret it, if reasonably possible, so as to prevent intestacy. As to what were the intentions of a testator in a given

case is often a question difficult of solution. Sometimes its final determination is but an approximation. We must take, not only the will, but its entire scheme; the property disposed of; the persons named as devisees or legatees; the words used; and the context. The technical import of words should not prevail over the obvious intent of the testator; and words should be construed with reference to the surroundings."

[11] During the course of the trial respondent called as a witness in his behalf the attorney who drafted the will of deceased, and over the objection of appellant was permitted to interrogate him concerning conversations he had had with deceased, and instructions given him by deceased during the course of the preparation of the will. Appellant now complains of this ruling as error. It seems to be the established rule in this state that where a latent ambiguity exists in a will such evidence is admissible. In re Estate of Donnellan, 164 Cal. 14, 127 P. 166; In re Estate of Dominici, 151 Cal. 181, 90 P. 448, 450. As was said in the last cited case: "There is, of course, a broad difference between testimony as to the casual remark of a man as to his intention to leave a portion of his estate to this person or the other, and the positive instructions which he has given to his attorney in the very performance of the testamentary act, and in any proper case such instructions may be received, without doing violence to section 1340 of the Civil Code. Thus, in Vernor v. Henry, 3 Watts (Pa.) 385, an ambiguity arose from a discrepancy between the name and the description of a devisee as here, and it was held that explanatory declarations made by the testator at the time of the execution of his will, indicative of his design to give his property in a particular way to a particular person, were admissible in evidence to explain the ambiguity. See, also, In re Gregory Settlement and Will, 34 Beav, 600. It should, of course, be unnecessary to add that, where a will without latent ambiguity expresses a clear intent, such evidence would never be permitted in an effort to show that the intent expressed was a mistaken one. It is only where the description of the person or property by extrinsic evidence is shown to be doubtful or imperfect, that such evidence may be employed in the effort of the court to arrive at and declare the meaning and intent which the testator, by the terms of his will, attempted, however irregularly, to declare. This under the familiar rule of evidence that a doubt arising from extrinsic evidence may be removed by extrinsic evidence."

[12] In the instant case there is no ambiguity on the face of the will. It is clear that the testator intended to and did bequeath to Preston Duncan the sum of $15,000. If the will had stopped with that bequest the extrinsic evidence would have developed no ambiguity which could be explained by extrinsic evidence. But the will did not stop with that bequest. It went on to provide the form and manner of payment of the bequest and here uncertainty arose in the mind of the executor, and extrinsic evidence, the testimony of the attorney who prepared the will, developed grounds for such an uncertainty.

The attorney testified that the deceased first consulted him about preparing a will in October, 1930; that the consultation extended over a number of weeks; that during October deceased brought with him memoranda in his own handwriting setting forth in detail the bequests he desired to make. On this paper appeared: "Preston Duncan (10 notes) 5 cash." During the consulation the attorney wrote "uncan" above the word "Duncan," and after the word "cash," "Hollywood—wife," so that this portion of the memoranda completed in the presence of deceased then read,
uncan
"Preston Duncan (10 notes) 5 cash Hollywood—wife." From other items of the same memoranda and from the testimony of the attorney, it conclusively appears that "10 notes" was intended and understood to mean about $10,000 in promissory notes which Preston Duncan then owed deceased; that "5 cash" was intended and understood to mean $5,000 in cash which deceased desired Preston Duncan to receive in addition to the $10,000 in the form of his notes, making a total bequest to Preston Duncan of $15,000. The attorney testified that the words "Hollywood—wife" were written as his memorandum indicating the address of Preston Duncan and the expressed intention of the testator that if Preston Duncan died before the testator the bequest should not lapse but that Duncan's wife should succeed to it. This attorney further testified that in the latter part of November or in December, 1930, deceased returned to his office and informed him "that he had, among other

things in regard to this Preston Duncan bequest, loaned Preston Duncan additional money and that the wording of the Will as I had it, of ten thousand dollars in notes which were cancelled and five thousand in cash wouldn't cover it, and suggested that we word it so that whatever he had given Duncan, which he then said was in the neighborhood of thirteen thousand dollars, would be a credit against the bequest. He said that Preston Duncan might pay part of it or that he might add some thing to it, and wanted the Will so worded that the whole thing would not be over fifteen thousand dollars including any additional loans, by virtue of the fact that he thought fifteen thousand dollars was all that he should have * * *."

When we examine the notes we find that in October, 1930, deceased held one note of class 1, two notes of class 2, and one and perhaps two notes of class 3; this latter depending on the exact date in October when the conversation with the attorney took place. These notes thus totaled either $9,000 or $10,000, which corresponds closely with his written estimate that Preston Duncan owed him notes totaling $10,000. The evidence further shows that between the date of this conversation and the final conversation which resulted in giving the instructions under which the paragraph of the will in question here was drawn, deceased had received one note falling in class 1 and one or two notes falling in class 3, totaling either $2,100 or $3,100. It is clear that in his own mind he made no distinction between the different classes of notes and believed them all obligations of Preston Duncan. It is also too clear for argument that he desired and expected all of the notes, regardless of the form of the signature each bore, to be charged against the bequest to Preston Duncan.

Under this state of the record does there appear a latent defect in the will that can be explained by extrinsic evidence so that the undoubted intention of the testator may be given force and effect by the courts? We think this question must be answered in the affirmative. In reaching this conclusion we have been assisted by the following cases: Patch v. White, supra; In re Estate of Dominici, supra; In re Estate of Donnellan, supra; Taylor v. McCowen, supra; In re Estate of Heins, 132 Cal. App. 131, 22 P.(2d) 549. Without analyzing these cases in detail, it should be remarked that while in none of them is the precise question before us decided, by analogy they present strong arguments supporting the conclusion we have reached.

While the stipulation concerning the testimony which Preston Duncan would have given does not bring into the case the theory that the Preston Duncan Studios, Ltd., was the alter ego of Preston Duncan, it furnishes added reasons for the conclusion that all the notes should be charged against the bequest of $15,000. The following inferences may be drawn from it: That Preston Duncan owned the majority of the corporate stock and "all but the qualifying shares" of the directors; that the forms of the notes, including the signatures they bore, were not discussed with the testator; that Duncan did not change the forms of the notes to defraud any one, including deceased, which must refer to the fact that some of the notes were executed by different makers.

"Actual fraud" is thus defined in section 1572 of the Civil Code: "Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: * * * 5. Any other act fitted to deceive."

If giving the notes in class 3 was not done with intent to deceive deceased the inferences follow that they must have been given under the belief that they were obligations of Preston Duncan; that neither deceased nor Preston Duncan differentiated between Preston Duncan and the corporation owned by him; that deceased accepted those notes as the obligations of Preston Duncan, believing that they bound Duncan, and in his will treated them as the obligations of Preston Duncan.

Under the circumstances disclosed by the record the trial judge was justified in concluding that there was a latent ambiguity in the will; that this ambiguity was cured by extrinsic evidence; that it was the intention of the testator that all the notes in classes 1, 2, and 3 be charged against the bequest to Preston Duncan. It follows that the decree cannot be reversed. As the findings on the question of the alter ego are not necessary to support the decree they may be disregarded.

Decree and judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

PEOPLE v. BIGGS et al. *

Cr. 2921.

District Court of Appeal, Second District, Division 2, California.

Jan. 29, 1937.

Rehearing Denied Feb. 9, 1937.

Hearing Granted by Supreme Court Feb. 25, 1937.

1. Criminal law ⚷1144(13)

On appeal from conviction, evidence must be viewed most favorably to prosecution.

2. Criminal law ⚷1202(1)

Fact that defendant had been pardoned by Governor for prior conviction of felony *held* not to exempt defendant from increased punishment prescribed by Penal Code on subsequent conviction (Pen.Code, § 644, as amended by St.1935, p. 1699).

3. Indictment and information ⚷161(3)

Court did not err in permitting district attorney to amend information prior to submission of cause to jury to conform to proof as to date of commission of offense and as to amount of money involved, since amendment of information may be permitted at any stage of proceedings where substantial rights of defendants are not thereby prejudiced (Pen.Code, § 1008).

4. Criminal law ⚷1130(2)

Appellate court would not consider contention of defendant that trial court committed prejudicial error in refusing to give certain instructions requested by defendant where defendant wholly failed to observe provisions of court rule requiring defendant who claims error in trial court's refusal to give requested instructions to print in full in his brief refused instructions (Rules of Supreme Court and District Courts of Appeal, rule 8, § 3).

◆

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Henry C. Groseclose was convicted on three counts of grand theft and was found to have been twice previously convicted of a felony, and he appeals.

Judgment affirmed.

R. A. Newell and Hugh G. Maddox, both of Long Beach, for appellant.

U. S. Webb, Atty. Gen., Paul D. McCormick, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Clarence S. Hunt, Deputy Dist. Atty., both of Los Angeles, for the People.

McCOMB, Justice pro tem.

This appeal is from the judgment and order denying appellant's motion for a new trial after his conviction by a jury of three counts of grand theft and the finding that he had been twice previously convicted of a felony.

Viewing the evidence most favorable to the prosecution (People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558), the facts in the instant case are:

[1] Appellant and his codefendants staged a fake automobile accident in which appellant falsely claimed that, while he was walking on the street as a pedestrian, he was struck and injured by an automobile owned and operated by defendant Biggs. Thereafter appellant filed claims with three separate and distinct insurance companies and collected a sum of money in excess of $200 from each of them.

Appellant had previously been convicted in the state of Texas of felonies and as to each conviction had obtained from the Governor of the state of Texas a pardon. These two prior convictions were alleged in the information and the trial court permitted proof of them to be submitted to the jury.

Before the case was submitted to the jury, the trial court over objection permitted the district attorney to amend count 2 in the information by interlineation to conform to the proof as to (a) the date of the commission of the offense, and (b) the amount of money involved.

Appellant relies for reversal of the judgment on the following propositions:

First. There is no substantial corroboration of the testimony of his accomplices to show his participation in or connection with either of the crimes of which he was convicted.

Second. A prior conviction of a felony which has been unconditionally pardoned by the Governor may not be alleged and proven for the purpose of bringing defendant within the category of habitual criminals. Section 644, Penal Code, as amended by St.1935, p. 1699.

Third. The trial court committed prejudicial error in permitting the district attorney to amend count 2 of the information prior to the submission of the cause

---

*For subsequent opinion see 71 P.2d 214.

to the jury to conform to the proof that the offense was committed on a date different from the date originally alleged and that the sum of money involved was not the same as the amount specified in the original indictment.

Fourth. The trial court committed prejudicial error in refusing to give certain instructions requested by appellant.

As to appellant's first contention, we have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to furnish the necessary corroboration of the testimony of appellant's accomplices. We therefore refrain from further discussion of the evidence. Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399; Koeberle v. Hotchkiss, 8 Cal.App.(2d) 634, 48 P.(2d) 104; Thatch v. Livingston, 13 Cal.App.(2d) 202, 56 P.(2d) 549.

[2] Turning to appellant's second proposition, the question is novel in this state. From an examination of the authorities in other jurisdictions, we find that the cases are squarely in conflict as to the effect a pardon has upon a prior conviction when the conviction is sought to be used in a subsequent criminal proceeding for the purpose of enhancing the punishment. After a careful review of these conflicting opinions, we are satisfied this question should be answered in the negative, and the correct rule is that the fact that accused has been pardoned for his prior conviction does not exempt him from the increased punishment prescribed by section 644 of the Penal Code on a subsequent conviction. 16 Cor.Jur. 1342. Full and complete reasons for this view are to be found in the case of Carlesi v. New York, 233 U.S. 51, 56, 34 S.Ct. 576, 58 L.Ed. 843.

[3] As to appellant's third proposition, the trial court may permit the amendment of an information at any stage of the proceedings, where, as in the instant case, the substantial rights of the defendant are not thereby prejudiced. Section 1008, Pen. Code.

[4] Appellant's final contention will not be considered by us for the reason that he has wholly failed to observe the provision of section 3 of rule VIII of this court, which requires an appellant who claims error in the trial court's refusal to give requested instructions to print in full in his brief the refused instructions. (Section 3, rule VIII, Rules of the Supreme Court and District Courts of Appeal of the State of California.)

The judgment and order appealed from are and each is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

---

19 Cal.App.2d 167

LADY v. SMITH.

Civ. 11255.

District Court of Appeal, Second District, Division 2, California.

Feb. 9, 1937.

Hearing Denied by Supreme Court April 8, 1937.

1. Appeal and error 🔑761

Assignment of error in brief required by court rule should take form of one or more stated propositions which, if sustained, would lend reasonable support to appellant's demand for reversal of judgment (Rules of the Supreme Court and District Courts of Appeal, rule 8, § 2).

2. Appeal and error 🔑761

Court of Appeals will not assume task of searching record for purpose of discovering errors not pointed out by counsel, but counsel has duty to comply with rule in its entirety requiring presentation of each point separately under appropriate heading showing nature of question to be presented and point to be made (Rules of the Supreme Court and District Courts of Appeal, rule 8, § 2).

3. Appeal and error 🔑761

Rule requiring each point to be presented separately under appropriate heading showing nature of question to be presented and point to be made is not mere technical requirement, but is prescribed for purpose of facilitating disposition of cases on appeal and directing court's attention to specific errors of law alleged to have been committed by trial court (Rules of the Supreme Court and District Courts of Appeal, rule 8, § 2).

4. Appeal and error 🔑766

Appeal *held* required to be dismissed, where appellant in opening brief failed to present each point separately under appropriate heading showing nature of question to be presented and point to be made, as required by court rule (Rules of the Supreme Court and District Courts of Appeal, rule 8, § 2).

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by W. E. Lady against Isaiah H. Smith. Judgment for defendant, and plaintiff appeals.

Appeal dismissed.

William Ellis Lady, of Los Angeles, for appellant.

Walter J. Little and W. Eugene Craven, both of Los Angeles, for respondent.

McCOMB, Justice pro tem.

This is an appeal from a judgment in favor of respondent after a trial before a court without a jury.

Appellant has failed in his opening brief to present each point separately under an appropriate heading, showing the nature of the question to be presented and the point to be made. Section 2, rule 8, Rules of the Supreme Court and District Courts of Appeal of the State of California.

[1] Mr. Presiding Justice Conrey in Adams v. Standard Accident Insurance Company, 124 Cal.App. 393, at page 394, 12 P.(2d) 464, in commenting upon this provision of rule 8, supra, accurately states the requirement thus: "Such assignment of error should take the form of one or more stated propositions, which, if sustained, would lend reasonable support to appellant's demand for reversal of the judgment."

[2, 3] This court has repeatedly held that it will not assume the task of searching the record for the purpose of discovering errors not pointed out by counsel. It is the duty of counsel to comply with rule 8, supra, in its entirety. The provisions of this section are not mere technical requirements, but are prescribed for the purpose of facilitating disposition of cases upon appeal and directing the court's attention to the specific errors of law alleged to have been committed by the trial court.

[4] For the foregoing reason the appeal is dismissed.

We concur: CRAIL, P. J.; WOOD, J.

---

19 Cal.App.2d 130

HARKEY et al. v. LUCKEHE.

Civ. 5586.

District Court of Appeal, Third District, California.

Feb. 6, 1937.

1. Automobiles 🔑246(9)

Instruction that person on roadway has right of way over person entering from driveway, but this does not mean person entering from private road must wait for automobile to pass that is further away than the distance that such automobile on road could drive if proceeding at legal rate of speed, and that legal rate of speed on date of collision was 45 miles per hour, should not have been given, since it was meaningless and incorrectly stated legal speed limit.

2. Automobiles 🔑246(60)

Instruction that driver of automobile is permitted to drive at speed of 45 miles per hour, but if he exceeds that speed, he is presumed to be negligent, should not have been given, since it was meaningless, and contrary to statute providing that driving in excess of speed limit fixed in Code does not constitute negligence as a matter of law (St.1923, p. 553, § 113, as amended by St. 1931, p. 2120; St.1935, p. 177, § 513).

3. Automobiles 🔑171(4)

Instruction that driver of automobile who has stopped as required by law at entrance to through highway shall yield to vehicle within intersection, or approaching so closely on through highway as to constitute an immediate hazard, *held* proper (St.1929, p. 542, § 132).

4. Appeal and error 🔑758(3)

Where no testimony is printed in appellant's brief, or in appendix thereto, purporting to show or attempting to show, that instructions referred to, even though admittedly erroneous as stated, constituted prejudicial error, or led to miscarriage of justice, District Court of Appeal will not set aside judgment, or grant new trial on ground of misdirection of jury (Const. art. 6, § 4½).

5. Automobiles 🔑244(2, 35, 41)

Evidence that plaintiff drove automobile out of private driveway, stopped and proceeded on to county road and was struck by defendant's automobile, and that plaintiff looked both ways but failed to see defendant's automobile, and that defendant did not see plaintiff's automobile until almost upon it although view was not obstructed, and that defendant was traveling at an illegal rate of speed, *held* to sustain finding that both parties were negligent.

◆

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by W. P. Harkey and another against Eva B. Luckehe, wherein defendant filed a cross-complaint. From a judgment denying damages upon her cross-complaint, defendant appeals.

Affirmed.

Charles A. Wetmore, Jr., of San Francisco, and King & King, of Gridley, for appellant.

Seth Millington, of Gridley, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This action arose out of an automobile collision in which the respondents sought damages from the appellant, and the appellant sought damages from the respondents. The verdict of the jury denied damages to either of the parties. From the judgment entered thereon denying damages to the appellant upon her cross-complaint, this appeal is prosecuted.

The record shows the following facts:

Just preceding the collision between the automobiles driven by the respective parties, the appellant was driving her automobile upon a public highway toward the city of Gridley, at a point about four miles distant therefrom. The plaintiff W. S. Harkey was driving an automobile belonging to his son, and was entering the highway referred to above from a private road. The plaintiffs allege that the appellant was driving at a rate of speed which constituted negligence, causing the accident. The appellant asserts she had the right of way, and that W. S. Harkey entered the highway without yielding the same. The appellant asserts that it became a question of fact as to whether appellant was driving at a rate of speed which constituted negligence on her part.

Upon this appeal the appellant relies solely for reversal upon the giving of three instructions alleged to be erroneous and prejudicial. These instructions are as follows, to wit:

"While a person on a road ordinarily has the right of way over a person entering from a driveway, nevertheless, that does not mean that a person entering from a private road must wait for a car to pass that is further away than the distance that such car on the road could drive if proceeding at the legal rate of speed. The legal rate of speed at the point where said accident occurred was in the 2nd day of October, 1934, forty-five miles an hour."

"While the driver of a motor vehicle is permitted to drive such vehicle at a speed of forty-five (45) miles per hour on a highway, if that driver exceeds forty-five (45) miles per hour, he is presumed to be negligent, but such presumption of negligence may be overcome and defeated by a preponderance of evidence that such excessive speed, if any, was not careful and prudent under all the circumstances of the case."

"The driver of any vehicle who has stopped as required by law at the entrance to a through highway shall yield to the vehicle within the intersection, or approaching so closely on the through highway as to constitute an immediate hazard."

[1] The first and second instruction copied herein should not have been given. The first instruction set out herein given by the court is really meaningless, and also incorrectly states the legal speed limit as applied to a civil case charging the driver with negligence.

[2] The second instruction is directly contrary to the provisions of section 113 of the California Vehicle Act (St.1923, p. 553, § 113, as amended by St.1931, p. 2120) and of section 513 of the California Vehicle Code (St.1935, p. 177) as the same now read. Both sections specify that driving in excess of the speed limit fixed in the Code does not constitute negligence as a matter of law, and that the question of negligence in so driving must be established by testimony.

[3] The third instruction relates to the right of one who is about to drive from a side road, to stop before passing onto or through a through highway, and shall yield the right of way to all vehicles within the intersection, or approaching so closely as to constitute an immediate hazard. This is a correct statement of the law, but its applicability in the present case does not appear to be shown, although the principle therein embodied is applicable to the present case.

Section 132 of the California Vehicle Act (St.1929, p. 542, § 132) as it read at the time of the collision is as follows: "The driver of a vehicle entering a public highway from a private road or drive shall yield to all vehicles approaching on such public highway." This section has received the interpretation of this court in the case of Wakefield v. Horn, 109 Cal.App. 325, 293 P. 97, 98, in which it is stated that the language of the section just referred to cannot be literally interpreted, but must be interpreted "to give effect to the intent of the Legislature, which was to prevent automobile drivers on private roads from entering a public highway when a car was approaching upon such highway so near as to constitute an immediate hazard, and not that no one should enter upon a public highway from a private road or driveway so long as the public highway was in use." Any other interpretation would forever bottle up one approaching a through highway from a private road.

We may further add that the second instruction set forth herein, if it has any meaning, is favorable to the appellant, but as it is worded, we are inclined to the opinion that it was meaningless.

This leaves only the first instruction set forth herein for further consideration.

Not a word of testimony is called to our attention by the appellant indicating the rate of speed at which she was traveling, or how far away from the private road she was at the time W. P. Harkey drove from the private road and entered the highway upon which the appellant was driving.

The respondents, in their brief, quote the testimony of the appellant, to the effect that she was driving only 25 miles an hour, and that such is the only testimony in the case as to the speed at which the appellant was driving her automobile at the time of the collision. If this is true, and there is no contradictory testimony, the fact that the court fixed the legal speed limit at 45 miles per hour, instead of being injurious to the appellant, really was favorable to her, to the extent of a possible additional speed limit of 20 miles per hour over that at which she testified she was driving.

[4] Section 4½ of article 6 of the Constitution reads: "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Not a scintilla of testimony is printed in the appellant's brief, or in any appendix thereto, purporting to show, or attempting to show, that the instructions referred to, even though admitted to be erroneous as stated, constituted prejudicial error, or in any way led to a miscarriage of justice. The testimony not having been printed by the appellant, it cannot be expected that this court will wade through some 200 pages of typewritten matter to ascertain if there is any possible testimony or any other cause upon which a holding can be had that the appellant has been prejudiced by reason of erroneous instructions given to the jury.

The appellant cites the case of Pilcher v. Tanner Motor Livery, 138 Cal.App. 558, 33 P.(2d) 58. A reading of that case, however, shows it is inapplicable. Under the testimony in that case it was held that the misdirection of the jury was prejudicial. Here, we have no such basis for so holding.

The respondents in their brief set out the testimony of the appellant showing that the appellant saw the car driven by the plaintiff W. P. Harkey approaching upon the highway while she was some distance from the private road. Just how far, the testimony does not disclose. The testimony set forth in the respondents' brief also shows that the car driven by W. P. Harkey had entirely crossed the appellant's right-hand side of the highway, and was struck by the appellant's car just in front of the left rear wheel, indicating that the appellant was driving on the wrong side of the road at the time she observed the approach of the Harkey car. Her testimony is to the effect that she swung her car to the right, and yet struck the appellant's car on her left-hand side of the highway.

[5] In the absence of testimony set out in appellant's brief, or as an appendix thereto, and likewise, in the absence of any testimony presented in this case by the briefs, we adopt the following taken from the opinion of the trial court in denying appellant's motion for a new trial, to wit: "The evidence in this case may be summarized as follows: Plaintiff W. S. Harkey drove an automobile out of his private driveway, stopped, then proceeded very slowly to a point on the county road, where it was struck by Mrs. Luckehe's automobile. He testified that he looked up and down the road before he started his car after stopping it; but the jury were warrant-

ed in believing that either he did not look at all or looked carelessly, for if he had looked carefully he should have seen Mrs. Luckehe's car, even if it was being driven at an excessive rate of speed. Mrs. Luckehe testified that she did not see the Harkey car until she was almost upon it, but it appeared that it was driven about 20 feet before it reached the highway and for some distance on the paved portion, and the jury apparently concluded that Mrs. Luckehe would have seen it if she had been watching the road, for there was no obstruction between her and the Harkey car for that distance, though she testified that trees beyond the car obscured it. On the other hand, there was testimony to the effect that Mrs. Luckehe was traveling at an illegal rate of speed. Upon such a state of facts the jury brought in a verdict against all the parties to the action, insofar as damages were concerned. Manifestly they believed that both W. S. Harkey and Mrs. Luckehe were negligent."

We do not deem it necessary to review the different cases cited by the respondents.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

---

19 Cal.App.2d 227

MOUNTAIN VIEW WALNUT GROWERS ASS'N v. CALIFORNIA WALNUT GROWERS ASS'N.

Civ. 11131.

District Court of Appeal, Second District, Division 2, California.

Feb. 11, 1937.

1. Agriculture 🔑6

Local co-operative association of walnut growers, which had acquiesced in central association's unauthorized retention as reserve fund of cash excess over estimated net return of sales, and which in 1925 entered into 15-year contract expressly authorizing such retention as a trust fund, *held* not entitled to demand portion of fund until contract was lawfully terminated, since fund existing at time of execution of contract was commingled with fund authorized thereunder and became part of it.

2. Limitation of actions 🔑13

In action by local co-operative association of walnut growers to recover portion of trust fund retained by central association as reserve under express authorization, central association *held* not entitled to invoke statute of limitations, where central association, as trustee, held trust fund according to parties' agreement and had not repudiated trust relationship.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by the Mountain View Walnut Growers Association against the California Walnut Growers Association. From a judgment for plaintiff, defendant appeals.

Reversed.

Farrand & Slosson, of Los Angeles, for appellant.

L. G. Shelton, of Los Angeles, for respondent.

WOOD, Justice.

In the complaint plaintiff asked judgment for the sum of $12,724.12, the amount claimed to have been retained by defendant from the proceeds of sales of walnuts made by defendant for plaintiff during the years 1921 to 1932. Defendant appeals from a judgment in plaintiff's favor in the sum of $3,761.03.

The defendant California Walnut Growers Association, referred to herein as "Central," is and since prior to 1920 has been a co-operative, nonprofit, noncapital stock corporation organized under the laws of the California, acting as a marketing agency for growers of walnuts. Its members are local co-operative associations of walnut growers, herein called "locals," there being forty-two such members, including plaintiff. Each local takes the walnuts from its grower members, prepares them for market and delivers them to Central, which in turn mingles them with walnuts of like grade from other locals and markets them through its sales organization. Plaintiff became a member of Central in 1920 and marketed through Central the nuts produced by its grower members until 1932, when, because of dwindling production, plaintiff ceased to handle the walnuts of its members. Plaintiff has maintained its corporate existence and is still a member of defendant, but those of plaintiff's members who have continued to produce walnuts have marketed them through other locals.

During the years in which Central was marketing plaintiff's walnuts it was the practice for Central to sell the bulk of the year's crop, estimate the probable net return from the unsold balance of walnuts then on hand, and distribute in cash to the locals the estimated total net return. The actual sales of the walnuts on hand at the time the estimate was made would not be consummated until later and the amount of the proceeds of such sales was naturally uncertain. In most of the years the estimates proved too low and a cash excess resulted. Instead of remitting the excess to the locals for distribution to their grower members Central retained it as a reserve fund to carry on its future operations. When this practice was commenced the contract between plaintiff and defendant did not provide for the reserve fund, but defendant made annual reports to plaintiff and its other members covering the sums retained and no objection was made to the practice. In 1925 a new contract was executed by plaintiff and defendant which according to its term is to remain in effect until 1940 and in which provision is expressly made for the retention by defendant within its discretion of a sum "for a reserve or other fund." Thereafter the practice was continued as it had been followed prior to the execution of the contract of 1925. The judgment of the trial court was for plaintiff's portion of the reserve fund retained before the execution of the contract of 1925. Judgment went for defendant for plaintiff's portion arising from the sale of walnuts after the contract of 1925.

[1, 2] Both parties agree that the reserve retained by defendant was and is a trust fund. From 1920 to 1925 this trust fund was retained by defendant for the benefit of all the constituent members of the defendant corporation. Plaintiff received reports from defendant and acquiesced in the practice which had been followed and in 1925, with full knowledge of the retention of the reserve fund, entered into a new agreement by which defendant was authorized to continue the practice. This agreement was made by the parties in view of all the past activities and with knowledge on the part of plaintiff that at the date of its execution there actually was a reserve fund in which plaintiff had a substantial interest. This fund was commingled with the reserve fund expressly authorized under the new agreement and became a part of it. Since the contract of 1925 covers the period ending in 1940, plaintiff is not in a position to demand a portion of the trust fund until the contract is lawfully terminated. The statute of limitations may not be invoked, since the defendant as trustee holds the trust fund according to the agreement of the parties and has not repudiated the trust relationship.

The judgment is reversed.

I concur: CRAIL, P. J.

McCOMB, Justice pro tem.

I concur in the judgment. In my opinion the plaintiff's cause of action is barred by section 337, subd. 1, Code of Civil Procedure (as amended by St.1935, p. 1740).

18 Cal.App.2d 615

ALBORI v. SMITH, Warden.

Civ. 10326.

District Court of Appeal, First District,
Division 2, California.

Jan. 21, 1937.

As Corrected on Denial of Rehearing
Feb. 20, 1937.

Hearing Denied by Supreme Court
March 22, 1937.

1. Prisons 🔑9

Though warden may examine records of conviction to ascertain exact judgment rendered against prisoner and report his findings to board of prison terms and paroles, he may go no further in construing such judgment (Pen.Code, § 1168, as amended; §§ 1572–1596).

2. Habeas corpus 🔑105

In habeas corpus proceedings to obtain release of a prisoner, as distinguished from mandamus directed to officer, court may examine and construe judgment of conviction to determine whether such prisoner's terms were to run concurrently or consecutively.

3. Prisons 🔑9

Prison records to be reported to Governor should show judgment of conviction, action of board of prison terms and paroles construing the judgment and fixing the term, and rules and orders of state board of prison directors (Pen.Code, § 1578, subd. 4).

4. Prisons ⚷9

Warden is not authorized to construe judgments of conviction nor to report such construction to Governor (Pen.Code, § 1168, as amended; §§ 1572–1596, 1578, 1579).

5. Mandamus ⚷73(1)

Mandamus will not lie against prison warden to obtain release of prisoner, warden not being authorized nor enjoined to construe the conviction as to length of term (Code Civ.Proc. § 1085; Pen.Code, § 1168, as amended; §§ 1572–1596).

6. Mandamus ⚷147

Board of prison terms and paroles *held* necessary party in mandamus proceedings to obtain release of prisoner, brought under theory that conviction provided for concurrent terms (Pen.Code, § 1168, as amended; §§ 1572–1596).

◆

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Mandamus by Marco Albori against Court Smith, as Warden of the State Prison at San Quentin. From a judgment denying the writ, petitioner appeals.

Affirmed.

Leo R. Friedman, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for respondent.

STURTEVANT, Justice.

The petitioner applied to the superior court of the state of California, in and for the county of Marin, for a writ of mandamus. The trial court made findings in favor of the respondent. From the judgment denying the writ the petitioner has appealed.

The controversy involved the right of the petitioner to receive an order of release from the state prison located at San Quentin. That controversy arises by reason of certain disputes regarding the legality and effect of certain commitments and certain alleged nunc pro tunc orders amending the same. Heretofore the petitioner was indicted for the commission of two different assaults with intent to commit murder. One action was numbered 34233, the other action was numbered 34266, of the superior court of the state of California, in and for the county of Los Angeles. On September 18, 1928, said court caused a judgment to be entered in action No. 34233 as follows:

"Whereas the said Marco Albori, having been duly found guilty in this court of the crime of assault with a deadly weapon, a felony, it is therefore ordered, adjudged and decreed that the said Marco Albori be punished by imprisonment in the State Prison of the State of California at San Quentin for the term prescribed by law.

"The defendant was then remanded to the custody of the sheriff of the County of Los Angeles.

"Done in open court this 13th day of September, 1928.

"Ten days stay of execution of sentence is granted."

On the same day it caused a judgment in identically the same words to be entered in action No. 34266. On January 28, 1931, the trial court made an order in action No. 34233 as follows:

"It is ordered that the sentence in the above entitled action run concurrently with case No. 34266.

"This order is made nunc pro tunc as of September 13, 1928."

On the same date in action No. 34266 the trial court made the same identical order inserting a different number. On October 27, 1931, at a meeting of the board of prison terms and paroles, the matter of fixing the term of the petitioner being under consideration, an order was made: "Crime—Assault with deadly weapon—2 counts consecutive—Term 7 years and 7 years—consecutive." Claiming that the board of prison terms and paroles misconstrued the law and that in truth and in fact the term of the petitioner has expired, the latter commenced this proceeding.

Formerly the law applicable to the government of the state prisons was contained in chapter 264, p. 404, Statutes of 1889. That statute was codified in 1907, and its provisions were carried into title 1, part 3 (sections 1572–1596) of the Penal Code. At the same time section 1579 was added as new matter.

Formerly the power to fix the term of a prisoner rested with the superior court in which the prisoner was convicted. Chapter 527, p. 665, Statutes of 1917 (section 1168 of the Penal Code), made a material change. It provided that the trial court should sentence the prisoner to be confined in the state prison; but the power to fix the prisoner's term was vested in the state board of prison directors. Later the powers of that board over such matters were vested in the board of prison terms and paroles. Chapter 483, p. 1053, Stats. 1931.

[1, 2] An examination of the statutes discloses that the state prisons are under the government and management of the state board of prison directors. Said board has the power to appoint a warden and a clerk. No clerical duty is imposed on the warden personally. On the clerk is imposed the duty of keeping the accounts and performing "such other duties as may from time to time be required of him by the board of directors." Solely on the board of prison terms and paroles is imposed the duty of carrying into effect the provisions of section 1168 of the Penal Code. It meets at each prison. It is authorized to appoint a secretary and prescribe his duties, and it has appointed as such secretary the clerk of the state board of prison directors and has prescribed his duties. The clerk is "the keeper and official custodian of all the official records and files, at, of, in, and for said prison." The statute does not contain any clause that gives to the warden any power to alter, amend, or change any order made by the board of prison directors or made by the board of prison terms and paroles. Nor do we find any provision that at any time or under any conditions the warden may fix the term of imprisonment of any prisoner. As executive officer of the prison, the warden has authority to examine the records of the action, ascertain the exact judgment which the trial court ordered, and report the facts to the board of prison terms and paroles. In a habeas corpus proceeding such facts may be inquired into. In re Mann, 192 Cal. 393, 220 P. 305. In such proceedings the limits of the hearing are very broad to the end that it can be ascertained whether the trial court has exceeded its jurisdiction. But this is a proceeding in mandamus brought "to compel the performance of an act which the law specially enjoins * * *." Code Civ. Proc. § 1085. The duty of examining the records and of construing the judgment was by section 1168 of the Penal Code vested first in the board of prison directors and then transferred to the board of prison terms and paroles and said boards were successively vested with jurisdiction to fix the terms of imprisonment. While, as executive officer of said boards, the warden could have made said examination and report to the board, he could go no further. Any other officer or agent of the board could have made the same examination and report. But in the board of prison terms and paroles the power to construe the judgments and fix the terms was solely vested. If its determinations are to be attacked, the board is the party against whom the process should run.

[3-5] The prison records show, or should show, the judgment of conviction of the court rendering the judgment, the action of the board of prison terms and paroles construing that judgment and fixing the term, and the rules and orders of the state board of prison directors made or adopted regarding the conduct and management of the state prisons. Copies of such records and only such copies is the warden authorized or required to report to the Governor. Pen.Code, § 1578, subd. 4. The law neither authorizes nor "specially enjoins" the warden to construe the judgments of the courts and report his construction to the Governor. It follows that no writ of mandamus, commanding him to do so, should issue against him. Code Civ.Proc. § 1085; Taylor v. Burks, 6 Cal.App. 225, 91 P. 814.

[6] Moreover, the board of prison terms and paroles was not made a party. It is the sole officer or tribunal having power to fix the terms of the prisoners. Under such circumstances no writ of mandamus should issue. California C. C. Corp. v. Superior Court, 122 Cal.App. 404, 407, 10 P.(2d) 176; Matteson v. Board of Education, 104 Cal.App. 647, 656, 286 P. 482; Beem v. Davis, 31 Idaho, 730, 175 P. 959, 962; School Dist. No. 24 v. Smith, 97 Or. 1, 191 P. 506, 511; People v. Craig, 197 App.Div. 503, 189 N.Y.S. 625, 627; People v. Watt, 115 Misc. 120, 188 N.Y.S. 559, 576.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

18 Cal.App.2d 619

ALBORI v. SYKES et al.

Civ. 10371.

District Court of Appeal, First District, Division 2, California.

Jan. 21, 1937.

Hearing Denied by Supreme Court March 22, 1937.

1. **Motions** ⚷56(2)

Maxim that delay by the court shall operate to prejudice neither party does not authorize indiscriminate entry of nunc pro tunc orders.

2. **Judgment** ⚷273(3)

Courts do not have inherent power to enter nunc pro tunc judgments to correct judicial errors, object of such orders being to supply matters of evidence and rectify clerical misprisions.

3. **Criminal law** ⚷996(1)

Where court, in pronouncing sentence on two offenses, expressly declined jurisdiction to determine how long the prison terms would be and whether they should run concurrently or consecutively, subsequent amendment making terms concurrent *held* invalid as attempt to enter nunc pro tunc order correcting judicial error.

4. **Criminal law** ⚷996(1)

Wherein, pronouncing sentence for two offenses, court fails to determine whether or not prison terms shall run concurrently, defendant may apply for amendment.

5. **Criminal law** ⚷1023(11)

Defendant may appeal from refusal to determine whether or not two prison terms are to run concurrently or consecutively.

6. **Mandamus** ⚷4(1)

When an inferior tribunal has jurisdiction of an action or proceeding and refuses to exercise its jurisdiction, and aggrieved party has no plain, speedy, and adequate remedy, he may apply for mandamus, unless he has the right to appeal (Code Civ. Proc. § 1085).

7. **Appeal and error** ⚷920(1)

Presumption on review that nunc pro tunc orders are valid has no application where record affirmatively shows facts invalidating such order.

8. **Mandamus** ⚷73(1)

Mandamus *held* not to lie against the board of prison terms and paroles to secure release of prisoner serving consecutive terms for two offenses, where sentence as pronounced was silent as to whether terms were to be concurrent, but was subsequently, without authority, amended by the court to make them concurrent (Code Civ.Proc. § 1085).

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Mandamus by Marco Albori against Frank C. Sykes and others, as members of the State Board of Prison Terms and Paroles. From a judgment allowing the writ, defendants appeal.

Reversed.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for appellants.

Leo R. Friedman, of San Francisco, for respondent.

STURTEVANT, Justice.

From a judgment against it in a mandamus proceeding the state board of prison terms and paroles has appealed. Except as to the parties defendant, the facts are the same as in Albori v. Smith (Cal.App.) 65 P.(2d) 81, this day filed. However, in the instant case there was an agreed statement of facts which, among other things, set forth the following proceedings had when the judgments in question were pronounced:

"The Court: It will be the judgment of the court that for the offense of which you have been convicted, towit, the crime of assault with a deadly weapon, an offense necessarily included in the offense alleged in indictment No. 34,233, that you be confined in the State Prison at San Quentin for the term prescribed by law and that for the offense of which you stand convicted, towit, assault with a deadly weapon, an offense necessarily included in the offense alleged in the indictment No. 34,266, it will be the judgment of the court that you be confined in the State Prison at San Quentin for the term prescribed by law, I think, Mr. White (attorney for defendant), that under the new law the term under such circumstances that a defendant is required to serve, remains wholly with the parole board, or the prison board, or whatever it is called, and that the court has no jurisdiction, as I construe the law, to determine whether the judgments and sentences shall run consecutively or concurrently. What is your judgment on that, Mr. Clark?

"Mr. Clark (the Assistant District Attorney): That is my opinion, your Honor."

[1,2] The defendants claim that the superior court in Los Angeles had no authority to enter the nunc pro tunc order because such order did not purport to correct any clerical error or omission, but, on the other hand, it did purport to change the former judgment in a matter of substance. To make such a change the defendant board claims the trial court did not have the power to make a nunc pro tunc order. In re Johannes, 213 Cal. 125, 130, 1 P.(2d) 984. The petitioner freely concedes the scope of the rule stated in the Johannes Case but attempts to distinguish it by calling our attention to the fact that the original judgments in that case expressly provided that the judgments should run consecutively and that by the order nunc pro tunc said judgments were made to run concurrently. Whereas, in the instant case the petitioner asserts the original judgments were silent as to whether they should run concurrently or consecutively, that the trial court ex industria, caused them to be silent, that in doing so it failed and refused to exercise its jurisdiction prior to making said nunc pro tunc orders, and that when the applications for said orders were made the trial court not only had the power but it was its duty to make them. He bases that claim on the maxim: "Actus curiæ neminem gravabit." We are unable to follow his reasoning. Giving to the maxim its fullest force it has never been held, so far as we are aware, that said maxim authorizes an indiscriminate exercise of the power of entering nunc pro tunc orders. On the other hand, the full scope of that power is as stated in the case entitled Estate of Potter, 141 Cal. 424, 75 P. 850. At page 426, of 141 Cal., 75 P. 850, 851, the court said:

"This, under the circumstances shown, we think the court had not the power to do. Undoubtedly the ground of motion upon the part of the administrator afforded no legal reason or legal excuse for the court's action. The fact that a party litigant inadvertently fails to ask for a judgment, confers neither power upon the court, nor right upon the litigant, to seek a modification of such judgment as the court may have advisedly given. There remains the only other question—whether or not the court has, as asserted in the motion, and here argued, the inherent power at any time to enter such a judgment. We think it has not such power. The object of entering judgments and decrees as of some previous date is to supply matters of evidence and to rectify clerical misprisions, but not to enable the court to correct judicial errors. If the court has not rendered a judgment that it might or should have rendered, or if it has rendered an imperfect or improper judgment, it has no power to remedy such errors by ordering an amendment nunc pro tunc of a proper judgment. Freeman on Judgments, §§ 61, 68; Morrison v. Dapman, 3 Cal. 255; In re Skerrett, 80 Cal. [62] 63, 22 P. 85; Leonis v. Leffingwell, 126 Cal. [369] 372, 58 P. 940; Cowdery v. London, etc. Bank [139 Cal. 298], 73 P. 196 [96 Am.St.Rep. 115].

[3-6] "The amendment to the judgment in the case at bar is within the limitation and prohibition of this principle. It was the attempt by the court, not to correct a clerical misprision, not to supply omitted evidentiary matter, but at a later date to enter a judgment which originally it had never contemplated entering, but which at the time of giving the original judgment it might have caused to be entered." And, in the instant case, the agreed statement of facts shows that in rendering the original judgment the trial court expressly declined to entertain jurisdiction to determine whether under section 669 the judgments should run concurrently or consecutively. Furthermore, it is equally clear that the clerk entered said judgments exactly as ordered. Hence there was no "clerical error or mistake." It follows if any error was made the error was a judicial as distinguished from a clerical error and that it may not be corrected by a nunc pro tunc order. Lankton v. Superior Court, 5 Cal. (2d) 694, 696, 55 P.(2d) 1170. In what we have said we are not in the least impugning the petitioner's rights as measured by the maxim on which he relies. When on rendering the original judgment the trial court omitted to pass on the question as to whether the judgments should run concurrently, the petitioner could at once have applied to the trial court for an amendment. Furthermore, he had the right to appeal and apply for an order directing the trial court to determine the question. In re Lee, 177 Cal. 690, 171 P. 958. When an inferior tribunal has jurisdiction of a certain action or proceeding and refuses to exercise its jurisdiction, and the aggrieved party has no plain, speedy, and adequate reme-

dy, he may enforce his rights by applying for a writ of mandamus. Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 114 P. 978. But, under the same set of facts, if the aggrieved party has the right to appeal then he is not entitled to a writ of mandamus. Code Civ.Proc., § 1085; 38 C.J. 610; Mandamus, § 88; Aldrich v. Superior Court, 135 Cal. 12, 66 P. 846.

[7, 8] The petitioner contends that it must be presumed the nunc pro tunc orders were valid. Haynes v. Los Angeles R. R. Corp., 80 Cal.App. 776, 252 P. 1072. The doctrine of that case is stated in the syllabus: "*Where the record on appeal is silent as to whether* the trial court had directed the clerk to specify in an order granting a new trial the grounds upon which it was granted, the appellate court will presume that a nunc pro tunc order correcting the order granting a new trial was valid, since every intendment is in favor of the validity and regularity of such order." (Italics ours.) Clearly the rule has no application where, as here, the facts appear from the agreed statement of facts.

The judgment appealed from is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

---

19 Cal.App.2d 201

VALLEJO BUS CO. v. SUPERIOR COURT IN AND FOR SOLANO COUNTY.

Civ. 5761.

District Court of Appeal, Third District, California.

Feb. 10, 1937.

Rehearing Denied March 12, 1937.

1. Courts 🔑207(5)

Fact that action which petitioner for writ of prohibition sought to prevent superior court from proceeding with further was an action in equity *held* not to require application for the writ to be made in the first instance to the Supreme Court, since both the Supreme Court and the District Courts of Appeal have concurrent and equal jurisdiction to issue writs of prohibition.

2. Injunction 🔑139

Superior court *held* without jurisdiction to issue injunction pendente lite in suit against bus company which restricted the issuance of stock by bus company to a certain stockholder where injunction conflicted with an order of Railroad Commission authorizing the issuance of the stock by which the stock could be issued to general public at a certain time, if stockholder did not take it up (St.1911, Ex.Sess., p. 18, as amended).

3. Public service commissions 🔑19½

Railroad Commission is vested with jurisdiction to supervise and regulate public utilities and to do all things necessary or convenient to the exercise of that power and having assumed to act in a particular case, the courts are deprived of jurisdiction (St. 1911, Ex.Sess., p. 18, as amended).

4. Prohibition 🔑13

That bus company had acquired new busses while suit against corporation was pending in which court had restrained the issuance of stock to finance purchase of new busses in manner authorized by commission *held* not to render question moot so as to preclude the issuance of a writ of prohibition to restrain the court from interfering with the decree of Railroad Commission (St.1911, Ex. Sess., p. 18, as amended).

Original proceedings by the Vallejo Bus Company for a writ of prohibition directed to the Superior Court of the state of California in and for Solano County.

Writ granted in accordance with opinion.

Peter tum Suden and Richard tum Suden, both of San Francisco, for petitioner.

Rolland L. Pope, of Vallejo, Dunnell & Wollenberg, of San Francisco, and Joseph M. Raines, of Fairfield, for respondent.

PULLEN, Presiding Judge.

Petitioner seeks by this writ of prohibition to prevent respondent from proceeding further in an action pending in the superior court of the state of California in and for the county of Solano, wherein Agnes Irene Geer is plaintiff and Vallejo Bus Company, a corporation, Victor Raahauge, Ney Raahauge, and Raymond Bottari are defendants.

The first cause of action set forth in the complaint is for a dissolution of a partnership alleged to exist between Agnes Irene Geer and Victor Raahauge, and to declare Vallejo Bus Company to be a trustee of such copartnership, and the second cause of action is for declaratory relief.

The petition for the writ of prohibition alleges the Vallejo Bus Company, a corporation, is a public utility and operates a passenger transportation service between Mare Island and the city of Vallejo and certain nearby points. It further sets forth that in September, 1936, the Vallejo Bus Company filed an application with the Railroad Commission of the state of California for an order authorizing it to issue $6,000 of its capital stock to finance the purchase of new equipment.

Upon the hearing evidence was introduced in support of the application to the effect that the equipment then in use was obsolete and unsafe. Mrs. Geer was present and submitted evidence that the Vallejo Bus Company was not financially able to carry out the proposed contract to purchase the new equipment and at the same time to keep up contracts previously entered into. Thereafter the Railroad Commission authorized the bus company to issue not to exceed $3,000 of its capital stock for the purpose of acquiring two new automobile busses "provided said $3,000.00 par value of stock be offered for sale to applicant's stockholders, with the understanding that if any stockholder does not subscribe for and pay for his or her pro rata share within twenty days after the date of said offer, said stock not acquired by said stockholder may be acquired by the other stockholder or by any one else." Pursuant to this order of the commission, the corporation offered the stock for sale and Victor Raahauge, a stockholder owning and holding 51 per cent. of the issued and outstanding stock of the corporation, subscribed for and purchased 51 per cent. of the new stock issue, being his pro rata thereof, and at the same time offered to subscribe for an unsubscribed stock. Mrs. Geer, a stockholder owning 49 per cent. of the stock of the corporation, was requested to subscribe for her pro rata but refused, and before the expiration of the twenty days within which others could purchase her allotment she filed the action above referred to in the superior court of the state of California in and for the county of Solano, and obtained a restraining order holding matters in status quo. Upon the filing of this complaint Raahauge withdrew his offer to purchase any of the 49 per cent. of the stock that had been set aside for Mrs. Geer.

Upon the hearing of the order to show cause, Raahauge, among others, appeared and objected to the superior court considering the matters set forth in the complaint as being beyond the jurisdiction of that court. After hearing argument thereon, respondent court issued an injunction pendente lite wherein it was ordered "that pending the determination of the above-entitled action (Geer v. Victor Raahauge, Ney Raahauge, Raymond Bottari and Vallejo Bus Company, a corporation) on its merits said defendants above named be and each of you are restrained and enjoined from taking or receiving, issuing or hypothecating, assigning, selling or transferring any of the capital stock of said corporation Vallejo Bus Company, provided however that the said stock authorized to be issued in the permit of the Railroad Commission * * * may be issued to the defendant Victor Raahauge the said Victor Raahauge however is hereby restrained and enjoined from transferring, assigning, selling, hypothecating or encumbering any of the capital stock of said corporation that may be so issued to him as aforesaid by virtue of said permit herein referred to."

It is the contention of petitioner herein that the superior court had no jurisdiction to review, annul, or enjoin petitioner from carrying out the order of the Railroad Commission for the reason that the provisions of the Public Utilities Act (Stats. Ex.Sess. 1911, p. 18, as amended), provide that in all collateral actions and proceedings the orders and decrees of the Railroad Commission which shall have become final are conclusive, and that no court of this state, except the Supreme Court, shall have jurisdiction to review, reverse, correct, or annul any order or decree of the Railroad Commission.

In answer, the respondent contends the the injunction pendente lite does not conflict with the order of the Railroad Commission for that order permitted the bus company to issue stock to Raahauge to procure funds with which to make the down payments on two new busses which was in accordance with the resolution of the company, and respondent further contends that inasmuch as the down payments have been made and the new busses delivered and put into service that the question is now moot.

[1] It is claimed also that inasmuch as the original action is one in equity, application for a writ of prohibition should in the first instance have been made to the Supreme Court. This last contention is disposed of by the case of Favorite v. Superior Court, 181 Cal. 261, 184 P. 15, 8 A.L.R. 290, wherein the Supreme Court held there was no merit in a motion to quash a writ of prohibition issued by the District Court of Appeal in an equitable action inasmuch as both the Supreme Court and District Courts of Appeal have equal and concurrent jurisdiction to issue writs of prohibition in all proper cases.

[2, 3] Although respondent claims the injunction pendente lite does not conflict with the order of the Railroad Commission, a reading of the order of the commission discloses that it is therein provided that if the offered stock of the bus company is not subscribed by a stockholder within a specified time it may then be offered for sale to the general public, while the injunction pendente lite issued by the superior court would limit the issuance of stock to Victor Raahauge only, a definite restriction and modification of the order of the Railroad Commission. The Railroad Commission is vested with the power and jurisdiction to supervise and regulate public utilities and to do all things necessary or convenient to the exercise of that power, and having assumed to act in a particular case, the courts are deprived of jurisdiction. Truck Owners & Shippers, Inc., v. Superior Court, 194 Cal. 146, 228 P. 19.

[4] As to the contention that this question has now become moot by reason of the fact that the busses have been purchased and placed in operation, it is sufficient to say that although some one may have temporarily financed such purchase is not an answer to the questions here submitted, and until the busses have been acquired in the manner prescribed by the commission, the question here presented is not moot.

Many cases are cited by respective counsel in their briefs dealing with the authority of the commission and with the power of the courts to review its decrees, but it requires the citation of no authority to show that the action of the trial court culminating in the injunction pendente lite is an attempt to limit or review the order of the commission and beyond its jurisdiction. Without the citation of authority or a further discussion of the facts, it is apparent that the order of the trial court has the effect of circumscribing the order of the Railroad Commission, and it is ordered therefore that the respondent court be permanently restrained and enjoined from proceeding further in the above-entitled action affecting petitioner's rights and duties to carry out the decree of the Railroad Commission of the state of California in reference to the issuance and sale of the capital stock of the Vallejo Bus Company, a corporation, as defined in decision No. 29138 of that body, as it affects the right to offer for sale the stock of the Vallejo Bus Company to the general public.

We concur: THOMPSON, J.; PLUMMER, J.

19 Cal.App.2d 159

ELDRED v. TSHEPPE'S ESTATE et al.

Civ. S. C. 6.

District Court of Appeal, Second District, Division 1, California.

Feb. 9, 1937.

Rehearing Denied March 1, 1937.

Hearing Denied by Supreme Court April 8, 1937.

Quieting title ⚷44(4)

Where realty had been conveyed to deceased and his housekeeper, but housekeeper had executed instrument terminating partnership relationship, and thereafter conveyed to deceased an undivided one-half interest in realty, evidence *held* to sustain finding that housekeeper did not have any interest in property.

Appeal from Superior Court, Los Angeles County; H. S. Gans, Judge.

Action by Elizabeth Eldred against the estate of Adolph Tsheppe, deceased, and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Samuel A. Rosenthal and Burton Briggs Crane, both of Los Angeles, for appellant.

Harold Richardson, of Whittier, for respondents F. W. Hadley, Bank of America, Ferdinand, Harry, and Alexander Tsheppe.

Wingert & Bewley, of Whittier, for respondent Whittier Nat. Trust & Savings Bank.

DESMOND, Justice pro tem.

Plaintiff appeals from a judgment rendered by the court in an action to quiet title to certain real property which we shall hereafter call the Painter avenue property, located in the city of Whittier. It is contended that the evidence was insufficient as a matter of law to support the findings upon which the decision of the trial court was based.

The principal defendant in the case is F. W. Hadley, sued as the executor of the Estate of Adolph Tsheppe, who died on April 23, 1934, at which time the property involved stood in his name. It appeared from the evidence that appellant in 1919 entered the employ of the decedent as his housekeeper and continued in that relationship until the time of his death, a period of about fifteen years. In addition to looking after Mr. Tsheppe's household affairs, she assisted him in caring for his property, collected his rentals, aided him in designing certain buildings, and advised him concerning the construction thereof. The decedent derived a considerable revenue, at least in the early years of Mrs. Eldred's employment, from oil properties, and, although he was approximately 76 years of age in 1919, he was a very active and energetic man for his years, and thereafter engaged in business enterprises until he was 90 years of age or thereabout.

After these two people had lived together for a period of 3 years or more, they became interested in the Painter avenue property, which in September of 1922 they undertook to buy from Jacob Stern & Sons, Inc. The purchase price of the property was $8,000. Upon it was an old house and, while it was the original intention of the parties to make the purchase under a contract running over a lengthy period of time, that purpose was abandoned when the owners of the land objected to the demolition of the old building standing upon it. This objection was made in December of 1922, after Mrs. Eldred had made two of the first three monthly payments of $60 which had theretofore become due. The balance of the purchase price was paid at that time by Mr. Tsheppe, and Stern & Sons, Inc., issued a deed dated December 22, 1922, conveying to Tsheppe an undivided one-half interest in the real estate and to Mrs. Eldred, also, an undivided one-half interest. One month later, on January 22, 1923, Mr. Tsheppe and Mrs. Eldred conveyed to J. H. Reese and Rose T. Reese all their right, title, and interest in and to the property in question, and the Reeses immediately reconveyed the property in joint tenancy to Mr. Tsheppe and Mrs. Eldred. This deed was recorded on February 7, 1923. Mrs. Eldred testified that Mr. Tsheppe stated to her at the time she was made his joint tenant that "He wanted me to stay with him; take care of him the rest of his days, and he wanted me to have that as my work, and he wanted to make it solid so it could not be taken away from me"; and as to the income from the property: "He wished all that income as long as he lived. Q. What did he say in that regard? A. Then he said, 'When I close my eyes, it will be yours.'"

In October of the same year Mrs. Eldred signed the following document, handwritten by Mr. Tsheppe:

"E. Whittier October 24th 1923

"For the consideration of Five hundred Dollars paid to me

by check	$120.00
Furniture in home 443 S. Newlin Ave.	$280.00
One hundred dollars credit on Royalty on Shepp Noble lease	100.00
	500.00

"I herewith agree to terminate contract of partnership in the property 325 N. Painter Ave. wich I entered into with Adolph Tsheppe.

~~Sept~~. 22nd 1923 [Signed] Mrs. E. Eldred."
Jan.

It appears from an examination of the photostatic copy of this instrument which was introduced as an exhibit at the trial that alterations were made in the document as originally written. The word "Sept." was stricken and "Jan." written by the hand of Mr. Tsheppe in pencil beneath it. The final digit which originally appeared in the year of the date was erased and the figure "3" was entered, but when the changes were made is not known. Respondents offered in evidence a statement handwritten by Mr. Tsheppe showing the condition of his account with the Whittier Savings Bank during the year 1923 containing under date of October 24th the following notation "partnership with Mrs. Eldred ended today by paying her $500, partly in goods, credit and check." Respondents contend that the signing by Mrs. Eldred of this $500 contract in 1923 operated virtually as a surrender of all rights in the property which she had received by the joint tenancy deed and that the surrender was made complete legally when, several years later, on the 12th day of December, 1929, she conveyed to Mr. Tsheppe, by means of a grant deed, an undivided one-half interest in and to the Painter avenue property. During all the intervening years this property was held in joint tenancy by Mr. Tsheppe and Mrs. Eldred. Shortly after it was acquired in January of 1923, it had been improved by the construction of a large building on the front of the lot and garages with housekeeping apartments overhead on the rear portion of the property. The total cost of the land and buildings, according to a memorandum made by Mr. Tsheppe and introduced in evidence, was $34,522.27, of which, the memorandum showed, Mrs. Eldred contributed $132.54. All revenue from the property during Mr. Tsheppe's lifetime was paid to him, Mrs. Eldred receiving no return therefrom but being paid by Mr. Tsheppe regularly every month amounts varying from $60 to $100, and occasionally receiving gifts of cash from him.

In the fall of 1929, Mrs. Eldred, who bought and sold property on her own account, wished to borrow $2,000 to enable her to purchase a parcel known as the Hecathorn property. According to her testimony she asked Mr. Tsheppe for the loan; he agreed to make it, and a little later, on December 12, 1929, an escrow was made at the Whittier branch of the Bank of America, under the terms of which Mr. and Mrs. Hecathorn contracted to sell their property to Mrs. Eldred upon a down payment of $2,000, and Mr. Tsheppe deposited that sum in the escrow payable to the order of Elizabeth Eldred: "* * * provided that on or before 30 days from date hereof you can deliver to me the following: 1st—Unrecorded deed, executed by Elizabeth Eldred in favor of Ad. Tsheppe of her undivided one-half interest in and to the real property, described as follows: (then follows a description of the Painter Avenue property). 2nd—Contract, unrecorded, dated December 12, 1929, executed by and between J. L. Hecathorn and Blanche M. Hecathorn, husband and wife, as Vendors, and Elizabeth Eldred, (then follows a description of the Hecathorn property). 3rd—Collateral Security Note for $2,000.00, dated December 12, 1929, executed by Elizabeth Eldred in favor of Adolph Tsheppe, due three years after date, with interest from date at the rate of 7% per annum, payable quarterly, at Whittier Branch, Bank of America of California, Whittier, California, and covering the above mentioned contract." As to the deposit in escrow of this deed by which Mrs. Eldred conveyed a one-half interest in the Painter avenue property to Mr. Tsheppe, she testified:

> "Well, he said he would put up the deed for security. I had some oil papers to offer him, but he said no; he would put up this deed. And jokingly he said, if I couldn't pay the two thousand, I would lose my opportunity for the apartment house." (Meaning the Painter avenue property.)
>
> "Q. What did you say? A. I said, 'Well, in six months I will turn something and pay you that back.' Which I did, with another piece of property."

The record shows that Mrs. Eldred acquitted herself of this obligation to Mr. Tsheppe, for, under date of September 30, 1930, he wrote at the end of a letter which the Whittier branch of the Bank of America had sent to Mrs. Eldred, referring to the Hecathorn-Eldred-Tsheppe escrow, and inclosing certain papers relative thereto, the following: "Mrs. Eldred paid me the Two thousand dollars owing me by transferring 542 Howard Street House to me on Sept. 30, 1930. (Signed) Ad. Tsheppe." As to the "unrecorded deed" mentioned in the escrow, Mrs. Eldred's testimony was as follows:

> "Q. State what if anything was said as to the return of this unrecorded deed. A. Why, when I paid it, he was to return it to me, just as it was put up there. Just for security.
>
> "Q. By the Court: You mean that was what was said at that time? A. Yes; said at that time."

Although the $2,000 debt was paid to Mr. Tsheppe in September of 1930, he did not return to Mrs. Eldred the deed which he had held unrecorded, but when, according to her testimony, she asked him for it, he then told her that he desired to borrow $5,000 on the Painter avenue property and requested her to negotiate with the Whittier National Trust & Savings Bank for a loan of that amount to him. Counsel for the bank stated in open court that: "At that time, he brought in certain title policies which showed the property to be in joint tenancy; and the Bank required either Mrs. Eldred to sign the note or to convey the property to Mr. Tsheppe. The deed was brought in, conveying that property to Mr. Tsheppe; whereupon we loaned $5,000 cash." For this loan the bank took a $5,000 note, secured by a trust deed of the Painter avenue property. This loan had not been discharged, but at the time of trial had been reduced to the amount of $3,500. As to certain payments which had been made thereon, Mrs. Eldred testified: "He said, now he had paid in January, February, and March. In April he was taken sick, and while he was very sick he said 'When I get better I will pay the rest of that so it will be all clear for you when I pass out and close my eyes.'"

Mrs. Eldred had never at any time received any income from the property, and the deed which she made to Mr. Tsheppe on December 12, 1929, was not recorded until December 27, 1930, at which time the Whittier National Trust & Savings Bank forwarded it to the county recorder for record in connection with the $5,000 loan to Mr. Tsheppe.

Appellant argues strongly that the agreement to terminate the partnership related solely to a partnership in revenues and not to ownership of the realty, finding support for this argument in the fact that for more than six years after October 24, 1923, no change was made in the title to the Painter avenue property. It continued to be held in joint tenancy by appellant and decedent. Further, it is pointed out that, when appellant's interest as a joint tenant was finally conveyed by the deed of December 12, 1929, it was by means of an "unrecorded deed" so described in the escrow, and appellant maintains that it seems reasonable, under the circumstances, to conclude that this deed which was not recorded for more than a year thereafter was given as additional security for the loan of $2,000 made by decedent to appellant. Otherwise, it is said, the only security decedent would have received in this transaction was the contract of purchase which appellant had made with the Hecathorns and the transaction in that form would have made him in effect the purchaser of the Hecathorn property instead of Mrs. Eldred who contracted for it. If the purpose of the deed when given in December of 1929 was to divest Mrs. Eldred permanently of her interest in the Painter avenue property, why, appellant asks, was the arrangement made that it should be held as an unrecorded deed? And, if it were not to be held as an "unrecorded deed" on the theory that those words were written by the escrow clerk merely as a description of the instrument without any special meaning to be attached to the word "unrecorded," then why, when Mr. Tsheppe received the deed, did he not actually record it if it was his intention to terminate the joint tenancy? Very likely these and other arguments which appear in appellant's able brief were addressed to the trial court, but that tribunal notwithstanding, was not convinced that the deed was intended merely as security for the payment of the $2,000 note. We have no means of knowing what passed through the mind of the trial judge. As opposed to the arguments of appellant he may have given some consideration not only to the partnership termination agreement but also to the fact that the escrow instructions signed by Mr. Tsheppe did not mention the deed as security for the performance of any promise, while it did expressly refer to the "Collateral Security Note for $2,000 * * * covering the above mentioned contract," to wit, the contract of purchase from Hecathorn which, incidentally, was mentioned as an "unrecorded contract." He may have wondered why Mrs. Eldred did not effectively assert her joint tenancy interest in the property by signing with the decedent the trust deed and note at the time the $5,000 loan was made from the bank, instead of delivering to that institution the instrument which conveyed away her rights. And it is undisputed that for more than three years after that loan was made no attempt was made by appellant to secure from Mr. Tsheppe her former interest in the property. These are a few of the considerations that run counter to the arguments of appellant. They are sufficient to indicate a condition which would not warrant this court in disturbing the conclusions reached by the trial court. It is stated in Harris v. Harris, 136 Cal.

379, at page 384, 69 P. 23, 25: "The rule is well settled that one who would claim the ownership of property of which the legal title stands of record in another, or that the same is held by such person in trust for the one so claiming, must establish such claim by evidence that is clear, satisfactory, and convincing. Woodside v. Hewel, 109 Cal. 481, 42 P. 152; Plass v. Plass, 122 Cal. 3, 54 P. 372. Whether the evidence in any particular case is of this character must be determined by the trial court, and its determination thereon will be accepted by this court as conclusive. In the present case the superior court held that the evidence before it is not sufficient to sustain this claim of the plaintiff, and we are not at liberty to say that the evidence required a different conclusion." See, also, Brison v. Brison, 90 Cal. 323, 334, 27 P. 186; Bollinger v. Bollinger, 154 Cal. 695, 703, 99 P. 196; Goodfellow v. Goodfellow, 219 Cal. 548, 554, 27 P.(2d) 898; 9 Cal.Jur. 338; 17 Cal.Jur. 756.

Judgment affirmed.

We concur: HOUSER, P. J.; YORK, J.

---

19 Cal.App.2d 288

PEOPLE v. BEVANS.

Cr. 411.

District Court of Appeal, Fourth District, California.

Feb. 18, 1937.

Criminal law ⚿200(1)

Conviction for violation of Juvenile Court Law *held* not to bar conviction for violation of statute dealing with crimes against children, since offenses charged, though identical in time, were not the same, where one act of defendant would not come under statute dealing with crimes against children as it was not on or with the body or any part or member thereof of the child (St.1915, p. 1225, as amended; Pen.Code, § 288, as amended by St.1933, p. 1028).

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Henry Edward Bevans was convicted of violation of the statute dealing with crimes against children, and with violation of the Juvenile Court Law, and he appeals.

Affirmed.

Herman Allen and Claude L. Chambers, both of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

MARKS, Justice.

Defendant was charged with violation of the provisions of section 288 of the Penal Code, as amended by St.1933, p. 1028, and also with violation of the provisions of the Juvenile Court Law (St.1915, p. 1225, as amended). The other person involved was a girl of the age of eight years. He was convicted and sentences were pronounced upon him on both counts. He has appealed from the judgments and the order denying his motion for new trial.

Defendant presents but a single ground for a reversal of the judgments and order. He was sentenced on the same day during the same hearing. The judgment on the verdict finding him guilty of violating the provisions of the Juvenile Court Law immediately preceded the pronouncement of judgment on his conviction of violating the provisions of section 288 of the Penal Code. He contends that but one act was charged and proved; that the offenses were identical; that the judgment first pronounced was a bar to the second judgment. This argument tacitly admits the legality of the judgment under the count of the information charging violation of the provisions of the Juvenile Court Law.

Section 288 of the Penal Code provides for the punishment of certain described acts committed on the body of a child under the age of fourteen years. The Juvenile Court Law provides for the punishment of acts which contribute to the delinquency of persons under the age of twenty-one years. The acts punishable under the Juvenile Court Law include many not included within the provisions of section 288 of the Penal Code. The two statutes do not attempt to define identical offenses.

The contention of defendant has been decided adversely to him in the case of People v. Coltrin, 5 Cal.(2d) 649, 55 P.(2d) 1161, 1166. In that case the defendant was convicted of abortion, and murder in the second degree, the death following the abortion. It was there said:

"The final contention is that in pronouncing sentence upon both counts the court violated section 13 of article 1 of the Constitution and section 654 of the Penal Code relative to placing a person twice in jeopardy and imposing two punishments for one act. In this connection it is also argued that since judgment was first pronounced on the abortion charge the court was without power to pronounce any judgment on the murder charge. Irrespective of the merits of the first of these contentions we think the order in which the verdicts were read, and in which the judgments were pronounced, is not material (People v. Degnen, 70 Cal.App. 567, 234 P. 129) and that, in any event, the sentence on the more serious charge may be sustained under the authorities which will be hereafter cited. * * *

"The constitutional provision referred to relates to a second jeopardy for the same offense. Section 654 of the Penal Code does not apply to statutes which do not make an act or omission punishable in different ways, but which name different acts and different offenses, and punishes each act separately. People v. Mehra, 73 Cal.App. 162, 238 P. 802. If the act involved in one charge is necessarily involved in the other and is merely incidental to that charge, but one offense is committed, and it cannot be carved into two offenses in order to inflict a double punishment. People v. Mazzola, 99 Cal.App. 682, 279 P. 211. But where the two offenses are entirely separate and distinct and the one is not necessarily included in the other, a prosecution for the one is no bar to a prosecution for the other even though the same testimony may be applicable to both. In re O'Connor, 80 Cal.App. 647, 252 P. 730, 732. * * * In People v. Kerrick, 144 Cal. 46, 77 P. 711, 712, the court said: 'To be "necessarily included" in the offense charged, the lesser offense must not only be part of the greater in fact, but it must be embraced within the legal definition of the greater as a part thereof. "To entitle a defendant to the plea of autrefois convict or acquit, it is necessary that the offense charged be the same in law and fact." People v. Helbing, 61 Cal. 620.'"

The offense charged in the count alleging violation of the Juvenile Court Law is not the same in law and not necessarily in fact with that charged in the count alleging violation of section 288 of the Penal Code. One act of defendant was proved which would not come under the provisions of section 288 of the Penal Code as it was not "upon or with the body, or any part or member thereof" of the little girl. That act would clearly come within those denounced by the Juvenile Court Law. Therefore the offenses charged while identical in time were not the same either in law or in fact. The conviction of the one would not be a bar to the conviction of the other.

The judgments and order appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

MALLETT v. SOUTHERN PAC. CO. et al.*

Civ. 5674.

District Court of Appeal, Third District, California.

Feb. 16, 1937.

Rehearing Granted March 18, 1937.

1. Railroads ⚷324(1)

Railroad crossing is itself warning of danger from either moving or stationary cars.

2. Railroads ⚷307(4)

Railroad will not ordinarily be held liable for negligence merely because railroad temporarily blockades crossing with car in nighttime or in dense fog without supplying special lights or watchman to warn motorists, unless circumstances render crossing peculiarly dangerous or city ordinance or statute is violated.

3. Railroads ⚷307(3)

Railroad which maintains automatic wigwag signal system at crossing will be held liable for injuries motorist sustains in collision with stationary car as result of defects in system, although system was designed to warn travelers of approach of trains rather than of danger from stationary cars.

4. Railroads ⚷326(4)

Presence of stationary train across public highway is ordinarily sufficient warning of danger to traveler who sees it, or who by exercise of ordinary care will be presumed to have seen it.

---

*For subsequent opinion see 68 P.2d 281.

5. Railroads ⚿330(2)

Where train standing across public highway is not observed by traveler through no fault of his own and traveler is injured by relying upon and reasonably acting in compliance with signals of system known by railroad to be defective, railroad is liable to traveler.

6. Railroads ⚿330(2)

Where railroad maintains crossing signals, even though law does not require signals to be installed, public has right to rely upon exercise of reasonable care by railroad to keep signals in good repair and in efficient working condition.

7. Railroads ⚿350(5, 28)

In action by motorist who drove into gondola car, standing on unlighted town crossing at night, in reliance on belief that wigwag signal system, which had ceased operating, operated until trains had cleared crossing, railroad's negligence, as regards maintenance of wigwag signal system which operated for southbound train until crossing was cleared, but ceased to operate for northbound train when last car passed point 31 feet south of crossing, and motorist's contributory negligence, *held* for jury.

8. New trial ⚿140(2)

In action by motorist who drove into gondola car, refusing railroad's motion for new trial on ground of newly discovered evidence that motorist was intoxicated at time of accident *held* not error, in view of counter affidavits.

9. Appeal and error ⚿977(3)
New trial ⚿6

Grant of new trial rests largely in trial judge's discretion, which is conclusive unless clearly abused.

10. Appeal and error ⚿1015(5)

Where there is substantial conflict of evidence in affidavits presented on motion for new trial for newly discovered evidence, trial court's ruling will not be disturbed.

◆

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by Nora Mallett against the Southern Pacific Company and others. From a judgment against it, named defendant appeals.

Affirmed.

George R. Freeman, of Willows, and R. C. Colombe, of Red Bluff, for appellant.

Clair Engle, of Corning, and Carter & Barrett and Daniel S. Carlton, all of Redding, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The Southern Pacific Company has appealed from a judgment of $8,259.25, which was rendered against it in a railroad crossing casualty which occurred in the nighttime. The plaintiff drove her automobile into a gondola car which blockaded the crossing in the town of Corning. The crossing was very dark at that time, and she failed to observe the car in time to avoid the collision. The crossing was not lighted. No warning of the presence of the car was given. The respondent claims that she was deceived by virtue of the fact that the wigwag signal, which she believed always operated when the crossing was blocked, was not then working. It is not claimed the judgment is excessive.

The Southern Pacific Railroad track runs north and south through the town of Corning. In the vicinity of the depot four parallel tracks are maintained which occupy a space of about 80 feet in width. A short distance south of the depot Solano street crosses the railroad tracks at a right angle. That street is paved and is approximately 60 feet in width. The railroad right of way at this crossing is 2 or 3 feet above the normal grade of Solano street. Beginning at a point about 120 feet westerly of the railroad right of way, Solano street approaches the tracks at an upward grade of from 1¼ per cent. to 2.91 per cent., the steepest portion being just before the railroad right of way is reached. The crossing is not lighted. The nearest electric light to that crossing is situated at the hotel corner on Solano street 160 feet away. Approaching from the west, the first track to be reached is called the "House Track." Within a few feet thereof the main track parallels it on the east. Immediately beyond the main track there are two other parallel tracks. Between these last two tracks, at a point about 6 feet southerly of the south line of Solano street, an automatic wigwag signal device is maintained.

The plaintiff lived in Corning west of the railroad track. For several years she had maintained a restaurant or lunch counter near Solano street adjacent to the railroad right of way on the easterly side thereof. For more than two years she had crossed the tracks on Solano street almost daily. She was familiar with that crossing, and with the electric wigwag system which is maintained at that point. She believed that wigwag system always operated when a train was either crossing the street or stationary thereon, by the constant swinging of a red lamp and the ringing of a bell. The defendant's yard foreman testified the wigwag was supposed to continue to operate until the train had passed the crossing. The automatic wigwag system does not operate the same with respect to both north and south bound trains. When a train is traveling south, the wigwag begins to operate when it reaches a point 1,700 feet north of the crossing and continues to operate until the last car has passed a point 17 feet southerly of Solano street. But, when a north bound train reaches a point 1,350 feet south of the crossing, the wigwag begins to operate, and the red lamp ceases to swing and the bell fails to ring when the last car reaches a point 31 feet south of that crossing. The plaintiff was not aware of that difference in its operation. She believed the wigwag continued to operate all the time that either a north or a south bound train was traveling or stationary within the prescribed zone. She was deceived by this lack of uniformity of the system.

At 4 o'clock on the morning of March 17, 1934, the plaintiff left her home west of the railroad track and proceeded easterly along Solano street to commence the preparation for her breakfast at the restaurant or lunch counter east of the station. She was alone and drove her Ford coupé, which was in good mechanical condition. Her headlights were burning. Just prior to her arrival at the track, a freight train consisting of an engine, three box cars, a low gravel gondola car, and a caboose, traveling north, had stopped at the station. She was not aware of the presence of the train. The gondola car blocked the crossing of Solano street. The caboose stood immediately south of the crossing, but it had passed the point at which the wigwag ceased to operate. The red lamp was not swinging and the bell was not ringing. The gondola car stood only seven and a half feet above the track. The side or box of the gondola car extended downward to a point about 3 feet above the track. Below the gondola box, at either end of the car, there was an iron lattice which in the darkness was not as readily observed as though it presented a solid surface. As the plaintiff approached the track she looked and listened for a train, but neither heard nor saw one. She was not expecting a train at that time in the morning. The rear lights on the caboose could not be seen by her. The evidence is conflicting as to whether there were side lamps on the caboose. The plaintiff saw none. It is reasonable to believe that as she ascended the slight grade to the track her headlights first overshot the box of the low gondola car, and, when she stopped her automobile, as she did, 15 feet from the car, her headlights undershot the gondola box and she failed to see it. She listened for the wigwag bell and heard none. She then proceeded on her way, attaining a speed of from 10 to 15 miles an hour, when she suddenly caught a glimpse of the car directly ahead of her. She was, however, unable to stop her machine. She swerved to her left and struck the car with great force, wedging her automobile under the gondola car. She received serious personal injuries as a result of the collision. She was taken in a senseless condition into the railway station, where a physician soon came to attend her. This suit for damages was subsequently instituted. The cause was tried with a jury. A verdict was returned in her favor. Judgment was rendered accordingly. From that judgment the defendant has appealed.

The appellant contends that the evidence fails to support the implied findings of the jury and judgment to the effect that it was guilty of negligence in blocking the railroad crossing; and asserts that the evidence affirmatively shows the plaintiff was guilty of contributory negligence, and that the court erred in refusing to grant the defendant a new trial on the ground of newly discovered evidence to the effect that plaintiff was intoxicated at the time of the accident.

[1, 2] We are of the opinion the evidence supports the implied findings and judgment that the defendant was guilty of negligence which proximately caused the accident and that the plaintiff was free from contributory negligence. It is true that a railroad crossing is itself a warning

of danger from either moving or stationary cars. Common knowledge of the movements of trains will ordinarily charge individuals with the information that they are likely to encounter railway trains in crossing the tracks. Koster v. Southern Pacific Company, 207 Cal. 753, 279 P. 788. In the absence of circumstances which render a railroad crossing peculiarly dangerous, a company will not ordinarily be held liable for negligence merely because a crossing is temporarily blockaded in the nighttime or in a dense fog by car without supplying special lights or a watchman to warn the drivers of vehicles on the highway, provided the act is not in conflict with a city ordinance or a statute. Dunlap v. Pacific Electric Railway Co., 12 Cal.App.(2d) 473, 55 P.(2d) 894, 895; Baldwin v. Pacific Electric Railway Co., 208 Cal. 364, 281 P. 380.

In the Dunlap Case, supra, which is relied upon by the appellant, the opinion cites with approval the case of Mabray v. Union Pac. R. Co. (D.C.) 5 F.Supp. 397, and states the following: "It was held that a railroad company has a right to occupy a crossing in the conduct and operation of its business, and that such obstruction is in itself notice of danger, so that the railroad company is not bound to give any further warning; and that, after a train has reached a crossing, the duty of a flagman ends as to that train, since then the train itself is a sufficient warning."

It is further said in the Dunlap Case: "No question of the giving of a warning of the approaching train is here involved, because at the time of the accident the engine had passed the crossing and was several hundred feet north thereof. 'All crossing signals are intended to protect the traveler against approaching trains and have been so regarded by our courts.'"

The preceding language was used in the Dunlap Case in affirming a judgment which was rendered against the plaintiff. However, it does not appear in that case that the appellant ran her automobile into a stationary train which was blockading a railroad crossing, relying upon the ringing of an automatic bell to warn her of an obstructed condition of the crossing, or that she was deceived by the silence of the bell into believing that the crossing was unobstructed. It does appear in the Dunlap Case that there was an automatic wigwag signal which was maintained at the crossing, and that "at no time did he (the driver) see any lights or see any wigwag working." But it neither appears in that case that the driver was deceived by the failure of the automatic device to operate in a uniform manner nor that he relied upon that signal as a warning.

[3-6] Whatever may be the purpose of maintaining an automatic wigwag signal at a railroad crossing, even though it be intended to merely warn travelers of the approach of trains, common justice will demand that it shall be so constructed and maintained that it will not lure them into danger. It follows that a company which does maintain such a defective system will be held liable for injuries sustained as the result of those imperfections, regardless of whether the system was designed to warn travelers of the approach of trains rather than to inform them of the danger from stationary cars which block the crossings. It is true that ordinarily the presence of a train which is stationary across a public highway is a sufficient warning of danger to a traveler who sees it, or who by the exercise of ordinary care will be presumed to have seen it. But if, through no fault of the traveler, the train is not observed, and he is injured by relying upon and reasonably acting in compliance with the signals of a system known by the company to be defective, the company will be liable therefor. When railroad crossing signals are maintained by a company, even though the law does not require them to be installed, the public has a right to rely upon the exercise of reasonable care on the part of the railroad company, to keep them in good repair and in efficient working condition. Wyseur v. Davis, 58 Cal.App. 598, 209 P. 213; 52 C.J. 201, § 1791.

In the authority last cited it is said: "If signals are provided, although not required by statute, the public has the right to rely thereon, and the company must use reasonable care to keep them in good condition and in working order, or to give notice that they are not operating, since if such a signal is misunderstood it is a menace."

[7] In the present case the plaintiff was familiar with the Solano street crossing of the railroad track, for she had used it almost daily for more than two years. She knew of the wigwag signal system which was maintained at that crossing, and relied upon her belief that it operated

uniformly by the constant swinging of a red light and the ringing of a bell until the trains had cleared the crossing traveling either north or south. It is undisputed that the system did not so operate. It was defectively constructed so that it did operate until the crossing was cleared for a south bound train, but unfortunately it ceased to operate for a north bound train when the last car passed a point 31 feet southerly of Solano street crossing. The plaintiff was ignorant of that fact. The company knew it to be true. The train in question stopped at a point so that the gondola car blocked the crossing, yet the caboose had cleared the zone in which the system operated, and the signal ceased to work. It was very dark in the vicinity of the crossing. The plaintiff cautiously looked and listened for the presence of a train as she approached the tracks. She stopped when her machine reached a point 15 feet from the nearest track, but she saw no train. She testified that she listened for the bell of the wigwag signal and did not hear it. It is conceded it was not ringing on account of the peculiar arrangement of the system. She looked for the red light and did not see it, for the reason that it was not swinging. Then, assuming that it was safe to do so, she proceeded to pass the tracks and the accident occurred. Under the circumstances of this case, the questions regarding the defendant's negligence and the plaintiff's freedom from negligence were problems for the determination of the jury. There is adequate evidence to support the implied findings and judgment upon those issues.

This case, which is dependent upon the plaintiff's reliance upon what may be deemed to be a defective automatic signal system, should be distinguished from those cases upon which the appellant relies in which the complainants were injured with or without their own contributory negligence by colliding with railroad cars which blocked a crossing merely because the companies were not required to furnish special lights or watchmen to warn travelers of the danger at the crossings. In the case of Louisville & N. R. Co. v. Mahoney, 220 Ky. 30, 294 S.W. 777, 779, it is said in that regard: "Possibly the light in the wigwag signal was not intended to give light to a traveler upon the highway so that he could see a train upon the track, but it was intended to give a warning signal to travelers upon the highway that the crossing was then occupied by a train or was about to be occupied by a train then approaching, and to warn the approaching traveler of the danger of attempting to pass over the crossing, and a traveler upon the highway, who was acquainted with the fact that a wigwag signal bell and light was regularly maintained at that crossing, had a right to rely upon the efficiency of that signal to warn him of the approach of the train to the crossing and of the train upon the crossing, when he could not see and know of the presence of the train at or about the crossing."

[8-10] The court did not err in denying defendant's motion for a new trial on the ground of newly discovered evidence. The evidence contained in the affidavits which were presented on that motion with relation to the plaintiff's alleged intoxication is conflicting. The granting of a new trial rests largely in the discretion of the trial judge, and his determination of that motion will not be disturbed on appeal except for a clear abuse of discretion. When there is a substantial conflict of evidence in the affidavits which are presented regarding the issue which is involved in the motion for a new trial, the ruling of the trial court will not be disturbed on appeal. Kataoka v. Hanselman, 150 Cal. 673, 89 P. 1082; Wessel v. Cazaretto, 109 Cal.App. 390, 293 P. 111; Miles v. Miles, 77 Cal.App. 219, 246 P. 143; 20 Cal.Jur. 81, § 58.

There is an abundance of evidence upon which the court was warranted in determining that the plaintiff was not intoxicated at the time of the accident. It appears she left her restaurant about 10 o'clock the night of the accident. She accompanied a friend by the name of Mrs. Mallett to Camp Olive, where they drank one or two glasses of beer. She then drove home and went to bed, where she remained until about three or half-past three o'clock in the morning, when she arose and started to drive to her place of business. These circumstances are corroborated by other affiants. But more important upon that issue of intoxication is the fact that the plaintiff was taken in an unconscious condition directly from her machine into the defendant's depot where she was surrounded by some of defendant's employees none of whom suggested that they detected the presence of the fumes of liquor or any indication that she was intoxicated.

Moreover, Dr. Arthur H. Meuser, a reputable Corning physician, who attended her immediately after the accident occurred, averred that:

"Affiant particularly examined said plaintiff to determine whether or not she was intoxicated or was under the influence of intoxicating liquor, or had recently drunk intoxicating liquor; that affiant smelled plaintiff's breath at said time, talked with her, and observed her for the purpose of determining whether or not there was any evidence whatever of intoxication, * * * and affiant did not detect any odor of alcoholic liquor on plaintiff's breath, and saw no other evidence whatever that plaintiff was intoxicated or was under the influence of intoxicating liquor, or had recently drunk intoxicating liquor, and affiant is of the opinion * * * that plaintiff was not then intoxicated or under the influence of intoxicating liquor, or had recently drunk intoxicating liquor."

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

19 Cal.App.2d 282

RABEN v. HAMILTON DIAMOND CO. et al.

Civ. 11118.

District Court of Appeal, Second District, Division 1, California.

Feb. 17, 1937.

Hearing Denied by Supreme Court April 15, 1937.

1. New trial 🔑72

Granting new trial to corporation in action against corporation and its servant for assault *held* not error, where record did not satisfactorily reveal whether mission of servant on behalf of corporation had been completed before assault took place (Civ. Code, § 2338).

2. Master and servant 🔑302(3)

Necessary element of case against corporation for assault committed by servant is that assault was committed in and as part of transaction of business of corporation (Civ.Code, § 2338).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Reva Raben against the Hamilton Diamond Company, Incorporated, and another. From an order granting a motion of the named defendant for a new trial, plaintiff appeals.

Affirmed.

Ben Rosenthal and Charles Murstein, both of Los Angeles, for appellant.

Pacht, Pelton, Warne & Black and Lazare F. Bernhard, all of Los Angeles, for respondent.

BISHOP, Justice pro tem.

Following the filing of findings of fact in which it was recited that the defendant Cliff and the defendant corporation, by and through Cliff as its servant, had assaulted plaintiff, the trial court entered judgment for the plaintiff against each defendant. Thereupon the defendant corporation moveed successfully for a new trial, the order granting it specifying that it was made on the ground that the evidence was insufficient. We find that the action of the trial court was warranted.

[1, 2] The evidence is in substantial conflict as to the making of an assault by the defendant Cliff, which of itself supports the order granting a new trial. 2 Cal.Jur. 909. If, moreover, we make two concessions to the appealing plaintiff, the first an assumption that the defendant Cliff regularly made a motion for a new trial on the ground that the evidence was insufficient, and the second an admission that the trial court's denial of that motion establishes for the purposes of this appeal that there was an assault, even so we find no abuse of discretion in the making of the order. In the background of the assault, the plaintiff appears as a purchaser of a ring from the defendant corporation. After her car had been attached because she was in default in payments on the ring, the defendant Cliff went with her to a finance company to obtain a loan on her car sufficient to satisfy the corporation's demand. The record does not satisfactorily reveal whether or not the loan had been made and the mission of the defendant Cliff on behalf of the defendant corporation completed, before the assault took place. There was only one witness who testified that the check, for which the defendant Cliff had come, had not been delivered to him before the plaintiff and he parted company, and that witness would ap-

pear discredited by his insistence that there was no assault. A necessary element of the plaintiff's case against the defendant corporation, that is that the assault was committed "in and as a part of the transaction of" the business of the corporation, as those words are used in section 2338 of the Civil Code, might well have appeared lacking to the trial judge, as he viewed the evidence from the vantage point of the motion for a new trial.

The order appealed from, therefore, does not appear to have been made without warrant. It is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

---

18 Cal.App.2d 567

OVERTON v. WHITE.

Civ. 1651.

District Court of Appeal, Fourth District, California.

Feb. 16, 1937.

Hearing Denied by Supreme Court March 18, 1937.

Pleading 🔑350(1)

Plaintiff's failure to give notice of motion for judgment on pleading *held* waived, where motion was made in open court and was argued and submitted without objection being made by defendant.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

On petition for rehearing.

Petition denied.

Prior opinion, 64 P.(2d) 758.

William Ellis Lady, of Los Angeles, for appellant.

Albert Ford, of Riverside, for respondent.

MARKS, Justice.

In his petition for rehearing defendant urges one ground not presented in his briefs on appeal. He now calls our attention to the fact that no notice of the motion for judgment on the pleadings was given by plaintiff. While this is true, the motion was actually made in open court and was argued and submitted without objection being made by defendant. This constituted a waiver of the failure to give notice. In Hammond Lumber Co. v. Bloodgood, 101 Cal.App. 561, 281 P. 1101, it was said: "It is the well-settled law of this state that, where both parties appear and contest a motion, without objection in the trial court, such appearance is a waiver of a written notice, if none were given, or of the defect in the notice to specify all of the relief asked and given, if the motion and order went beyond the terms of the notice. Acock v. Halsey et al., 90 Cal. 215, 27 P. 193; Curtin v. Dunne, 10 Cal.App. 586, 102 P. 825; Walberg v. Underwood, 39 Cal.App. 748, 180 P. 55; Brown v. Superior Court, 65 Cal.App. 147, 223 P. 426."

The petition for rehearing is denied.

I concur: BARNARD, P. J.

JENNINGS, J., being absent, does not participate herein.

---

19 Cal.App.2d 284

PEOPLE v. LIONBERGER et al.

Cr. 340.

District Court of Appeal, Fourth District, California.

Feb. 17, 1937.

1. Criminal law 🔑1170½(5)

On trial for automobile theft, exclusion on cross-examination of owner of automobile of question whether he was drunk or sober when he left his car at place from which he claimed that it was stolen *held* not sufficiently prejudicial to justify reversal where there was no claim that he would have answered question favorably to defendant, no offer was made to prove that the witness was not sober, and if his testimony as to the exact place where he left the car was disregarded, the evidence would still have supported the judgment.

2. Criminal law 🔑396(2)

Where on insistence by defendant's counsel that witness be permitted to finish any conversation he had with defendant, court stated that he would be permitted to finish any conversation pertaining to the transac tion, but witness, upon being asked what other conversation he had, replied "That was all," and no attempt was made on cross-examination to bring out anything else, no error was committed.

3. Criminal law ⚿656(2)

On trial for automobile theft, though defendant contended he found automobile several blocks from place where owner left it and thought it belonged to a friend of his, instruction that only question was who stole the automobile *held* not reversible error as comment on the evidence, where court twice instructed jury that they were the exclusive judges of the evidence and the credibility of the witnesses, and that court did not intend to entrench upon their province or duty.

4. Larceny ⚿68(1)

On trial for automobile theft, evidence *held* not to justify submission of offense of attempted grand theft.

◆

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Audie Lionberger and another were convicted of grand theft, and the defendant named appeals.

Affirmed.

J. R. Le Gallez, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendants were accused of the crime of grand theft and convicted by a jury. From the judgment which followed the defendant Lionberger has appealed.

It appears from the evidence that on the night of September 19, 1936, one Alvah Wing parked his automobile near a dance hall known as "Bob's Place" in the city of Ontario. Shortly after 1 o'clock a. m. on that night Wing left the dance hall and found that his car was gone. He immediately reported the loss at the police station and a few minutes later two police officers and another man, who were driving around in a police radio car, came across Wing's car on a side street about four and one-half blocks from the dance hall. Wing's car was stopped opposite a vacant lot with its engine running and its lights on, and as the police car came up the other car made a quick movement forward for about two feet, after which the engine stopped, apparently because the driver had stalled his engine in attempting to start too quickly. Just as the officers got out of the police car the defendant Morris came running up. One of the officers asked Morris where he got Wing's car and he replied: "I did not steal no car." The appellant, who was sitting behind the wheel of Wing's car, was taken to the police station, where he told the officers that he "got it at Bob's Place" and that "We were going to Oklahoma." Morris ran away before the officers took the appellant to the police station. He was apprehended the next day, when he told the officer that he and the appellant had come from Bob's Place, that they found the automobile and got into it, that the appellant said they would take the car and go to Oklahoma, and that he tried to prevent the appellant from doing this. At the trial the appellant testified that when he got into Wing's car he thought it was a car belonging to a friend of his named Fletcher.

[1] The first point raised is that the court committed prejudicial error in refusing to permit counsel for the appellant, upon cross-examination, to ask the prosecuting witness whether he was drunk or sober when he left his car outside of Bob's Place. Such a question was asked and an objection sustained. The respondent concedes that this was error, citing People v. Salladay, 22 Cal.App. 552, 135 P. 508, People v. Bennett, 79 Cal.App. 76, 249 P. 20, and Silvey v. Harm, 120 Cal.App. 561, 8 P.(2d) 570. Although this ruling was erroneous, no attempt is made to show that any prejudice resulted therefrom. It is not claimed that the question, if allowed, would have been answered favorably to the appellant, and it may be observed, in this connection, that the report made by the prosecuting witness at the police station indicates that the answer would have been unfavorable, since this witness was able to give an unusually good and detailed description of his car. No offer was made to prove that this witness was not sober at the time in question. It appears without dispute that the car in question was the property of Wing, who had just reported the theft of his car at the police station. The car was found shortly thereafter with the appellant behind the wheel with the lights on and the engine running. An attempt was made to start the car when the officers came up and the car was moved a few feet. Both of the defendants admitted that they had been at

Bob's Place and had left there about the time the car disappeared, and the appellant admitted to the officers that he took the car from that place. If the testimony of Wing as to the exact place where he left his car be disregarded, the evidence, with the reasonable inference therefrom, is sufficient to support the judgment, and, under the circumstances, the error in question is not sufficiently prejudicial to justify a reversal. Silvey v. Harm, supra; People v. Hoffman, 199 Cal. 155, 248 P. 504.

[2] Appellant's second point is that the court erred in refusing to allow a witness for the state to finish his recital of a conversation with the appellant. This witness on direct examination was asked what else the appellant had said, to which he replied: "Well, he asked me if I could do anything to get him out of that mess. He said 'you were young once, and we were out having a good time and I haven't done anything.'" The witness was then asked what the appellant had said respecting his connection with the automobile. Counsel for the appellant interrupted to insist that the witness be permitted to finish any conversation he might have had with the appellant. The court stated that the witness would be permitted to finish any conversation pertaining to this transaction. Immediately thereafter the witness was asked what other conversation he had had with the appellant concerning his connection with the automobile, to which he replied: "That was all." The court opened the door to all of the conversation pertaining to this transaction, the witness stated that he had given all thereof, and no attempt was made on cross-examination to bring out anything else. No error appears.

[3] It is next contended that the court erred in commenting upon the evidence. This is based upon two comments or statements made by the trial court, which are as follows:

"Now the question of who stole the automobile is here before you. That the machine was stolen apparently is without controversy. The question, and the only question for you to determine, is who stole the automobile. The facts are the stolen property was in the possession of the defendants. There is no evidence to the contrary; there is no conclusion to the contrary."

"The only question, as I said before, and I wish to accent it, is for you to keep in mind that the question before you, and the question to be determined by you, is who stole the automobile."

A reading of the transcript discloses that no question was raised as to the fact that the automobile in question had been taken from where it was parked near the dance hall. The defense relied upon was that the appellant and his companion had found it about four and one-half blocks away, where the officers later found them, and that the appellant thought it belonged to a friend of his. This defense rests upon the inference that someone else had moved the automobile to the place where the appellant claimed to have found it. In effect the court, in these comments, left it with the jury to decide whether or not the appellant was the person who took the automobile from the place where it had been parked by its owner. The court was not making an argument to the jury within the meaning of the decision in People v. Talkington, 8 Cal.App.(2d) 75, 47 P.(2d) 368. The court twice instructed the jurors that they were the exclusive judges of the evidence and the credibility of the witnesses and that the court did not intend in any way to entrench upon their province or duty in that respect. In our opinion no reversible error appears. People v. De Moss, 4 Cal.(2d) 469, 50 P.(2d) 1031.

[4] The last point raised is that the court erred in failing to submit to the jury a form of verdict permitting them to find the appellant guilty of attempted grand theft. Not only was no request therefor made by the appellant, but we find nothing in the evidence to justify the submission of such a matter. Under the evidence submitted, the appellant was either guilty of grand theft or he was not guilty.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

19 Cal.App.2d 135

In re BAILEY'S ESTATE.

BISHOP'S SCHOOL UPON SCRIPPS FOUNDATION v. WELLS et al. (BAKER et al., Interveners).

Civ. 1665.

District Court of Appeal, Fourth District, California.

Feb. 6, 1937.

1. Perpetuities 🔑3(1)

Word "eleemosynary," in constitutional provision that no perpetuities should be allowed except for eleemosynary purposes, is synonymous with "charitable," as used in law of trusts (Const. art. 20, § 9).

[Ed. Note.—For other definitions of "Eleemosynary," see Words & Phrases.]

2. Charities 🔑8

Necessary element of charitable trust is that such trust be for benefit of indefinite number of persons.

3. Wills 🔑16

That school or college charges tuition does not deprive it of its character as a charitable institution, if such income be used solely for benefit of school or college and not for private profit.

4. Wills 🔑16

School which was not conducted for private purpose of any person, corporation, or group of individuals, and whose surplus in earnings over expenditures could not be distributed in dividends but must be used for benefit of school, and beneficiaries of which were indefinite and undetermined and could come from group of young people possessing necessary moral and educational qualifications, *held* "charitable corporation" which was precluded by statute from taking bequest under will executed within 30 days of testator's death (Probate Code, § 41).

[Ed. Note.—For other definitions of "Charitable Corporation," see Words & Phrases.]

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Proceeding in the matter of the estate of Wheeler J. Bailey, also known as W. J. Bailey, deceased, wherein the Bishop's School upon the Scripps Foundation, a corporation, filed a petition which was opposed by Arthur C. Wells and another, as executors of the estate of Wheeler J. Bailey, also known as W. J. Bailey, deceased, and wherein Edna Wyman Baker and others intervened. From the decree, the petitioner appeals.

Affirmed.

Hillyer & Boldman, of San Diego, for appellant.

Laurence H. Smith, of La Jolla, and Vernon Bettin, of Los Angeles, for interveners.

MARKS, Justice.

This is an appeal from a decree made in probate holding void a bequest in the will of Wheeler J. Bailey, deceased, made to the Bishop's School Upon the Scripps Foundation. The will was executed within thirty days of the death of deceased. The sole question to be decided is whether the Bishop's School Upon the Scripps Foundation, which we will hereafter refer to as the School, is a charitable corporation within the meaning of section 41 of the Probate Code and therefore prohibited by that section from taking under the will because it was not executed more than thirty days prior to the death of the testator.

The facts are not in dispute and are thus summarized in appellant's opening brief, with references to the record deleted:

"Some 24 or 25 years ago a Mr. McKenzie interested Mr. Bailey, the decedent, in Bishop's School. The decedent at the time of his death had been secretary and treasurer of Bishop's School for a number of years. He died on March 6, 1935. His will was executed on February 21, 1935. Bishop's School is named as one of the residuary legatees in the will of the decedent and is to receive, if the bequest is valid, 36% of the residue and remainder of decedent's estate. The residue amounts to approximately $106,000 after the payment of all taxes and expenses of administration.

"Bishop's School was incorporated in California in 1910 under Title XVII of the Civil Code comprising sections 649 to 651d, both inclusive, relating to Colleges and Seminaries of Learning.

"The purpose for which Bishop's School was formed as declared by Article Second of its Articles of Incorporation is to 'create, maintain and conduct under the auspices of the Protestant Episcopal Church a seminary and institution of learning devoted to the Primary, Secondary and Higher Education of youth of both sexes with such branches, departments and schools as may be necessary or proper for the carrying out of said educational purposes.'

"Bishop's School is managed by a board of eleven trustees, a majority of whom must always be members of the Protestant Episcopal Church. The members of the corporation are the same persons who are trustees and any person upon ceasing to be a trustee automatically ceases to be a member thereof.

"Bishop's School is now conducting and for many years last past has conducted a school for girls at La Jolla, in the City of San Diego, and for many years past has not given instruction to boys; tuition is usually charged for students in the school but the school provides and gives scholarships to some of its students; any girl of good reputation and possessing the necessary academic training is eligible for admission as a student in the school, and no restriction is placed thereon as to color, race, or religion.

"It is provided in Article Sixth of the Articles of Incorporation of Bishop's School that the corporation 'is not formed for profit, but solely for the educational purposes hereinbefore enumerated. No member, director, or officer shall have any personal, proprietary or beneficial interest in the property of the corporation, either during its corporate existence or upon the termination thereof, it being hereby expressly provided that all property acquired by this corporation or the trustees thereof shall be devoted in perpetuity to such educational purposes as may be designated by the donors, or, in the absence of such designation, by the Board of Trustees, and/or as otherwise provided by law.'

"The rates charged students of Bishop's School for board and tuition are sufficient to carry the operations of the school. It was stipulated at the trial 'that during the last five-year period of the operation of the school, the profits exceeded the losses,' and 'that at all times during the existence of this corporation the annual profits in those years in which a profit was made were employed by the corporation either in making up the losses previously sustained, or for the making of betterments and improvements in the property of the corporation itself, and that no part of the profits has ever been paid or distributed to any trustee or member of the corporation.'

"It was further stipulated at the trial that Bishop's School, since its organization has engaged in no other business than the conduct of the school, and that it has been the custom and practice of the school to solicit contributions from the Protestant Episcopal Churches and from others.

"In August, 1933, Bishop's School was sued by a student of the school who sustained an alleged injury while riding a horse at one of the school events. One of the defenses set up in the answer to this suit was that Bishop's School was a charitable corporation, and that as it used due care in the selection of its employees and servants it was not liable for the alleged injury. The decedent was the secretary and treasurer of Bishop's School at that time and he verified the answer."

Section 9 of article 20 of the Constitution provides as follows: "No perpetuities shall be allowed except for eleemosynary purposes."

[1] It has been held that the word "eleemosynary" as used in the foregoing section of the Constitution is synonymous with the word "charitable" as used in the law of trusts. Estate of Wirt, 207 Cal. 106, 277 P. 118; Estate of Sutro, 155 Cal. 727, 102 P. 920; People ex rel. Ellert v. Cogswell, 113 Cal. 129, 45 P. 270, 35 L.R.A. 269.

Section 41 of the Probate Code provides in part as follows: "No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, unless done by will duly executed at least thirty days before the death of the testator."

Therefore, if the School is a charitable corporation the bequest to it must lapse and the decree of the probate court must be affirmed.

The definition of a charitable institution as it pertains to schools and colleges is thus set forth in Restatement of the Law, Trusts, in § 370, at page 1146, as follows:

"A trust for the advancement of education is charitable.

"Comment: a. *Methods of advancing education.* Trusts for the promotion of education include trusts to establish or maintain schools, colleges or other educational institutions; to establish professorships; to pay or to increase the salaries of professors or to provide pensions for professors; to establish scholarships or otherwise to assist students in acquiring education; * * *

"b. *General trust to promote education.* A trust for the promotion of education generally, without specifying the method to be employed, is valid. Thus, a trust 'for the promotion of education' or 'for educational purposes' is charitable.

"c. *Charging fees.* A trust to establish or maintain an educational institution is charitable, although it is provided that the pupils shall pay fees or otherwise contribute to the expense of maintaining the institution (See sec. 376, Comment c)."

The same rule is set forth in 5 California Jurisprudence, p. 20, as follows: "The word 'educational' has never been in terms defined by the courts of California, but its obvious meaning renders such definition unnecessary. An educational purpose is one pertaining to 'learning,' and the latter has been declared to be charitable, but it is obvious that this must be on the assumption that the 'learning' provided is for public benefit and not for private gain. This does not mean that the education or tuition provided must be absolutely gratuitous, but that if fees are charged, they must be wholly used for the support of the educational institution itself, and in every case, the burden of proving that an educational institution is a private and not a public enterprise is on those who seek to avoid the bequest."

[2, 3] The foregoing rules find support in the decisions of the state. See Estate of Hinckley, 58 Cal. 457; People v. Cogswell, supra; Estate of Sutro, supra; Estate of Wirt, supra; Estate of Halm, 196 Cal. 778, 239 P. 307; Estate of Bartlett, 122 Cal.App. 375, 10 P.(2d) 126; Estate of Huebner, 127 Cal.App. 244, 15 P.(2d) 758. It seems to be established that one necessary element of a charitable trust is that it be "for the benefit of an indefinite number of persons." Baker v. Board of Trustees, 133 Cal.App. 243, 23 P.(2d) 1071, 1072; Estate of Dol, 182 Cal. 159, 187 P. 428; Estate of Sutro, supra. The fact that a school or college charges tuition does not deprive it of its character as a charitable institution if such income be used solely for the benefit of the school and not for private profit. Parks v. Northwestern University, 218 Ill. 381, 75 N.E. 991, 2 L.R.A.(N.S.) 556, 4 Ann.Cas. 103; St. Mary's Academy of Sisters v. Solomon, 77 Colo. 463, 238 P. 22, 24, 42 A.L.R. 964. In the latter case it was said: "It is said that the corporations are not charitable. The statute of 43 Elizabeth, c. 4, which is the law of this state, includes schools of learning under the head of 'charitable.' The fact that a school charges tuition does not make it otherwise. Parks v. Northwestern University, 218 Ill. 381, 383, 75 N.E. 991, 2 L.R.A.(N.S.) 556, 4 Ann.Cas. 103. The point that sufficient facts do not appear to show their charitable character we think not well taken. In Jensen v. Maine, etc., Infirmary, 107 Me. [408] 411, 78 A. [898] 899, 33 L.R.A.(N.S.) 141, a charitable trust is defined as one having 'no capital and no provision for making dividends or profits, deriving its funds mainly from public and private charity, and holding them in trust for the object of the institution.' These corporation defendants come within this definition."

[4] The School comes within the definitions of a charitable institution set forth by the foregoing text writers and in the cited cases. It is not conducted for the private profit of any person, corporation, or group of individuals. A surplus in earnings over its expenditures cannot be distributed in dividends but must be used for the benefit of the institution. The beneficiaries of the trust are indefinite and undetermined and may come from the group of young people possessing the necessary moral and educational qualifications. It being a charitable corporation, it cannot take under a will unless it be executed at least thirty days before the death of the testator. Section 41, Probate Code. As the will of deceased was executed less than thirty days before his death, the bequest to the School must fail.

The decree or order is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

19 Cal.App.2d 141

BISHOP'S SCHOOL UPON SCRIPPS FOUNDATION v. WELLS et al. (STROUT et al., Interveners).

Civ. 1666.

District Court of Appeal, Fourth District, California.

Feb. 6, 1937.

1. Wills 🔑16

School could not obtain stock of deceased on ground that such stock had been bequeathed to school by alleged testamentary instruments, where school was charitable corporation and testator had died within 30 days after execution of such alleged testamentary instruments (Probate Code, § 41).

2. Gifts 🔑4

To constitute a valid gift inter vivos, there must be intention of donor to make gift, and either actual or symbolical delivery amounting to present transfer of title.

3. Gifts 🔑49(6)

Evidence that deceased had his secretary place stock, which he desired school to have, in her safe deposit box for his own convenience along with other securities belonging to him, that deceased did not part with possession of stock, and that he did not indorse certificates of stock, *held* insufficient to show such actual or symbolical delivery of stock to school, or to any one for it, as would create valid gift inter vivos, notwithstanding that deceased was officer of school.

4. Trusts 🔑25(1), 38

To create express trust there must be intention on part of trustor to create trust and of trustee to accept trust (Civ.Code, §§ 2221, 2222).

5. Trusts 🔑44(1)

School could not obtain stock of deceased on ground that deceased had placed stock in trust for school, in absence of any evidence of intention of deceased to create trust or to vest title in trustee, or of acceptance of trust (Civ.Code, §§ 2221, 2222).

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by the Bishop's School upon the Scripps Foundation against Arthur C. Wells, and another, as executors of the estate of Wheeler J. Bailey, also known as W. J. Bailey, deceased, wherein Helen North Strout and others intervened. From a decree for the defendants and the interveners, the plaintiff appeals.

Affirmed.

Hillyer & Boldman, of San Diego, for appellant.

Laurence H. Smith, of La Jolla, and Vernon Bettin, of Los Angeles, for interveners.

MARKS, Justice.

Plaintiff brought this action to recover possession of 126 shares of the common stock and 33 shares of the preferred stock of the Western Metal Supply Company or $13,000, their alleged value, in case delivery could not be had. Interveners are the heirs at law of Wheeler J. Bailey, deceased, and defendants are executors of his last will. Judgment went for defendants and interveners and plaintiff has appealed.

Deceased was a resident of La Jolla in the city of San Diego and for several years had been secretary and treasurer of plaintiff, a charitable educational corporation with its school in the same location.

For four and one-half years prior to his death Mr. Bailey had lived with Miriam North, his stepniece, who drove his automobile and acted in the capacity of his confidential secretary. Deceased had a safe deposit box in the First National Trust & Savings Bank of San Diego in downtown San Diego, where he kept his securities. Miss North had a safe deposit box in La Jolla where she kept hers.

Some weeks before his death on March 6, 1935, deceased took steps to make an adjustment of his earthly affairs. He had numerous conferences with his attorney and defendant Wells concerning the disposition of his property. Several drafts of a will were prepared in the earlier of which disposition was made of the stock in question here. In the final draft which was executed no mention was made of this stock for the reason that deceased told his advisers that he intended to give this stock to plaintiff either absolutely or in the form of a trust for its benefit.

The will was executed on February 21, 1935. About two days later deceased had Miss North drive him to the First National Trust & Savings Bank of San Diego where he took from his safe deposit box the stock in question here and other securities, each in separate envelopes. He made notations on the envelope containing the Western Metal Supply Company stock which, although dated and in his handwriting, were not signed by him. He had Miss North drive him to her bank in La Jolla where he gave her the envelope containing the Western Metal Supply Company stock and envelopes containing other securities, all of which were placed in Miss North's box.

On February 25, 1935, deceased dictated to Miss North and she wrote on her typewriter the following letter:

"February 25, 1935.

"The Finance Committee of the Bishop's School,
"La Jolla, Calif.
"Attention Mr. J. C. Harper.

"Dear Sirs:

"I have brought out certificates of stock both common and preferred of the Western Metal and Supply Co. which I wish to present to the School, the income to be used for a maintenance fund for the library and the residue of such income to be added to the Scholarship Fund.

"Yours truly."

On March 2, 1935, this letter was subscribed and sworn to by deceased before a notary public. It was not otherwise witnessed nor attested. It was not delivered to the school but was found with the stock after Mr. Bailey's death.

Miss North was the only living person who had any knowledge of what transpired when the stock was placed in her safe deposit box. Her testimony concerning this happening is as follows:

"Q. In the month of February, of this year, did you have any transaction with Mr. Bailey relating to some Western Metal Supply Company stock? A. Yes.

"Q. Where did that take place? A. In San Diego, or La Jolla; he gave me the stock which he had gotten from his box in San Diego, and gave it to me in La Jolla to put in my box.

"Q. What did the stock consist of? A. I don't know the number—I didn't look inside of the envelope. He just gave me the envelope to put in my box. * * *

"Q. Then I understand Mr. Bailey handed you an envelope and which you subsequently found contained these certificates of stock of the Western Metal Supply Company? A. I never took the stock out; it was written on the envelope what was in it, but I never opened it.

"Q. I show you this document and ask you; is that the envelope to which you refer? A. I think so, that is his writing. * * *

"Q. And did you ever examine the contents of this envelope prior to Mr. Bailey's death? A. I did not.

"Q. When Mr. Bailey gave you this envelope, what did he say to you? A. He asked me to put it in my box in La Jolla, at the bank.

"Q. Then when did you next see this document, this envelope? A. When the executors asked for it.

"Q. You took it out of your own safe deposit box? A. The executor went with me; I went with Mr. Wells; Mr. Wells was there.

"Q. That was after Mr. Bailey's death? A. Yes, sir.

"Q. And were the contents disturbed during the time between the time when you received the envelope from Mr. Bailey, and the time you handed it to Mr. Wells? A. No.

"Q. Was it opened in your presence? A. I am not sure. I presume it was, but I cannot remember. * * *

"Q. Did you receive from Mr. Bailey a document in the words of this typewritten document, which I am handing you? A. I think I wrote it for Mr. Bailey on my typewriter. * * *

"Q. All right. You have told us all that was said at the time the envelope was given you? A. Yes. * * *

"Q. You had some other securities belonging to Mr. Bailey in your box? A. Yes.

"Q. After he died, didn't you? A. Yes.

"Q. And what was the circumstance of your having those securities in that box? A. He took them from his box at the same time he took the Western Metal because it was difficult for him to go to the First National. So he could get them more easily, he asked me to keep these in my box.

"Q. When he gave this envelope to you, did he give it to you separately, or was it with a group of other securities? A. A group of other securities.

"Q. You don't know whether that envelope was in there from your own knowledge, except you found it in there afterwards? A. Oh, no, the other securities were in a separate envelope but the envelopes were all together.

"Q. And it was always customary for you to keep these securities in your own box at his request and deliver them to him if and when he wanted them? A. Yes, at that particular time, along at that particular time, is all.

"Q. He told you to take them down to your box; he didn't say, 'I'll give these to you,' and you understood they were his securities? A. Oh, they were his, absolutely.

"Q. Didn't he say to you when he handed these to you, in reference to that particular envelope, that he did not want to let go of possession of that security or securities, he was giving you, or words to that effect? A. I think that was his idea, at that particular time.

"Mr. Hillyer: I move to strike the answer out. (Question and answer read by reporter.)

"The Court: Motion granted.

"Q. Was that the substance of the conversation? A. Yes. * * *

"Q. Did he ever instruct you to give that envelope to anybody? A. No.

"Q. He did not instruct you to give it to the Bishop's School? A. No. * * *

"Q. Miss North, just as nearly as you can will you give the entire conversation in substance that took place at the time Mr. Bailey gave you the envelope? * * * A. He handed it to me and asked me to put it in my box.

"Q. Did he say anything else? A. No, I don't think he did, not definitely.

"Q. Not at that time? A. No.

"Q. Did he say anything to you before that time about it? A. Well, I know—I cannot say exactly what he said; I know what his intentions were; I can give you— * * *

"Q. (Interrupting.) Now, listen, please. I am asking you not what his intentions were, but what he said to you. A. I cannot tell you absolutely. At this particular time you mean?

"Q. Do the best you can; as far as you can recall at the particular time of the delivery of the document, did he tell you to put it in your box? A. At that time, yes, sir.

"Q. Before that time had he ever talked to you about this stock? A. Yes, sir.

"Q. What did he say about it? A. He said he would like to have the Bishop School have it sometime.

"Q. Anything else that you recall? A. No. I don't think so.

"Q. After he gave you the stock, did he say anything to you about it? A. No, that he asked me to put it in the box.

"Q. After that, did you ever talk to him about it again that you recall? A. Not definitely. He may have mentioned it at some time, but I cannot remember; no."

There are only three possible theories under which the attempted transfer of the stock to the school might be sustained. They are, first, a testamentary disposition; second, a gift; and, third, the creation of a trust of which the school was beneficiary.

[1] That there was no valid testamentary disposition of the stock is evident from what we have already said. A bequest of it to the school was not included within the provisions of the will of deceased. The memorandum on the envelope, while in the handwriting of deceased and dated, was not signed by him. The letter of February 25 was typewritten and was not witnessed as is required of a will. Further, his death occurred within thirty days from the execution of the three documents. Under such circumstances the school, being a charitable corporation, could not take under any of the documents had they been duly executed testaments. Section 41, Probate Code; In re Estate of Bailey (Bishop's School v. Wells) (Cal.App.) 65 P.(2d) 102.

[2] Among the elements necessary to constitute a valid gift inter vivos are, first, an intention on the part of the donor to make a gift, and, second, a delivery either actual or symbolical amounting to a present transfer of title. Estate of McEuen (Cal. App.) 63 P.(2d) 332; Sullivan v. Shea, 32 Cal.App. 369, 162 P. 925, 926. In the Sullivan Case, it was said:

"The elements essential to constitute a valid gift are an intention to give, and the delivery, either actual or symbolical, of the thing intended to be given. Neither alone is sufficient. The rule is very clearly set forth in the case of Jones v. Falls, 101 Mo. App. 536, 73 S.W. 903, where it is said: 'To constitute a valid gift inter vivos, there must be an intention to give, and a delivery to the donee, or to some one for him, of the property given. An intention of the donor to give is not alone sufficient;

the intention must be executed, by a complete and unconditional delivery. Neither will a delivery be sufficient unless made with an intention to give.' See, also, Beaver v. Beaver, 117 N.Y. 421, 22 N.E. 940, 6 L.R.A. 403, 15 Am.St.Rep. 531; Knight v. Tripp, 121 Cal. [674], 678, 54 P. 267; Pullen v. Placer County Bank, 138 Cal. [169] 170, 66 P. 740, 71 P. 83, 94 Am.St.Rep. 19. * * *

"The burden of proving a gift is upon the donee. Lehr v. Jones, 74 App.Div. 54, 77 N.Y.S. 213; Thomas v. Tilley, 147 Ala. 189, 41 So. 854; Bray v. O'Rourke, 89 App. Div. 400, 85 N.Y.S. 907.

"It is also said to be the rule that where a claim of gift is asserted after the death of a donor, every element necessary to constitute a gift must be sustained by explicit and convincing evidence." See, also, Estate of Hall, 154 Cal. 527, 98 P. 269; Zeller v. Jordan, 105 Cal. 143, 38 P. 640; Mutual Benefit Life Ins. Co. v. Clark, 81 Cal.App. 546, 254 P. 306; Lo Presti v. Manning, 125 Cal.App. 442, 13 P.(2d) 1002.

[3] The evidence thoroughly established a desire and intention on the part of deceased that the school should have the stock. It fails to show either an actual or symbolical delivery of the stock to the school or to any one for it. Deceased had Miss North place the stock in her safe deposit box for his own convenience. He neither parted with possession of it nor control over it. The certificates were not endorsed by him. They were placed in the box with other securities belonging to him and which he continued to own and control. There is no reason for concluding that there was any more effectual delivery of the Western Metal Supply Company stock to the school than of the other securities which he had placed in the box at the same time and under identical circumstances. The school asserts no claim to the other securities.

Appellant suggests that as deceased was an officer of the school at the time the stock was placed in Miss North's safe deposit box the delivery was complete as he then held the stock as an officer of the school and not in his individual capacity. This argument is ingenious if not convincing. All of the evidence is to the effect that deceased expressed an intent to make a future gift. There is nothing to indicate that the gift was actually completed by delivery.

This last argument is effectually negatived in the case of Giselman v. Starr, 106 Cal. 651, 40 P. 8, 9. In that case a father who was guardian of his incompetent daughter expressed an intention of giving her a note and mortgage, thus providing her with support. In an inventory of her estate, verified by the father, the note and mortgage were returned as property of the estate of the daughter. In holding this evidence insufficient to establish a gift, the Supreme Court said: "This array of facts and circumstances makes a strong presentation of the intent of Hastings to give the note and mortgage to his daughter. It is established that upon one occasion, under oath, he declared them to be her property. But such a declaration, however binding in good morals, is not of itself sufficient to establish a gift. No legal duty was imposed upon Hastings to give this particular property to his daughter, and, if the intended donation lacked anything of consummation, the promises or declarations were but nudum pactum, and not enforceable. It is not here a question of acceptance of the gift by the incompetent, which, the gift being advantageous to her, the law would presume; but the question is whether the gift was so completely made as to enable the law to presume its acceptance. To every gift delivery is essential. * * * The Civil Code declares that 'a verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee.' Section 1147. Hastings' attempted or intended gift fell short of these requirements. Lacking his indorsement of the note, his possession remained a possession in his personal, and not in his representative, character, and the gift failed of completion."

[4, 5] The theory of a trust established for the benefit of the school is also untenable. In order to create an express trust there must be an intention on the part of the trustor to create a trust and of a trustee to accept the trust. Sections 2221 and 2222, Civ. Code. Both elements are lacking in the instant case.

The complaint is not drawn on the theory of the existence of a trust. There is nothing in the record even suggesting that deceased attempted to create a trust. His only intention disclosed at the time the stock was placed in the La Jolla bank was to make a gift of it. In Noble v.

Learned, 153 Cal. 245, 94 P. 1047, 1048, it was said: "An ineffectual attempt to make a gift does not create a trust, and equity will not perfect an imperfect gift by establishing a trust where none was in contemplation."

There was not proved any intention to vest title in a trustee which is a necessary element of a valid trust. There was no evidence of an acceptance of the trust by Miss North or by any other person.

The evidence fails to disclose any legal theory upon which appellant can acquire title to the property in question. As it was not the owner of the stock and had no interest in it its suit must fail.

The decree or order of the probate court under review here is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

19 Cal.App.2d 194

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. CENTURY LAND & WATER CO. et al.

Civ. 11164.

District Court of Appeal, Second District, Division 2, California.

Feb. 10, 1937.

1. Mortgages 🔑330

Statute limiting amount of deficiency judgment after foreclosure sale of realty to difference between entire indebtedness and fair market value of property at time of sale *held* inapplicable to action on note executed prior to enactment of statute (Code Civ.Proc. § 580a, as added by St.1933, p. 1672).

2. Mortgages 🔑362

Trustee in trust deed securing indebtedness may also be beneficiary and may become purchaser at foreclosure sale.

3. Mortgages 🔑369(3)

Inadequacy of foreclosure sale price is not in itself sufficient ground for setting aside a sale legally made, but, if price is palpably inadequate, slight irregularities in conjunction with sale authorize court to set it aside if such irregularities have conduced to the inadequacy of price or in some other way contributed to injury of debtor.

4. Mortgages 🔑375

In absence of irregularities or oppression, fraud or unfairness, holder of note secured by trust deed was entitled to deficiency judgment of difference between foreclosure sale price and indebtedness without deduction for difference between reasonable market value of property and amount for which holder purchased property at foreclosure sale, where note was executed prior to enactment of statute limiting amount of deficiency judgment (Code Civ.Proc. § 580a, as added by St.1933, p. 1672).

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Bank of America National Trust & Savings Association against the Century Land & Water Company and others. From the judgment, plaintiff appeals.

Judgment modified, and superior court directed to enter judgment in accordance with opinion.

See, also (Cal.App.) 65 P.(2d) 110.

Edmund Nelson, Howard Waterman, Freston & Files, and Ralph E. Lewis, all of Los Angeles (Louis Ferrari, of San Francisco, of counsel), for appellant.

L. M. Cahill, Alfred E. Rogers, W. C. Shelton, George W. Burch, Jr., W. Eugene Craven, Carl Yanow, Hervey & Hervey, Robert L. Faucett, Raymond Hoyt, and J. S. McKnight, all of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff held the promissory note of Century Land & Water Company, a duck hunting club, in the sum of $27,500, executed August 25, 1930, and secured by a trust deed on real estate of the club. A number of the members of the club indorsed the note and are joined as defendants with the maker of the note. Default was made in the payments on the note, the trust deed was foreclosed, and the property which was made security was sold at public auction under the terms of the trust deed for the sum of $8,500. Plaintiff bank was the owner and holder of the note, the trustee for the property, and the only bidder at the sale. The purchase price was applied upon the amount due and the bank thereupon sued for a deficiency. The court found that the land was of the reasonable market value of $16,000. The trial court concluded that "the trustee made a profit for itself in the sum of seven thousand five hundred dollars ($7,500), for which profit it is accountable to the trustor and maker of the note, and said profit in the amount of seven thousand five hundred dollars ($7,500) should be credited toward the principal amount of said deed of trust and said promissory note described in the findings of fact herein as of the 14th day of January, 1935." Plaintiff appeals upon the judgment roll, claiming that it is entitled to judgment for the additional sum of $7,500.

[1-4] Section 580a of the Code of Civil Procedure (as added by St.1933, p. 1672) is not applicable to the present action, since the note was executed prior to the enactment of the section. California Trust Company v. Smead Investment Co., 6 Cal. App.(2d) 432, 44 P.(2d) 624; Brown v. Ferdon, 5 Cal.(2d) 226, 54 P.(2d) 712. Defendants attempt to uphold the judgment with a discussion of the general duties and obligations of a trustee. It has been held that the trustee may also be the beneficiary and may become a purchaser at the sale. California Trust Company v. Smead Investment Co., supra; 25 Cal.Jur. 19, and cases there cited. In this state inadequacy of price is not in itself sufficient ground for setting aside a sale legally made. If the price is palpably inadequate, slight irregularities in conjunction with the sale might authorize the court to set it aside; but such irregularities to have this effect "must have conduced to the inadequacy of the price, or in some other way have contributed to the injury of the plaintiff." Sargent v. Shumaker, 193 Cal. 122, 223 P. 464, 468. Since the appeal is upon the judgment roll, we must look to the findings to determine if any irregularities exist. Nothing is contained therein which can be classified as an irregularity or which indicates that there was any oppression, fraud, or unfairness. In the absence of such findings plaintiff is entitled to judgment for the additional sum of $7,500.

None of the defendants, with the possible exception of defendant Merrill, have presented issues in the pleadings which call for findings by the trial court on the subject of irregularities connected with the sale. Defendant Merrill prosecutes a separate appeal from the judgment, and on that appeal we are this day filing an opinion reversing the judgment as to defendant Merrill on a point having no bearing upon the issues raised by plaintiff's appeal.

The judgment is modified, and the superior court is directed to enter judgment in favor of appellant and against respondents other than respondent Merrill in accordance with the prayer of the complaint.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.

19 Cal.App.2d 197

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. CENTURY LAND & WATER CO. et al.

Civ. 11217.

District Court of Appeal, Second District, Division 2, California.

Feb. 10, 1937.

1. Bills and notes 🔑398

Indorser to whom notice of dishonor has not been given in manner provided by law is discharged from liability (Civ.Code, § 3189).

2. Bills and notes 🔑498

Burden of proof of service of notice of dishonor of note is on party who seeks to enforce liability of indorser (Civ.Code, § 3189).

3. Bills and notes 🔑526

Evidence *held* insufficient to sustain finding that holder of note exercised due and reasonable diligence in effort to learn an address to which notice of dishonor could be sent with reasonable probability that it would reach indorser (Civ.Code, §§ 3186, 3189).

4. Bills and notes 🔑421

Where, under evidence that holder of note used current city directory and current city telephone directory in obtaining addresses for mailing notices of dishonor to indorsers, that current city directory disclosed indorser's business address and residence address, but that nevertheless the holder mailed notice of dishonor to address contained on list of names of indorsers of note, indorser *held* discharged from liability where he did not receive notice of dishonor; since holder did not use due diligence in depending on address disclosed by its list (Civ.Code, §§ 3186, 3189).

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Bank of America National Trust & Savings Association against the Century Land & Water Company, C. C. Merrill, and others. From the judgment, C. C. Merrill appeals.

Judgment reversed as to defendant Merrill.

See, also (Cal.App.) 65 P.(2d) 109.

Alex W. Davis and Call & Murphey, all of Los Angeles, for appellant.

Edmund Nelson, Howard Waterman, and Freston & Files (by Ralph E. Lewis), all of Los Angeles (Louis Ferrari, of San Francisco, of counsel), for respondent.

WOOD, Justice.

Plaintiff bank commenced this action to obtain a deficiency judgment after a sale by foreclosure of a trust deed given to secure the payment of a promissory note in the sum of $27,500. The maker of the note and various indorsers were made parties defendant. Upon a separate appeal by plaintiff we have this day decided that plaintiff is entitled to an increased judgment against all the defendants except defendant Merrill. In the present appeal defendant Merrill appeals from the judgment, making the point, among others, that he was not served with notice of dishonor as required by law.

The note in question was executed August 25, 1930. On July 11, 1934, plaintiff gave written notice of dishonor by mail to various defendants. The letter addressed to defendant C. C. Merrill was inclosed in a sealed envelope, addressed to him at 2277 West Twenty-Third street, Los Angeles, with 2 cents ordinary postage and the proper registry postage prepaid thereon and was mailed as a registered letter with the instruction indorsed on the envelope that it should be delivered to the addressee only. The letter was returned to plaintiff by the post office department on July 24, 1934, with indorsement on the envelope showing that it had been readdressed by the Los Angeles post office to "622 North Arden, Beverly Hills, California"; that it had been marked, "Due 1c," had been forwarded from the Los Angeles post office to the Beverly Hills post office on July 12, had been marked, "Unclaimed, Return to Writer," and had been dispatched from the Beverly Hills post office to the Los Angeles post office on July 23, 1934. The Los Angeles city directory current at the time of the mailing showed a business address of Charles C. Merrill at "727 West 7th Street, Los Angeles," and a residence address of Charles C. Merrill "Beverly Hills." The directory did not contain the name of any other C. C. Merrill. The official in charge of the division of registered letters of the Los Angeles post office testified that if a letter is registered without restriction it is delivered to any authorized person at the residence, but if a letter is registered and delivery restricted to the addressee only and delivery is not made to the addressee personally, the letter is returned to the writer; that if delivery of a letter is restricted to the addressee only, delivery cannot be made at his residence to a man having an office in Los Angeles who is away from his home during postal delivery hours unless the addressee personally calls at the post office for the letter during postoffice hours.

The trial court found that plaintiff on June 11, 1934, gave written notice of dishonor to each of the defendants. The court further found that "plaintiff exercised due and reasonable diligence in an effort to learn an address to which letters could be sent with reasonable probability that it would reach the addressee." Appellant contends that this finding is not supported by the evidence and that it is insufficient to support the judgment.

[1, 2] An indorser to whom notice of dishonor has not been given in the manner provided by law is discharged from liability. It is a part of the contract of indorsement that the indorser shall be liable only in case notice of dishonor is served upon him. The burden of proof of service of notice of dishonor is upon the party who seeks to enforce the liability of the indorser. Utah Construction Co. v. Western Pacific Ry. Co., 174 Cal. 156, 162 P. 631; Hurlbut v. Quigley, 180 Cal. 265, 180 P. 613. Section 3189 of the Civil Code provides the manner of serving notice of dishonor. "Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows: (1) Either to the postoffice nearest to his place of residence, or to the postoffice where he is accustomed to receive his letters; or (2) If he live in one place, and have his place of business in another, notice may be sent to either place; or (3) If he is sojourning in another place, notice may be sent to the place where he is sojourning." Appellant did not add his address to his signature

on the note. The notice was not actually received. No evidence was admitted showing that Merrill was sojourning at any place on the date of the mailing. The court made no finding as to the address of Merrill. The finding that plaintiff exercised diligence to learn "an address to which mail could be sent with reasonable probability that it would reach the addressee" is not a finding that plaintiff used diligence to find either the place of business or the residence of appellant.

[3, 4] The finding that the plaintiff "exercised due and reasonable diligence" is not sustained by the evidence. Plaintiff relies upon section 3186 of the Civil Code, which provides: "Where notice of dishonor is duly addressed and deposited in the postoffice, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails." But the evidence offered affirmatively shows that the letter was not "duly addressed" and there is a dearth of evidence to show due diligence in addressing it. Plaintiff's witness, an employee of the bank, testified that a list containing names of indorsees of the note was in plaintiff's files and was used in the mailing. On this list the following appears: "C. C. Merrill [Typewritten.] V. P. So. Westn. Portland Cement Co., 727 W. 7th St. 2277 W. 23rd St. [Pencil.]" Apparently the address which was written on the envelope was taken from this pencil notation. One of the employees of the bank testified that she used the current city directory and the current city telephone directory in obtaining addresses for mailing the notices. From the current city directory information was before plaintiff that the only C. C. Merrill listed in the directory was a vice president of Southwest Portland Cement Company, and his residence was in Beverly Hills. Ordinary diligence would have readily disclosed the proper address to be placed upon the envelope for C. C. Merrill. Plaintiff's own records disclose Merrill's business address and his position with the Southwest Portland Cement Company. The city directory which plaintiff used disclosed his residence address as Beverly Hills. With this information before it plaintiff did not use due diligence in depending upon the pencil notation of the West Twenty-Third street address. Plaintiff did not check directories of any territory outside of the city of Los Angeles. The name of C. C. Merrill did not appear in the current telephone directory of the city of Los Angeles. The language used by the court in Bank of Utica v. Bender, 21 Wend.(N.Y.) 643, 645, 34 Am.Dec. 281, and quoted in Garver v. Downie, 33 Cal. 176, is applicable to the present situation: "It is not absolutely necessary that notice should be brought home to the endorser, nor even that it should be directed to his place of residence. It is enough that the holder of a bill make diligent inquiry for the endorser, and acts upon the best information he is able to procure. If, after doing so, the notice fail to reach the endorser, the misfortune falls on him, not on the holder. There must be ordinary or reasonable diligence—such as men of business usually exercise when their interest depends upon obtaining correct information. The holder must act in good faith, and not give credit to doubtful intelligence when better could have been obtained." In Trenton Trust Co. v. Hudson Mechanical R. Co., 212 App.Div. 375, 209 N.Y.S. 30, 33, the court said: "Under the provisions of the Negotiable Instruments Law above quoted, where the indorser states no address to which notices should be sent, such notice may be mailed to him at the post office of the city in which he resides or has his place of business. Where, however, the sender goes further and gives a local address, he does so at his peril, if such address should prove to be incorrect, unless it appear that such address was ascertained in the exercise of due diligence to ascertain the correct address." In addressing the letter to the West Twenty-Third street address plaintiff gave "credit to doubtful intelligence when better could have been obtained."

The judgment is reversed as to defendant C. C. Merrill.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.

In re LOWE'S ESTATES.

AITKEN v. LOWE.

Civ. 11190.

District Court of Appeal, Second District, Division 1, California.

Feb. 16, 1937.

Hearing Denied by Supreme Court April 15, 1937.

1. Absentees 🔑4

Statute authorizing lower court to administer upon estate of those persons only who are residents of California but who have been missing therefrom for at least 90 days, etc., *held* to require fact that missing person was resident of state to be pleaded, proved, and adjudicated, and no order may be made until such jurisdictional element is established (Probate Code, § 260 et seq., as added by St.1935, p. 1922 et seq.).

2. Absentees 🔑5

Under statute providing that petition to administer estate of missing persons, may be presented by missing person's wife or any of his family or friends, petitioner for appointment as administrator *held* required to plead and prove fact that petitioner is wife or is member of missing person's family or a friend of missing person, and failure to do so deprives lower court of jurisdiction (Probate Code, § 260 et seq., as added by St.1935, p. 1922 et seq.).

◆

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

In the matter of the estates of Edmund G. Lowe, also known as E. G. Lowe, and Jane Doe Lowe, his wife. From an order approving the expenditures of T. H. M. Aitken, trustee, and overruling a motion to vacate all proceedings subsequent to the appointment of the trustee and filing bond, Edmund G. Lowe appeals.

Reversed.

Charles S. Conner, of Los Angeles, for appellant.

Will H. Winston, of Long Beach, for respondent.

HOUSER, Presiding Justice.

The appeal herein presents for the consideration of this court several questions that have arisen from the administration of the estate of Edmund G. Lowe and "Jane Doe Lowe," on the assumption that each of them was a missing person who had estate within the county of Los Angeles, and that such estate required "attention, supervision, and care of ownership." Section 1822, Code Civ.Proc.; section 260 et seq., Prob.Code, as added by St.1935, p. 1922 et seq.

It appears that one Aitken filed a petition in the superior court for the appointment of himself as "trustee of Edmund G. Lowe and Jane Doe Lowe, his wife, missing persons." Briefly, the purport of the allegations contained in such petition was that Lowe and his wife were the owners of certain real property, which, in consequence of an oil lease thereof theretofore made to Aitken and thereafter assigned by him to the Union Oil Company, entitled Lowe and his wife to "a 4⅙% landowners' interest in the lease"; with the result that the Union Oil Company then held approximately $5,000 to the credit of Lowe and his wife, which sum had been accumulated during several years theretofore passed; that an oil well on the property of said lessor was continuing to produce oil and gas, for which no accounting to the "missing" persons was being made; that for more than four years theretofore both Lowe and his wife had been "missing or their whereabouts unknown"; that Aitken had spent more than $100 in endeavoring to locate Lowe and his wife, and "that it is absolutely necessary that the estates of said Edmund G. Lowe, also known as E. G. Lowe, and Jane Doe Lowe, his wife, be attended to, supervised and cared for"; that Aitken "believes that the said Edmund G. Lowe, also known as E. G. Lowe, and Jane Doe Lowe, his wife, can be located and that your petitioner should be authorized to expend money from the estates to locate said Edmund G. Lowe, also known as E. G. Lowe, and Jane Doe Lowe, his wife, in endeavoring to locate them."

Acting on said petition, the court appointed Aitken trustee of the estates of Lowe and his wife, as missing persons, with authority vested in him to "take charge and possession of said estates, and manage and control them under the direction of this court." Thereafter, in addition to the $100 already expended by Aitken in search of the "missing" persons, Aitken's final account was approved for $500 that was also expended by him for that purpose; beside $500 to the said trustee and $850 to his attorney for their respective personal services rendered in the matter. The appeal is from such order, which includes the approval of other expenditures by the trustee, as well as from another order by which a motion to vacate or set aside all proceedings "subsequent to the appointment of the trustee and filing bond" was denied.

The first point that is presented by appellant is that the lower court never acquired jurisdiction to appoint a trustee herein.

By the terms of a part of former section 1822 of the Code of Civil Procedure (now, in substance, section 260 et seq. of the Prob.Code), it is provided that: "Whenever any resident of this state, who owns or is entitled to the possession of any real or personal property situate therein, is missing, or his whereabouts unknown, for ninety days, and a verified petition is presented to the superior court of the county of which he is a resident by his wife or any of his family or friends, representing that his whereabouts has been, for such time, and still is, unknown, and that his estate requires attention, supervision, and care of ownership, the court must order such petition to be filed, and appoint a day for its hearing, not less than ten days from the date of the order."

Such a drastic, and at the same time such a far-reaching, provision in its ordinary or possible results as far as one's estate may be concerned, should require strict supervision and close observance by the courts in administration, especially with reference to outlined procedure.

With reference to asserted jurisdictional prerequisites, the attention of this court is first directed to the language of the statute to the effect that the lower court is authorized to administer upon the estate of those persons only who are *"residents* of this state," but who have been "missing" therefrom for at least ninety days, etc.

An examination of the petition filed by Aitken fails to disclose an allegation that in any wise relates to the residence of either Lowe or his wife. In other words, the record is wholly silent in that regard. A most potent reason for the statutory language that "whenever any *resident* of this state" has been missing or his whereabouts unknown, his estate located within this state may be administered upon as is thereafter provided, is that unless restricted to residents of this state, the property of nonresidents who may have been "missing," or their "whereabouts unknown," for a period of ninety days or more, may be subject to the same sort of proceedings as are provided for "residents" of this state. It is not impossible that the language of the statute might admit of its application to one who in making a pleasure trip to Europe would be absent from the state for ninety days. Or its application might be invoked even to one who might remove his residence from one locality within the state, to another, and in so doing fail to notify all his "friends," whether intimate or only casual, of his new address. As a matter of interest only, it may be noted that in the instant matter it is asserted by appellant and not denied by respondent, that more than twenty years before the petition was filed, Lowe and his wife had removed from Los Angeles county to San Diego county, where thereafter, including all times during which the proceedings herein were in progress, they had continuously resided.

[1] With reference to the fact of residence as a jurisdictional element in pleading and proof, the several statutes and various decisions in this state that relate respectively to the adoption of minor children (section 226, Civ.Code; Ex parte Clark, 87 Cal. 638, 25 P. 967); to divorce proceedings (Coleman v. Coleman, 23 Cal.App. 423, 138 P. 362); to matters in probate (Beckett v. Selover, 7 Cal. 215, 68 Am.Dec. 237; In re Brady's Estate, 177 Cal. 537, 171 P. 303); as well as to guardianship matters (Ricci v. Superior Court, 107 Cal.App. 395, 290 P. 517)—all very clearly indicate that the fact of residence of interested parties is regarded as of vital importance. The legislative intent in each of such proceedings would seem unmistakable to the effect that the fact of "residence" was indispensable. The language of the statute here under consideration, to wit, that "whenever any resident of this state * * * is missing, or his whereabouts unknown, for ninety days," etc., admits of no conclusion other than that before any legal action with reference to the administration of the estate of such a person may be taken or had, the fact must be established that he was, (or is), a "resident of this state"; and of course, in order that such fact may properly, regularly, and legally be made to appear, it must not only be pleaded and proved, but as well, must be so adjudicated. In other words, that fact constitutes a jurisdictional element in the proceedings; in the absence of which no legal order in the premises may be made.

[2] And in principle, the same situation prevails with reference to the person by

whom the petition for the appointment of a trustee of the estate may be properly presented. In that regard, the statutory requirement is that such a petition may be presented "by his (the missing person's) wife or any of his family or friends." Manifestly, no one whose individuality fails with respect to the statutory description or classification is legally eligible to present such a petition. Again, on examination of the petition herein, it may be observed that it contains neither fitting, nor appropriate, nor other allegation of the relationship, if any, that the petitioner bore to either of the "missing" persons. Nor with respect to the fact of relationship was any finding of such necessary fact either expressly or impliedly made by the court. And again, purely as a matter of interest, from appellant's brief it is learned that as a matter of fact (even had it been made), the petitioner would have been wholly unable to verify any such allegation, for the reason that he had never even seen either of the "missing" persons, and that as connected with any specific business in which the petitioner and the "missing" persons were, or ever had been, either mutually or otherwise interested, the position occupied by the petitioner therein was adverse to and conflicting with that of the "missing" persons.

Although several other important and material points which urgently suggest the reversal of the judgment are presented by appellant, it becomes unnecessary to consider either of them.

The orders from which the appeal is taken are reversed.

We concur: YORK, J.; DORAN, J.

---

19 Cal.App.2d 253

ARCHER v. EDWARDS.

Civ. 11075.

District Court of Appeal, Second District, Division 1, California.

Feb. 15, 1937.

Rehearing Denied March 12, 1937.

Hearing Denied by Supreme Court April 15, 1937.

1. Mortgages 🔑251

Where, after foreclosure sale under trust deed executed by grantees of land, grantor obtained decree invalidating her deed because omitting grantee's name, whereupon remote assignee of note and trust deed brought action on common count against his assignor for money received, Negotiable Instruments Law *held* not susceptible of application in aid of any contention of assignor (Civ.Code, § 3082 et seq.).

2. Limitation of actions 🔑105(1)

Where, after foreclosure sale in 1928 by remote assignee of trust deed executed in 1927 by grantees of land, grantor brought action to quiet title, and within fourteen months after Supreme Court's decree invalidating grantor's deed became final in 1934, remote assignee brought action on common count against his assignor for money received, action *held* not barred by limitations, since statute was tolled by parties' action and trial court's decision, together with time occupied by appeal, up to date when Supreme Court's decision became final (Code Civ.Proc. §§ 337–340).

3. Mortgages 🔑251

Where, after foreclosure sale by remote assignee of note and trust deed executed by grantees of land, grantor obtained decree invalidating her deed because omitting grantee's name, whereupon remote assignee brought action on common count against his assignor for money received, rule of caveat emptor *held* inapplicable, in absence of evidence that assignee, before parting with his money, had any knowledge or means of knowledge that deed omitted grantee's name (Civ.Code, §§ 1764, 1774).

4. Mortgages 🔑251

Where, after foreclosure sale by remote assignee of trust deed executed by grantees of land, grantor obtained decree from Supreme Court invalidating her deed because omitting grantee's name, remote assignee *held* entitled to recover in action on common count against his assignor for money received, since Supreme Court's opinion showed on face that there was total failure of consideration.

HOUSER, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by R. P. Archer against Charles M. Edwards. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Samuel J. Crawford, of Santa Monica, for appellant.

Tobias R. Archer, of Los Angeles, for respondent.

YORK, Justice.

Early in the year 1927, one Kate Trout, the owner of a certain parcel of real property, exchanged the same for some stock owned by parties named Taylor. The Taylors on May 13, 1927, executed a promissory note due in one year for the sum of $4,000 in favor of one Jess Chenoweth, and to secure the same executed a trust deed on the property which they had obtained from Kate Trout. On June 15, 1927, Chenoweth assigned the note and trust deed for a valuable consideration to the appellant, Charles M. Edwards, indorsing the note on the back thereof: "Without recourse. For value received, I do hereby transfer and assign the within note to C. M. Edwards, together with all rights, accrued or to accrue under the Deed of Trust securing the same so far as the same relate to this note and without recourse on me. Jess Chenoweth." A few days thereafter, to wit, on June 21, 1927, appellant sold the note and trust deed to the respondent for $3,805 cash, indorsing the note as follows:

"Los Angeles, California, May 27, 1927.

"For value received, I do hereby grant and assign to R. P. Archer the within note together with all rights accrued or to accrue under the Deed of Trust securing the same, so far as the same relate to this note.

"Chas. M. Edwards."

The note not being paid at maturity, respondent Archer caused the property covered by the trust deed to be sold, he himself bidding in the property at said sale for $4,500, and on June 23, 1928, he received a trustee's deed therefor.

On November 5, 1928, Kate Trout served notice of rescission on respondent Archer and other parties to the exchange transaction first above mentioned, demanding a return of the real property which she had exchanged for the stock owned by the Taylors, and on January 8, 1929, she commenced an action to quiet title to the real property which was then held by respondent Archer by virtue of his trustee's deed. The trial court in that case found that the deed executed by Trout, which did not contain the name of the grantee at the time it was executed, was null and void, but in order to secure respondent Archer for the sum of $4,611.16 due him at the time of the foreclosure sale, awarded him a lien against the real property involved for that amount. Upon appeal, the Supreme Court, under date of April 30, 1934, held that the deed executed by Kate Trout was void in toto and a nullity, since it did not contain the name of the grantee at the time it was executed by Trout, and, therefore, could not be made the foundation of a good title even under the equitable doctrine of bona fide purchase, and denied any relief to respondent Archer. Trout v. Taylor, 220 Cal. 652, 32 P.(2d) 968.

On July 16, 1935, respondent Archer brought the present action on a common count against appellant Edwards to recover the "sum of $3805.00, money received from plaintiff by defendant to and for the use and benefit of plaintiff." The court found for respondent in the sum of $3,689, and also found that the "plaintiff's cause of action is not barred by any of the provisions of either of the sections 337, 338, 339, or 340 of the Code of Civil Procedure of the State of California, pleaded by defendant." Judgment was entered accordingly.

Upon this appeal it is claimed by appellant that:

"First: The action is governed by the provisions of the Negotiable Instruments Law [Civ.Code, § 3082 et seq.].

"Second: The action, if any there be, is barred by the provisions of the Statute of Limitations.

"Third: The Rule of Caveat Emptor applies as the transaction here involved is to be treated as the case of an ordinary sale of a chose and is governed by the provisions of C.C. § 1764 and C.C. § 1774, as existing in 1927.

"Fourth: The plaintiff did not establish a total failure of consideration."

[1] As to the first numbered claim of appellant, we do not find facts or circumstances shown by the record in this case that even indicate that the negotiable instruments law of the state of California could be made to apply in aid of any contention of appellant.

[2] As to the claim of appellant that the action is barred by the statute of limitations, the record discloses that the statute of limitations was tolled by the action of the parties and the decision of the trial court, together with the time taken

by the Supreme Court in deciding the appeal, up to and including the date that the decision of said Supreme Court became final, to wit, May 30, 1934.

[3] As to the claim that the rule of caveat emptor applies to the transaction here involved, there is no evidence that the respondent at any time prior to the time that he parted with his money had any knowledge or means of knowledge that the deed of Kate Trout when it was executed did not contain the name of the grantee, and it was not until after he was in court that he gained knowledge of that fact.

[4] As to appellant's fourth claim that respondent did not establish a total failure of consideration, the opinion of the Supreme Court in Trout v. Taylor, supra, shows on its face that there was a total failure of consideration passing to the respondent herein.

The judgment is affirmed.

I concur: DORAN, J.

I dissent: HOUSER, P. J.

In re HARRIS' ESTATE.*

HARRIS et al. v. LARTER et al.

Civ. 1663.

District Court of Appeal, Fourth District, California.

Feb. 18, 1937.

Rehearing Denied March 16, 1937.

1. Judgment 🔑743(2)

Decision of Supreme Court, in settlement of estate of deceased husband, that surviving widow was entitled to property held in joint ownership with right of survivorship, was conclusive in a proceeding in the matter of the estate of the widow, as to parcels of land purchased by the widow after the death of her husband with money from sale of stock acquired through survivorship.

2. Joint tenancy 🔑1

Personal property acquired through funds held in joint tenancy retains same character in absence of any agreement to terminate joint tenancy.

3. Judgment 🔑714(1)

Decision of Supreme Court, in settlement of estate of deceased husband, that surviving widow was entitled to personalty purchased before death of husband with funds of joint bank account, which had been established with right of survivorship, was not controlling in proceeding in the matter of the estate of the widow as to realty purchased before death of husband with such funds.

4. Appeal and error 🔑931(1)

On appeal, evidence must be construed most strongly in support of judgment.

5. Husband and wife 🔑14(3)

Transactions in which husband without knowledge or consent of wife uses joint tenancy funds to purchase real property are scrutinized most carefully and will be regarded as fraudulent unless it is proved that husband acted in transactions according to general rules which control actions of persons occupying confidential relations with each other (Civ.Code, § 158).

6. Trusts 🔑1, 91

Trusts may be either voluntary or "involuntary," an "involuntary trust" being generally referred to as a "constructive trust" (Civ.Code, §§ 2215, 2223, 2224).

[Ed. Note.—For other definitions of "Constructive Trust" and "Involuntary Trust," see Words & Phrases.]

7. Trusts 🔑140(1)

Two or more persons may hold beneficial estate in trust as joint tenants.

8. Trusts 🔑61(3)

Though one of several beneficiaries of trust becomes sole trustee of the trust, or the sole trustee becomes one of several beneficiaries, the trust is not terminated.

9. Joint tenancy 🔑1

Estate in joint tenancy is ownership recognized by law, and is an estate complete in itself, being separate and distinct and not interdependent upon any other estate (Civ. Code, § 682).

10. Trusts 🔑107

Where husband without knowledge of wife took money from joint bank account with right of survivorship and purchased realty in his own name, fraud on wife would be presumed and an involuntary trust im-

*For subsequent opinion see 72 P.2d 873.

pressed on husband and realty for benefit of himself and wife (Civ.Code, §§ 2215, 2223, 2224).

11. Joint tenancy 🔑5

One joint tenant may terminate joint tenancy without consent of cotenant by conveying his interest to another, grantee and other cotenant then owning property as tenants in common with undivided one-half interest vested in each.

12. Joint tenancy 🔑5

Where one joint tenant of realty conveys to the other, the joint tenancy is terminated and entire title is vested in grantee.

13. Trusts 🔑91

Involuntary or constructive trust is not created by deed, will, or other writing, but is imposed on property by law (Civ.Code, §§ 2215, 2223, 2224).

14. Joint tenancy 🔑1

Provisions of Civil Code defining joint interest do not apply to constructive trusts, since to do so would render inoperative with respect to joint beneficial estate other sections of Code dealing with constructive trusts (Civ.Code, §§ 683, 2215, 2223, 2224).

15. Descent and distribution 🔑61

Where husband held legal title to realty as trustee for himself and wife as joint tenants, because he purchased realty with funds from joint bank account, if deeds to realty were delivered after death of husband, wife would succeed to entire beneficial estate, but if delivered prior to his death, joint tenancy was terminated and realty would be considered gift and subject to statute passing property to heirs of husband in such instance on death of wife without issue (Probate Code, § 229).

16. Descent and distribution 🔑61

Heirs of deceased husband could not recover proceeds from sale of alleged gift of realty by husband to wife, who died without issue, unless they could trace proceeds or part of them and show that they were part of wife's estate (Probate Code, § 229).

17. Executors and administrators 🔑315(6)

Heirs of deceased husband could not collaterally attack, in settlement of estate of widow, distribution of realty made more than 20 years before which had been approved by probate court in settlement of husband's estate.

18. Husband and wife 🔑14(3)

In settlement of estate of widow, evidence that there had been an oral agreement between widow and her deceased husband that they would divide estate on her death equally among their heirs *held* properly excluded where, subsequent to time of alleged agreement, joint tenancy had been established between husband and wife.

◆

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Proceeding in the matter of the estate of Maria L. Harris, deceased, wherein A. E. Harris and others brought suit against Donald L. Larter, administrator of the estate of Maria L. Harris, deceased, and others. From a judgment in favor of the defendants, the plaintiffs appeal.

Reversed, and cause remanded.

W. M. Greathouse and C. E. McDowell, both of Los Angeles, and Head, Wellington & Jacobs and Otto A. Jacobs, all of Santa Ana, for appellants.

R. Y. Williams and Charles D. Swanner, both of Santa Ana, for respondents.

BARNARD, Presiding Justice.

R. T. Harris died in 1911, leaving no issue surviving. In a controversy over whether certain property held by his widow, Maria L. Harris, should have been included in his estate the Supreme Court, after stating that the parties had established a joint bank account with the right of survivorship in pursuance of an agreement made between them during the early years of their marriage, which provided in effect that all property owned or acquired by either or both of them should be held together in joint ownership as joint tenants and that all of the property there in controversy was acquired with money from this joint account, held that the property thus acquired retained the character of joint property, in the absence of an agreement between the parties changing its character, and belonged to the widow as the survivor. In re Estate of Harris, 169 Cal. 725, 147 P. 967.

The widow, Maria L. Harris, died on July 2, 1933, leaving no issue. The present controversy is between the brothers and sister of Maria L. Harris and the brothers, sisters, nephews, and nieces of her predeceased husband, R. T. Harris, the latter claiming that all or part of the property in her estate came to her as a gift from her husband or as community property, and that they are entitled to the same either in whole or in part under section 229 or section 228 of the Probate Code.

[1] The court, in its decree of distribution, found that "the whole of said estate was the separate property of said Maria L. Harris, deceased, and did not come to her by gift from R. T. Harris, her deceased husband, but said decedent became the owner of the whole of said property by right of survivorship, under an agreement entered into between said decedent and R. T. Harris, her deceased husband, in the early years of their married life, whereby it was agreed that all property which either owned as separate property, or which they had or might acquire during their married life, as community property, should be held in joint tenancy with the right of survivorship to the one surviving. That the said R. T. Harris predeceased said Maria L. Harris, and all his interest in said property so held in joint tenancy under said agreement terminated, and Maria L. Harris became the sole owner by said right of survivorship." The court also found that eight described parcels of real property were acquired by Maria L. Harris after the death of R. T. Harris by purchase with funds from the sale of the stocks acquired by her through right of survivorship under the joint tenancy agreement referred to. This finding is not attacked and is conclusive as to those parcels under the decision in Re Estate of Harris, supra. However, the heirs of R. T. Harris appeal from the final decree distributing the entire balance of this estate to the heirs of Maria L. Harris, contending that certain parcels of real property are subject to the provisions of section 228 and section 229 of the Probate Code. It is conceded that these sections are applicable unless all of the property in question came to Maria L. Harris by right of survivorship with respect to property held in joint tenancy by herself and her husband.

The appellants attack the decree in so far as it affects parcels 9, 10, and 11, as described in the inventory and appraisement herein. These three parcels of real property were purchased by R. T. Harris with funds taken by him from the joint bank account of himself and his wife. Before his death he executed deeds conveying these properties to his wife, and these were recorded about a month after his death. There is no evidence that Mrs. Harris knew that the joint funds had been withdrawn by her husband, that the properties had been purchased by him, that the titles had been taken in his name, or that she consented thereto, and no evidence of any agreement or understanding between them at the time of the purchases as to how the titles should be taken.

The appellants argue that since these properties were conveyed to R. T. Harris alone they could not constitute an estate in joint tenancy, and, therefore, became his separate property and that having been voluntarily conveyed by him to his wife, they must be considered as a gift within the meaning of section 229 of the Probate Code. The respondents argue that the finding of the court, in connection with the estate of R. T. Harris, that there was no other property belonging to that estate which had not been accounted for, is binding upon all of the heirs of R. T. Harris; that the decision on appeal in that matter (In re Estate of Harris, supra) established that all properties owned by this husband and wife at the time of his death were held in joint tenancy, and is decisive of this case; that the real property here in question, having been purchased with funds taken from the joint bank account, retained its character as joint tenancy property regardless of in whose name the title was taken; and that, therefore, this property became the separate property of Maria L. Harris by right of survivorship.

[2] It seems to be well settled that personal property acquired through funds held in joint tenancy retains the same character in the absence of any agreement to terminate the joint tenancy. In re Estate of Harris, supra; In re Estate of McCoin, 9 Cal.App.(2d) 480, 50 P.(2d) 114; Lagar v. Erickson, 13 Cal.App.(2d) 365, 56 P.(2d) 1287. A difficulty arises in applying the same rule to real property purchased with joint funds where title is taken in the name of one of the joint tenants because of the provision of section 683 of the Civil Code, as it then read, requiring an express declaration in a transfer in order to create a joint tenancy.

[3] The precise question here presented seems to be one of first impression in California. Personal property only was involved in the appeal in Re Estate of Harris, supra, and nothing said in the opinion therein is controlling here. Dalton v. Keers, 213 Cal. 204, while helpful, does not solve the problem. There the real property

was purchased with joint funds, but both cotenants participated in the purchase of the other property, the instrument of purchase failed to declare an intention to create a joint tenancy, and there was other evidence justifying an inference that the parties intended to take as tenants in common.

[4, 5] Stated baldly, the evidence in the instant case which must be construed most strongly in support of the judgment, justifies the conclusion that Mr. Harris, without his wife's knowledge or consent, withdrew funds from the joint account with which he purchased three parcels of real property placing the record titles in his own name. Thus there is presented a situation where a husband, without the knowledge or consent of his wife, used their joint tenancy funds to purchase real property, the title to which he took in his own name. Because of the confidential relation existing between a husband and a wife, such transactions are always scrutinized most carefully and will be regarded as fraudulent unless it is proved that the husband acted in the transactions according "to the general rules which control the actions of persons occupying the confidential relations with each other, as defined by the title on trusts." (Section 158, Civ.Code; 13 Cal.Jur. 860, and cases cited.)

In 13 California Jurisprudence 869 it is said:

"If a husband fraudulently obtains money of his wife and applies it to the purchase of property, he becomes an involuntary trustee and holds the legal title for her benefit. So also a husband becomes a trustee for the wife where, by a void contract between them, he receives her money, or when he converts funds of his wife in his possession as bailee, or where the wife mortgages her property to secure his debt, and he purchases the property at the foreclosure sale.

"Where by means of an oral promise made without any intention of performing it, a husband or wife obtains a deed of property from the other without giving any consideration therefor, it is a case of actual fraud and a trust for the grantor arises. So also if one spouse, without consideration other than a parol promise to convey or to hold land for the purpose of carrying out a trust in favor of the grantor, obtains an absolute deed from the other, the breach of promise is constructive fraud, and makes the grantee an involuntary trustee for the grantor, although at the time there was no intention not to perform. The law, from considerations of public policy, presumes such transactions to have been induced by indue influence. The betrayal of the confidence is constructively fraudulent and gives rise to a constructive trust."

[6] Trusts may be either voluntary or involuntary. Section 2215, Civ.Code. "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner." Section 2223, Civ.Code. Section 2224 of the Civil Code provides as follows: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." An involuntary trust is generally referred to by law writers as a constructive trust.

[7, 8] Two or more persons may hold the beneficial estate in a trust as joint tenants. Greer v. Blanchar, 40 Cal. 194; Restatement of the Law, Trusts, § 113; 25 Cal.Jur. 315. "Although one of several beneficiaries of a trust becomes the sole trustee of the trust, or the sole trustee becomes one of several beneficiaries, the trust is not terminated." Restatement of the Law, Trusts, p. 1050.

[9] An estate in joint tenancy is an ownership recognized by our law. Section 682, Civ.Code. It is an estate complete in itself and is "separate and distinct and not in any wise interdependent" upon any other estate. Siberell v. Siberell, 214 Cal. 767, 7 P.(2d) 1003, 1004. When and while it exists it excludes the possibility of the existence of any other estate.

[10] When we apply the foregoing rules to the facts of the case before us there is but one conclusion that follows, namely, that when Mr. Harris took the joint funds belonging to himself and his wife and invested them in real estate, taking title in his own name to the apparent exclusion of her interest, the law will presume that act a fraud on the wife. As he gained title to the property by a wrongful act with the money of the joint tenancy, the law will impress an involuntary trust upon him and the property purchased by him. Unless an involuntary trust be declared and imposed, such a transaction would result in one joint owner of a bank account being able

to defraud the other by resorting to the simple expedient of withdrawing the joint funds and investing them in real estate, taking title in his own name to the exclusion of the other. While in the instant case the fraud of Mr. Harris is only presumed by the law, still if it should be held that his taking title to the real property purchased with the joint funds vested the entire title in him, it would open the way for actual fraud on the part of designing and unscrupulous joint tenants.

[11, 12] It is true that it is the established law in California that one joint tenant may terminate the joint tenancy without the consent of his cotenant by conveying his interest to another. His grantee and the other cotenant would then own the property as tenants in common with an undivided one-half interest vested in each. Swartzbaugh v. Sampson, 11 Cal.App.(2d) 451, 54 P.(2d) 73. It should be equally true that where one joint tenant of real property conveys to the other the joint tenancy is terminated and the entire title is vested in the grantee. It might be argued that where a joint tenant, without the knowledge or consent of his cotenant, withdraws funds from a joint account and purchases real estate, taking title in his own name, the joint tenancy is terminated and a tenancy in common results with an involuntary trust imposed on a half interest in the property in favor of the nonconsenting joint tenant. As opposed to this conclusion, we have the firmly established rule which has been consistently followed since the decisions of Kennedy v. McMurray, 169 Cal. 287, 146 P. 647, Ann.Cas.1916D, 515, and In re Estate of Harris, 169 Cal. 725, 147 P. 967, that where personal property is purchased by one joint tenant with joint tenancy funds the joint tenancy will be impressed upon the personal property even though title be taken in the name of the purchasing cotenant. The mental processes and physical acts involved in the purchase of real estate do not necessarily differ from those involved in the purchase of personal property. Both may involve the withdrawal of joint tenancy funds by one cotenant and the purchase of the property without the knowledge or consent of the other cotenant. Where similar acts are involved, a similar result should follow where reasonably possible. While in many cases it may not be possible to accomplish this result, because of section 683 of the Civil Code, we are here concerned with the proper execution of a trust.

The very purpose of recognizing a constructive trust is to preserve the rights of the parties, which have been interfered with by some wrongful act. Where real property was held by a third party, under a constructive trust, for the benefit of parties whose real interest was that of joint tenants, we see no reason why a court, in returning the property to the rightful owner, could not preserve their rights by returning it as it actually was, joint tenancy property. As one may be both a trustee and one of the beneficiaries of the trust, and as the beneficial estate may be held in joint tenancy, it would seem to follow that the same result should obtain where the trustee was one of the beneficiaries and cotenants. Since the real property thus purchased by Mr. Harris was impressed with an involuntary trust for the benefit of himself and his wife, whose real interests were those of joint tenants, a full compliance with the trust requires that the property be returned to them as such joint tenants, and not merely as individuals with unrelated and separate rights. We therefore hold that Mr. Harris took title to parcels 9, 10, and 11 as trustee of an involuntary trust for the benefit of himself and wife as joint tenants.

[13, 14] Nor do we think that the conclusions here reached conflict with the provisions of section 683 of the Civil Code. While the legal title to the properties in question was conveyed to Mr. Harris alone, the actual ownership thereof is controlled by the trust. An involuntary or constructive trust is not created by deed, will, or other writing but is imposed upon property by the law so that justice and equity may be done. As an involuntary trust cannot be created by a writing, it is unreasonable to suppose that the provisions of section 683 of the Civil Code were intended to apply to such trusts. To so apply them would mean that the other sections of the Civil Code which concern themselves with involuntary trusts are inoperative with respect to a joint beneficial estate. Section 683 of the Civil Code was enacted in its original form on March 21, 1872, as were sections 2215, 2223 and 2224 of the same code. It would be unreasonable for us to conclude that the Legislature intended to provide for involuntary trusts where the beneficiaries held as joint tenants and

at the same time to make impossible the existence of such trusts.

[15] Having reached the conclusion that Mr. Harris held the legal title to the three parcels of real property as trustee for the benefit of himself and his wife as joint tenants, the only remaining problem under this phase of the case is the respective interests of the heirs of Mr. Harris and Mrs. Harris in these real properties. There is not sufficient evidence before us to determine this question as we do not know when the deeds conveying these properties were delivered to Mrs. Harris. If they were not delivered until after the death of Mr. Harris they may be considered as an execution of the duties of his trust, as his interest as joint beneficiary was terminated by his death, and Mrs. Harris would succeed to the entire beneficial estate at that time. If they were delivered prior to his death, thus terminating the joint tenancy, the conveyance of his half interest must be considered a gift and subject to the provisions of section 229 of the Probate Code.

[16] Another parcel of real estate came to Mrs. Harris under the same circumstances as the three parcels above referred to, but this parcel was sold by her in 1919. The appellants claim an interest in the proceeds therefrom. If it be assumed that a one-half interest in this property came to Mrs. Harris as a gift from her husband it was hers to do with as she pleased, and section 229 of the Probate Code would apply only in the event some or all of the proceeds of that particular property remained in her hands at the time of her death and became a part of her estate. It appears that Mrs. Harris gave large sums to churches and other institutions during the later years of her life. In our opinion, the appellants cannot recover any part of the proceeds of this piece of real property unless they can trace those funds and show that part or all of them are now a part of her estate.

The appellants claim an interest in parcel 4, as set forth in the inventory and appraisement in this estate. The trial court found that an undivided one-half interest in a part of this property was purchased by Maria L. Harris after the death of her husband with funds from the sale of stocks which she had acquired by right of survivorship under the joint tenancy agreement. This finding is not attacked. We are unable to tell from the record how the remaining portions of this parcel came into the hands of Mrs. Harris. The appellants state in their brief that all of parcel 4 was purchased by R. T. Harris prior to the creation of the joint tenancy account, but point to no evidence to sustain this statement. If the remainder of this property was the separate property of R. T. Harris and was conveyed by him to Mrs. Harris it must be considered a gift and is subject to the provisions of section 229 of the Probate Code. If it was purchased by him with joint tenancy funds the same rules would apply as in the case of parcels 9, 10, and 11. If it was, in fact, the community property of the parties its disposition would be subject to section 228 of the Probate Code. A new trial will be required to determine the facts with respect thereto.

[17] Another question is raised by the appellants with respect to parcel 5, as described in the inventory and appraisement herein. This piece of real property was included in the estate of R. T. Harris and during those probate proceedings was sold more than twenty years ago to one Crookshank. The sale was confirmed by the court and Mrs. Harris, as administratrix of that estate, accounted for the proceeds showing that she had used all thereof in paying the debts of the decedent. It appears that some three years after this probate sale the said Crookshank conveyed the property to Mrs. Harris. On the hearing of the contest involved on this appeal the appellants offered to prove that Crookshank did not, in fact, purchase this property, that Mrs. Harris purchased it herself, using his name as a matter of convenience, and that after the close of the probate proceedings he transferred the property back to her without consideration. The evidence thus offered was excluded by the court. The appellants cite cases to the effect that where an administrator purchases property of an estate through a third person he holds the property in trust for the heirs of the intestate, and argue that this property should now be distributed "as any other community property." We think this probate sale cannot now be thus collaterally attacked. Burris v. Kennedy, 108 Cal. 331, 41 P. 458; In re Davis' Estate, 151 Cal. 318, 86 P. 183, 90 P. 711, 121 Am. St.Rep. 105.

[18] The appellants offered evidence of an oral agreement made in 1904 between R. T. Harris and his wife, whereby he agreed

to give all of his property to her and she agreed to divide, upon her death, the unconsumed assets so received equally among his relatives and hers. This evidence was excluded, and the same is assigned as error. It would be impossible to show that this agreement was executed in view of the joint tenancy agreement established by In re Estate of Harris, supra, which was undoubtedly in force for many years after 1904. Under the circumstances shown by the record this evidence was properly excluded.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: MARKS, J.; JENNINGS, J.

---

19 Cal.App.2d 169

BLODGETT v. MERRITT ANNEX OIL CO.

Civ. 5769.

District Court of Appeal, Third District, California.

Feb. 9, 1937.

1. Appeal and error 🔑692(1)

Transcript which did not show offer as to what was intended to be proven by witness whose testimony was refused presented nothing for review.

2. Evidence 🔑448

When language employed in contract is fairly susceptible of either one of two constructions contended for without doing violence to its usual and ordinary import, ambiguity arises where extrinsic evidence may be resorted to for purpose of explaining intention of parties, and for this purpose conversations between and declarations of parties during negotiations at and before execution of contract may be shown.

3. Sales 🔑467

If there are any reservations in conditional sales contract and provisions that certain portions thereof are to continue in effect, even though conditional sales part thereof is canceled or abrogated, termination of contract under its terms does not put an end to all unperformed portions thereof.

4. Evidence 🔑450(8)

Parol evidence *held* inadmissible to show that seller of oil drilling equipment was entitled to royalty from well under written conditional sales contract notwithstanding default and repossession by seller where contract provided that upon repossession contract should "terminate," since contract was unambiguous and interpretation permitting collection of royalty after default would be unreasonable (Civ.Code, § 1643).

The "termination" of a conditional contract means to put an end to all of the unperformed portions thereof.

[Ed. Note.—For other definitions of "Terminate; Termination," see Words & Phrases.]

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Claude R. Blodgett, as trustee in bankruptcy for the Federal Drilling Company, against the Merritt Annex Oil Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Pease & Dolley, of Los Angeles, for appellant.

Frederick W. Welsh and Alfred Siemon, both of Bakersfield, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This is an action to determine the rights of the respective parties, if any, under a certain oil drilling contract dated February 14, 1930.

On the date just mentioned the appellant entered into an agreement with Carl S. Hemple and James E. Brown, having for its purpose the drilling of certain oil wells. The rights and privileges of Hemple and Brown under the agreement were subsequently assigned to the Federal Drilling Company, a corporation. Under the contract the appellant allowed the respondent Drilling Company to take possession of a certain rotary oil drilling outfit. Subsequently, the Federal Drilling Company took possession of the drilling outfit and began operations upon what is termed in the contract Well No. 1. This well was never finished. The Federal Drilling Company became bankrupt, ceased its drilling operations beyond the time allowed in the contract, permitting the appellant to repossess itself of the drilling equipment. The appellant brought a reclamation proceeding against the referee in bankruptcy and obtained possession of the property mentioned above. Thereafter, the trustee in bankruptcy instituted this proceeding to determine the rights of appellant, if any, to the royalty mentioned in the contract.

The contract provided that upon cessation of work for a certain length of time, the appellant might repossess itself of the drilling outfit and terminate the contract. The portion of the contract in dispute between the parties is worded as follows (omitting names of parties): "Annexed hereto and made part hereof is an inventory of a rotary drilling outfit and other oil well tools and equipment (hereinafter called the drilling equipment) owned by Merritt Annex and title to which is warranted by Merritt Annex to be free and clear of encumbrances, now located on property known as the Lindner Lease in the Huntington Beach Field, Orange County, California. Second parties have inspected the drilling equipment and will accept delivery 'as is', without warranty or representation by Merritt Annex as to condition or equality. Within ten days after date hereof second parties shall dismantle and remove the drilling equipment to the location for 'Well No. 1' hereinafter mentioned, all at expense of second parties. At the location of, and for use in connection with 'Well No. 1,' and not elsewhere, second parties shall install and keep the drilling equipment in good order and repair, at expense of second parties, and shall use the same for the drilling of said 'Well No. 1.' Second parties agree that the drilling of 'Well No. 1' will be commenced and prosecuted diligently and in good faith. In event of abandonment of 'Well No. 1' prior to time it is completed and on production, or cessation of work thereon for thirty (30) days prior to time it is completed and on production, this contract, at option of Merritt Annex, shall terminate and second parties shall surrender possession of the drilling equipment and Merritt Annex may remove the same, and this contract thereupon shall terminate."

Following this portion of the contract it is provided that the second parties therein assign to Merritt Annex, and agree that Merritt Annex shall be paid, and shall own that which shall be equivalent to a one-eighth per cent. royalty as to production from and after date hereof, from all wells drilled on the entire section.

The contract further provided that at all times after the first of such subsequent wells is commenced, Merritt Annex will own, and shall receive and be paid at least one-half of said 8 per cent. royalty, subject to deduction of one-half of said respective monthly deduction, and at other times may, and ultimately may own, receive, and be paid the full amount of said royalty and subject to monthly deductions, as aforesaid.

As stated, Well No. 1 was never completed, and the appellant, under the contract, repossessed itself of the drilling outfit. The question presented before the trial court and urged upon appeal is whether, after proceeding under the portion of the contract which we have set out herein and repossessing itself of the drilling outfit, the appellant is still entitled to receive 8 per cent. royalty subject to the deductions mentioned in the contract. In other words, is the language found in the contract susceptible of being interpreted so that even if no drilling operations are carried on hereafter by the Federal Drilling Company or the trustee in this action, the appellant for all time is entitled to, and has become the owner of 8 per cent. of the oil that may be produced from the leased premises on which Well No. 1 was commenced.

On the part of the respondent it is contended that the portion of the contract which we have set forth herein is plain and unambiguous and means exactly what it says, to wit: That upon the repossession of the drilling outfit by the appellant "this contract shall thereupon terminate."

On the part of the appellant it is contended that this language refers only to the drilling outfit, and does not bar the right of the appellant thereunder to take and receive the 8 per cent. royalty. The pleadings do not tender any issue seeking to reform the contract or have it read so as to express any other intention than as set forth herein.

Upon the trial of the action the appellant apparently sought to introduce testimony showing the intent of the parties at the time the contract was executed, and for that purpose placed a witness on the stand and asked the following question: "Q. On or about the 14th day of February, 1930, did you have any negotiations with Carl S. Hemple and James E. Brown?" This question was objected to and the court sustained the objection. The transcript does not show any offer on the part of the appellant as to what was intended to be proven by the witness in the event the question just set forth was answered affirmatively.

[1] While we know from the briefs that the appellant sought to prove that the parties intended that only a portion of the contract would be terminated, there is nothing in the transcript upon which we can base such a conclusion. Under the principle as set forth in 2 California Jurisprudence 275, nothing is presented to this court upon which we can decide that prejudicial error was committed, if it be conceded that the court erred in sustaining the objection offered by the respondent.

[2] The rule as to when parol testimony may be introduced to explain the terms of a contract or to show the intention of the parties, is clearly set forth in the case of Kenney v. Los Feliz Investment Co., 121 Cal.App. 378, 9 P.(2d) 225, 229, as follows: "It is a settled rule that, when the language employed is fairly susceptible of either one of two constructions contended for without doing violence to its usual and ordinary import, an ambiguity arises where extrinsic evidence may be resorted to for the purpose of explaining the intention of the parties, and that for this purpose conversations between and declarations of the parties during the negotiations at and before the execution of the contract may be shown."

[3, 4] Irrespective of whether a proper foundation was laid by an offer to the trial court of what the appellant hoped to establish by the testimony, we do not find anything ambiguous in the language of the contract. The termination of a conditional contract, as stated in the case of Sanborn v. Ballanfonte, 98 Cal.App. 482, 277 P. 152, means to put an end to all of the unperformed portions thereof. If there are any reservations in the contract and provisions that certain portions thereof are to continue in effect, even though the conditional sales part thereof is canceled or abrogated, then a different conclusion follows, but there is nothing of that kind in this contract.

Again, section 1643 of the Civil Code provides that a contract must receive such an interpretation as will make it reasonable. See, also, 6 Cal.Jur., p. 271. It would not seem reasonable that after the action on the part of the appellant to cancel the contract and repossess itself of the drilling property, that for all time to come it should receive 8 per cent. royalty in the event that oil is thereafter produced from the premises upon which Well No. 1 was proposed to be drilled.

A case somewhat similar in principle is that of Cocores v. Assimopoulos, 127 Cal. App. 360, 15 P.(2d) 892, in which it was held that under a conditional sales contract not providing otherwise, the repossession of the property by the vendor ended the contract. It was also provided in that contract that upon the failure to make payments by the vendee, the vendor might at his option terminate the contract and repossess himself of the property, just as in this case.

It appears from the record that the appellant received some compensation for the use of its property, but how much is not stated.

We think the judgment should be affirmed. And it is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.

---

19 Cal.App.2d 234

BISHOP v. HAYWARD LUMBER & INVESTMENT CO. et al.

Civ. 5770.

District Court of Appeal, Third District, California.

Feb. 11, 1937.

1. Mines and minerals ⚷38(16)

Where defendant in action to quiet title to mining claims admitted on trial that proper location notices of mining claims had been filed as required by law and that plaintiff was in possession thereof, admission supported finding that plaintiff was in possession, owner of property, and entitled to decree quieting title thereto unless defendant had acquired title thereto by purported foreclosure.

2. Mechanics' liens ⚷136(1)

Notice of materialman's lien on which foreclosure proceedings rested, which gave no description of property foreclosed, was fatally defective (Code Civ.Proc. § 1187).

3. Mechanics' liens ⚷158

Where notice of lien is void or insufficient to identify property, instrument cannot be reformed, since law requiring filing of notice of lien is intended to give general public notice thereof (Code Civ.Proc. § 1187).

4. Quieting title ⚷7(4)

Plaintiff *held* entitled to judgment quieting title as against materialman who claimed title under foreclosure proceedings resting on materialman's lien where sheriff's notice of sale, return of foreclosure, and deed were ineffective to describe the property.

◆

Appeal from Superior Court, Kern County; Allen B. Campbell, Judge.

Action to quiet title by Josie S. Bishop, also known as J. S. Bishop, against the Hayward Lumber & Investment Company and others. From a judgment in favor of the plaintiff, the named defendant appeals.

Affirmed.

LeRoy Lorenz and Philip T. Lyons, both of Los Angeles, for appellant.

Ray Bailey, of Bakersfield, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment in an action to quiet title to eleven quartz mining claims, known as "Beryl Mining Claims," all located in the Red Rock mining district in the county of Kern, state of California. From this judgment the Hayward Lumber & Investment Company, a corporation, appeals.

The court found that the plaintiff was the owner of all of said mining claims, and entered judgment to the effect that her title thereto be quieted, and especially as against any claims of the Hayward Lumber & Investment Company.

At the trial of the action the Hayward Lumber & Investment Company relied upon the record of certain purported foreclosure proceedings, and in support of its defense to the action, introduced the entire record of said purported foreclosure proceedings.

[1] It was admitted upon the trial that proper location notices of the mining claims referred to had been filed as required by law, and that the plaintiff was in possession thereof. This admission is sufficient to support the finding of the court that the plaintiff was in possession, and the owner of the property mentioned in the complaint, and entitled to a decree quieting her title thereto as against the appellant, unless the appellant had acquired title thereto by its purported foreclosure proceedings.

It appears that a man by the name of H. W. Hess had purchased from the appellant certain lumber and materials, and the appellant had furnished to and constructed upon certain premises purporting to belong to H. W. Hess certain buildings, for which there was still due on the purchase price from said Hess the sum of $1,157.17. The premises upon which the structures were erected were different from, and not the same premises claimed by the plaintiff on account of her mining locations. Appellant, however, in its foreclosure proceedings purported to have foreclosure entered upon the premises belonging to the plaintiff, and to have proceeded with the issuance of an execution in support of its judgment of foreclosure, and also to have made sale thereof, and that a sheriff's deed had been executed and delivered to the appellant conveying all the right, title, and interest of the plaintiff in and to said mining claims.

The complaint and summons in the foreclosure proceedings were served upon the plaintiff in this action, but being advised that it did not affect her premises, made no appearance and filed no answer in the foreclosure proceedings, and permitted the judgment therein, in so far as it purported to affect her interest, to be taken by default. In this action the appellant only has appeared and filed a brief in support of its appeal, the plaintiff not filing any brief by reason of her alleged financial inability to pay the costs of preparing and printing same. This has devolved upon us a careful examination of the transcript to ascertain whether the plaintiff's title to the mining premises in question has been divested by reason of the foreclosure proceedings, and thereby vested in the appellant.

An examination of the record discloses beyond question that the claim of the appellant to have acquired title to the premises in controversy is utterly untenable, and that so far as foreclosure proceedings are concerned and are purported to relate to the premises found by the court to be owned by the plaintiff, is wholly void.

Section 1187 of the Code of Civil Procedure, in authorizing the filing of a claim of lien by a materialman, requires that there must be a description of the property contained in the claim of lien which is filed in the recorder's office. Turning to the claim of lien set forth in the transcript, we find the following: "Notice is hereby given that the Hayward Lumber & Investment Company, a corporation, hereby claims a lien upon the premises hereinafter described, for building materials furnished H. W. Hess for use in, and which were used in the construction, alteration, addition to, or repair of certain buildings or improvements upon the parcel of land, situated in the county of Kern, State of California, described as follows: Section three (3), Township 29 South, Range 37 East, Mount Diablo Base and Meridian, as per government survey. That H. W. Hess is the owner and the reputed owner of said premises," etc.

The costs of the improvements and the amount due are stated in following paragraphs. That, of course, is no description of any property described in the plaintiff's complaint. The plaintiff's complaint describes her property as located in section 30, township 29 south, range 37 east. No mention is made in the claim of lien filed by the Hayward Lumber & Investment Company, as we have said, of any of the mining claims mentioned in the plaintiff's complaint, and found to be owned by her.

[2, 3] The lien upon which the appellant's foreclosure proceedings rest is not one of defective description of the premises claimed and found to be owned by the plaintiff, but presents an instrument in which no description whatever is given of her property, and falls under the rule announced in the case of Penrose v. Calkins, 77 Cal. 396, 19 P. 641, where it is said: "A notice of a mechanic's lien which entirely omits to describe the real estate sought to be charged with the lien is fatally defective." And likewise, in the case of Fernandez v. Burleson, 110 Cal. 164, 42 P. 566, 52 Am.St.Rep. 75, where it is said: "Where there is no description in the notice of lien sufficient to identify the mining claim upon which the work was actually done with reasonable certainty, to the exclusion of other premises, the notice of lien is insufficient." And in which case it is further held that the notice of lien is not an instrument susceptible of reformation. In other words, if the notice of lien is void or insufficient to identify the property and therefore is void, there is no method of reforming such an instrument, for the simple reason that the law requiring the filing of a notice of lien is intended to give the general public notice thereof, and the reformation founded upon the plaintiff's complaint, and judgment to that effect would be wholly ineffective to give notice of the lien to the general public as required by the Code of Civil Procedure.

[4] The void character of the notice of lien, so far as being ineffective to describe the property of the plaintiff, appears in the judgment. There, the property purported to be covered by the foreclosure proceedings is described as follows: "Section thirty (30) and that certain mining claim known as Morning Star No. 3, in Township Twenty-nine (29) South, of Range Thirty-seven (37) East, Mount Diablo Base and Meridian, County of Kern, State of California." The sheriff's notice of sale described the property in the same manner. The sheriff's return of foreclosure describes the property in the same words, and the sheriff's deed purporting to convey title to the appellant is in exactly the same words. A judgment decreeing foreclosure upon land lying and being in the county of Kern, state of California, and bounded and described as section 30, is absolutely void for uncertainty, as there are a number of section thirties in the county of Kern. Likewise, the notice of sale following that description, is void for uncertainty, and a deed of, and conveyance of property mentioned simply as "Section 30" is void for uncertainty.

In this proceeding we are not concerned as to whether the further description of property described as, "that certain mining claim known as Morning Star No. 3, in Township Twenty-nine (29) South of Range Thirty-seven (37) East, Mount Diablo Base and Meridian, County of Kern, State of California," is sufficient to comply with the Code provisions as to the description of the property, for the reason that the plaintiff's action does not involve any portion of said premises.

Upon this proceeding the appellant argues at length that a number of findings of the court are not supported by the testimony, to-wit: All the findings of the court purporting to hold that the plaintiff was misled and lulled into security by reason of statements made by an agent of the company. In such particulars we may agree with the appellant, and yet, for the reasons which we have stated, the appellant sets forth no grounds for reversal.

It being admitted that the plaintiff is entitled to a decree unless her interest in the property described in the complaint has been divested by the foreclosure proceedings; and the foreclosure proceedings being insufficient to divest her title, any errors of the court as to the findings complained of could in nowise be prejudicial.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

19 Cal.App.2d 276

NATIONAL AUTOMOBILE INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 11247.

District Court of Appeal, Second District, Division 2, California.

Feb. 16, 1937.

Hearing Denied by Supreme Court April 15, 1937.

1. Insurance ⚿137(3)

That insurer's agent came to insured with workmen's compensation insurance policy issued by insurer together with statement of premium due thereon, taken in connection with agent's right to deduct commission before making remittance to insurer, created inference that agent was authorized to deliver policy and to collect and receipt for premium.

2. Insurance ⚿141(2)

Where insurer delivered workmen's compensation insurance policy to agent together with statement of premium due thereon thereby creating inference that agent was authorized to deliver policy and collect premium, insurer was estopped to deny agent's authority to bind insurer by collecting premium and waived condition precedent requiring payment of premium to insurer at its office to render policy effective.

3. Insurance ⚿286

Statement in application for workmen's compensation insurance policy that similar insurance had not been canceled during past year *held* not false, so as to preclude recovery on policy, where policy in force at time of application was not canceled until voluntarily surrendered on delivery of policy issued in accordance with application.

◆

Petition by the National Automobile Insurance Company to review a decision of the Industrial Accident Commission of the State of California determining that the petitioner, rather than the Travelers Insurance Company, was insurance carrier of the risk of Guy C. Pealer, an employee of Milton E. Foster, doing business as the Custombuilt Trailer Manufacturing Company.

Affirmed.

C. W. Bowers and Letus N. Crowell, both of Los Angeles, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondent Industrial Accident Commission.

CRAIL, Presiding Justice.

This is a review of an order made by the Industrial Accident Commission finding that the petitioner was the insurance carrier covering the risk of respondent Guy C. Pealer and an appeal from the "Order on Rehearing" and all the orders leading up to said final order. The contentions of the petitioner are: (1) That the policy of insurance was null and void because the premium was not paid as provided in the policy; (2) that the time and place of payment of the premium was not waived by the fact that the broker delivered the policy; (3) that the broker, Ramelkamp, was not the agent of petitioner; (4) that the petitioner's policy was never in force because the Travelers' policy covering the same risk had not been canceled; and (5) that the policy was void ab initio because of fraud, misrepresentation, and concealment. This case was before the Commission on several occasions, and finally Commissioner Charles A. Son reviewed the case and personally wrote a memorandum entitled, "Decision on Rehearing." This memorandum sets forth the facts and issues in the case and the law applicable thereto with clearness and precision. We therefore adopt the major portion of his opinion as the opinion of this court:

"The injury occurred on October 28. 1935. Defendant Foster, doing business as Custombuilt Trailer Manufacturing Company, was the employer, whose insurance matters in his office were handled by his manager Salisbury and through said manager the business was referred to and handled by one Ramelkamp, a licensed insurance broker, who also held and holds a general agency contract with defendant Travelers Company.

"Defendant Travelers issued and delivered a compensation policy to Foster, covering the period from July 18, 1935, to July 18, 1936, which policy Foster delivered for cancellation to Ramelkamp at the latter's request on October 24, 1935, at which time Ramelkamp delivered to Salisbury a policy of defendant National Company dated October 24, 1935, and covering the period October 26, 1935, to October 26, 1936, which policy defendant National Company issued and delivered to Ramelkamp for delivery to insured under the following circumstances:

"On October 21, 1935, Ramelkamp went to defendant National Company and there talked with a Miss Woodruff and told her he had a case in mind which he was not sure the National Company would want to consider, but he would give her the information. He told her that Travelers wanted to get off this risk because of losses. She said she would take the information (application) and he would hear from it. The application contains the question and answer, 'Has similar insurance been cancelled by any insurance carrier during past year? None.'

"* * * Ramelkamp 'phoned the National on October 24 and was told that the policy had been issued, and he then received it and took it to Foster's, and there to Salisbury, said, 'Here is a policy. I want the Travelers policy' or words to that effect.

"Salisbury said, 'Is this (New) insurance in force,' or 'does it cover us,' or something to that effect. Ramelkamp told him that it did. Salisbury thereupon delivered to Ramelkamp the Travelers policy, which Ramelkamp turned over to the Travelers. At the same time Ramelkamp called Salisbury's attention to the 'Red Rider' on the National policy which is in words and effect as follows:

"'* * * as a condition precedent, this policy is null and void unless the total initial premium stated herein is paid by the broker or assured to the National Automobile Insurance Company at its office in Los Angeles, California, on or before November 8, 1935.'

"On November 7, 1935, Ramelkamp went to Foster's and received a check for $120.00, the full amount of the premium; cashed the check, and on the 7th or 8th of November Ramelkamp gave to National at its office his own check for $102.00, having deducted his commission of $18.00. The National Company's ledger sheet is in evidence, showing this charge, billed to Ramelkamp and stamped:

"'Rec'd November 9, 1935, at 11:50 a. m. and Paid Nov. 12, 1935. Payment stopped.'

"On November 9th Ramelkamp received a letter from National Company, dated November 5, which letter had been incorrectly addressed, which accounted for its belated delivery. The letter which is in evidence is as follows:

"'We have just checked experience in this case and find that it has not been satisfactory. We therefore regret to advise that we must ask you to pick up this policy and return same to us for cancellation within five days.'

"Upon receipt of this letter Ramelkamp, not wanting the National to cash his check and then hold up the refund until an audit was made, which experience he had had with another company, went to his bank and stopped payment on his check.

"On November 15, 1935, defendant National sent a letter to Ramelkamp to the effect that the premium not having been paid 'to this office on or before November 8, 1935, that the policy was null and void in accordance with its terms.'

"Neither Foster, the insured, nor his office manager Salisbury knew anything about any of the above dealings of Ramelkamp with either of these companies.

"The injury, which has been stated occurred on October 28, 1935, and which was 'small finger on right hand cut at second joint or a joiner plane,' although it caused applicant to at once leave work and go to a hospital, does not appear ever to have been called to attention of defendant Travelers, and not to be known to defendant National until November 19, 1935.

"The injury resulted in removal of small finger on right hand at knuckle joint. Application for compensation was filed with this Commission November 25, 1935. The above facts, largely documentary evidence, fully cover all the specific issues raised in this case. * * *

"The controlling question, therefore, is: Was the National policy in effect, and that question turns on (1) the authority of Ramelkamp to collect the premium, so as to charge National with its receipt; and (2) was there a *false* warranty in the application.

"We hold (1) that Ramelkamp had such authority; (2) that there was no falseness in the warranty, and as a result of such holding that award shall run against defendant National Company. * * * As authority for such holdings the following points and authorities are cited:

[1] "(1) The fact that Ramelkamp came to applicant armed with the defendant's policy duly issued by the defendant company together with a bill or statement of the premium due thereon, taken in connection with the right of Ramelkamp to deduct his commission before remitting to defendant, immediately gives rise to the inference that Ramelkamp was authorized to deliver the policy and to collect and re-

ceipt for the premium. (Frasch v. London & Lancashire Fire Ins. Co., 213 Cal. 219 [2 P.(2d) 147])

"In the Frasch Case are cited, 'merely to indicate the trend of the authorities,' the cases of Arthurholt and Terry, from which, because they are on all fours with the instant case, we give a full quotation, taken from the comprehensive note in 85 A.L.R. 749, entitled, 'Person to whom payment of insurance premium may be made (or tendered) so as to charge insurer' and to which note reference is made for further authorities. (Arthurholt v. Susquehanna Mut. Fire Ins. Co., [1893] 159 Pa. 1, 28 A. 197, 39 Am.St.Rep. 659; Terry v. Provident Fund Soc. [1895] 13 Ind.App. 1, 41 N.E. 18, 55 Am.St.Rep. 217.) [Quotation omitted.]

[2] "In accordance with the foregoing authorities, the defendant National Company must be taken to have waived the condition precedent in the red rider, i. e., payment to the company at its office, and to be estopped to deny Ramelkamp's authority to bind the company by collecting the premium. See also the reasoning in: Vierra v. New York Life Ins. Co., 119 Cal. App. 352 [6 P.(2d) 349]; Bankers' Indemnity Ins. Co. v. Industrial Accident Commission, 4 Cal.(2d) 89 [47 P.(2d) 719]; Schramm v. Industrial Accident Commission (Cal.App.) 59 P.(2d) 858. And that the liability rests on an estoppel, see Lycoming Co. v. Ward, 90 Ill. 545.

[3] "(2) There was no falseness in the question and answer in the application (see above), because at the time that the answer was made defendant Travelers Company's policy was in force and was not canceled until later delivered up to Ramelkamp for cancellation, under the circumstances outlined in the above statement of facts. Asking Ramelkamp to 'pick up' the policy simply means asking him to try to get the insured to *voluntarily* surrender it for cancellation, but is not cancellation, because cancellation can be made only in accordance with the 10 day notice, etc., required both by the terms of the policy and by California Statutes.

"The foregoing disposes of all questions raised as to the validity of the coverage of the National Company policy. It would unnecessarily prolong this opinion to discuss the many corroborative facts as to the authority of Ramelkamp, in collecting the premium, to bind the National Company, such as its bookkeeping entries, its failure to question anything that Ramelkamp did except cancellation of his own check, and its conduct subsequent to the injury and after it learned thereof.

"In conclusion, the following California cases are cited to show that 'evidence tending to show waiver is favorably regarded, and forfeiture will be avoided upon any reasonable showing': Murray v. Home Benefit Life Ass'n, 90 Cal. 402 [27 P. 309, 25 Am.St.Rep. 133]; Knarston v. Manhattan Life Ins. Co., 140 Cal. 57 [73 P. 740]; Raulet v. Northwestern Nat. Ins. Co., 157 Cal. 213 [107 P. 292]; Vierra v. New York Life Ins. Co., 119 Cal.App. 352 [6 P.(2d) 349]."

The orders are affirmed.

We concur: WOOD, J.; McCOMB Justice pro tem.

19 Cal.App.2d 239

OCCIDENTAL LIFE INS. CO. v. McCRACKEN et al.

Civ. 5644.

District Court of Appeal, Third District, California.

Feb. 11, 1937.

1. Mortgages 🔑278

Where land is sold subject to a mortgage, land becomes primarily liable and mortgagor becomes a surety and is entitled to all protection which the law gives to sureties (Civ.Code, § 2819).

2. Mortgages 🔑278

Mortgagee's agreement with mortgagor's successor, who has taken the land subject to the mortgage, extending time for payment without the consent of mortgagor, exonerates mortgagor from further liability (Civ.Code, § 2819).

3. Contracts 🔑75(2)

Agreement for payment of a part of the amount due is without consideration.

4. Contracts 🔑54(1)

Doing or promising to do something which was not either expressly or impliedly a part of the subsisting contract or was not contemplated by parties as falling within the provisions is good and sufficient consideration.

5. Mortgages ⚷278

Agreement between holder of mortgage and purchaser of land subject to mortgage extending the time for payment by which purchaser, who was not so bound, agreed to pay part of the mortgage debt and the interest monthly, when interest was not required oftener than semiannually or otherwise than in a lump sum, *held* supported by a sufficient consideration, and to constitute a material change in the original contract, releasing mortgagor from personal liability who did not consent to the extension of time (Civ.Code, §§ 2819, 2820).

◆

Appeal from Superior Court, Tulare County; K. Van Zante, Judge.

Action to foreclose a mortgage by the Occidental Life Insurance Company against Courtney McCracken and others. From a judgment of foreclosure providing for a deficiency judgment, the named defendant appeals, complaining of the provision for a deficiency judgment against him.

Reversed.

McClure & Combs, of Visalia, for appellant.

Hurt, Farner & Hurt, of Los Angeles, for respondent.

PER CURIAM.

This was an action to foreclose a mortgage on real property. Judgment of foreclosure was entered and providing for a deficiency judgment against appellant in case the sale did not satisfy the judgment. Appellant does not complain of the judgment decreeing a foreclosure, but appeals from that portion which provides that the respondent recover from him a deficiency judgment.

In 1926 appellant Courtney McCracken executed and delivered to one Stevenson a promissory note and to secure the repayment thereof executed a mortgage upon certain real property. Through various transfers the note and mortgage, before maturity, became the property of Occidental Life Insurance Company, who was the owner and holder at the time this action was brought. Also, the mortgaged premises were, shortly after the execution of the mortgage, sold and conveyed to defendants herein, the deed of conveyance reciting that the real property therein described was conveyed subject to the mortgage.

Shortly before maturity demand for payment was made and a small remittance paid on account, but the note remained unsatisfied. After maturity defendants wrote to the Insurance Company, the holders of the note and mortgage, that they were unable to pay the note in full but could pay $200 on account and $30 a month until the note was discharged. This was accepted by the company and the debtors made several payments, including monthly interest payments, computed at the rate of 6 per cent. per annum. Later defendants found they could not keep up the payments, and foreclosure was instituted and the judgment, including a deficiency judgment against McCracken, was entered. It is the claim of McCracken that he was released from personal liability on the debt by the extension of time given without his consent by respondent to the subsequent holder of the land.

[1, 2] There is no doubt, and it is so held in Braun v. Crew, 183 Cal. 728, 192 P. 531, under facts very similar to the instant case, that where a vendee takes land subject to a mortgage, the land becomes, so far as the mortgagor is concerned, as between him, the creditor, and the vendee, primarily liable for the payment of the debt, and the relation of principal and surety arises, the mortgagor being the surety and the land the principal debtor, and he is entitled to all the protection which the law gives to sureties. A surety is exonerated (section 2819, Civ.Code), if by any act of the creditor, without the consent of the surety, the original position of the principal is altered in any respect. Under these principles it is held in Braun v. Crew, supra, that by the agreement of the mortgagee with the then owner extending the time of payment of the then matured debt without the consent of the mortgagor, the original obligation of the principal was materially altered, and the mortgagor and surety for the payment of the debt is by such extension of time exonerated from further liability.

[3-5] After coming to this conclusion, it is necessary to determine if the agreement extending the time was a valid contract, for if it were not a valid and binding extension, then, of course, the mort-

gagor would not be discharged; or, as stated in section 2820 of the Civil Code, "A promise by a creditor, which for any cause is void, or voidable by him at his option, does not alter the obligation or suspend or impair the remedy." The only point at issue as to the validity of the extension is whether it was based upon a sufficient consideration. Section 1605 of the Civil Code defines a good consideration as "any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor."

It has many times been held that an agreement for payment of a part of the amount due is without consideration. Dean v. Sedan Milling Co., 19 Cal.App. 28, 124 P. 736; Stroud v. Thomas, 139 Cal. 274, 72 P. 1008, 96 Am.St.Rep. 111; Bradbury v. Thomas, 135 Cal.App. 435, 27 P.(2d) 402. Here, however, the time of payment of the balance due was extended, monthly payments were provided for, and the interest payments and rate on the amount due changed from 6 per cent. payable semiannually to 6 per cent. payable monthly. Something more than merely paying a portion of the mortgage due was done. Things not contemplated by the original contract were here undertaken, such as paying the interest in advance in monthly installments, instead of semiannually as provided in the note, and the forbearance of legal action to collect the debt while the new agreement was being faithfully performed. In 13 California Jurisprudence, page 355, a consideration is held good and sufficient "if it is the doing or the promising to do something which was not, either expressly or impliedly, a part of the subsisting contract, or was not contemplated by the parties as falling within the provisions. Under this rule a promise to extend time of payment of a debt in consideration of a promise of the debtor to pay interest where none was reserved in the original contract, or to pay increased interest, is binding; so payment of interest in advance will afford a consideration, or payment of interest monthly instead of yearly, or payment of the debt, or part thereof, before it is due, or in a different medium, or at a different place than that contracted for."

This principle has been recognized and embodied in the American Law Institute Restatement of the Law of Contracts, Vol. 1, § 76 as follows: "A owes B a matured liquidated debt bearing interest. Mutual promises to extend the debt for a year are binding, though the rate of interest is below that which the law allows on overdue debts for which no interest has been contracted. A might have paid the debt and altogether prevented B from acquiring a right of interest."

Here the Insurance Company could have foreclosed upon the security of the obligation, but the owner of the property was anxious to avoid such procedure and purchased immunity by agreeing to do something he was not legally bound to do, namely, pay the mortgage debt at the rate of $30 per month, with interest payable monthly. As to the interest payments particularly, no one had theretofore been required to make payments thereof oftener than semiannually or different than in a lump sum. This of itself constituted a material change in the original contract and became a sufficient consideration for the extension payment.

The judgment appealed from is therefore reversed.

8 Cal.2d 329

PALIN v. SWEITZER et al.

Sac. 5058.

Supreme Court of California.
Feb. 24, 1937.

1. Tenancy in common 🔑15(10)

Evidence in partition suit *held* to support court's finding in favor of cotenant tendering issues of ouster, disseisin, and adverse possession (Code Civ.Proc. § 325).

2. Adverse possession 🔑19

For adverse possession of land used for cattle pasturage to ripen into title, entire tract need not be inclosed by fence, if fences constructed, with natural barriers, are sufficient inclosures to turn cattle (Code Civ. Proc. § 325).

3. Adverse possession 🔑25

Possession of land by tenants of one claiming title thereto by adverse possession was his possession (Code Civ.Proc. § 325).

In Bank.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action in partition by Frank E. Palin against Lewis H. Sweitzer and others. From a judgment for named defendant, plaintiff appeals.

Affirmed.

Bryce Swartfager, of Santa Rosa, for appellant.

Lowell Palmer and L. E. Johnston, both of Napa, for respondents.

SHENK, Justice.

In this action in partition the answer of one of the cotenants, Lewis H. Sweitzer, tendered the issues of ouster, disseisin, and adverse possession. The court found in his favor, and the plaintiff appeals.

The property consists of 240 acres of mountainous land in the northwesterly portion of Napa county. The pasturage of stock is the only adaptable surface use. These lands are, however, situate in a mineralized district where cinnabar ore has been found in paying quantities. The northerly and westerly boundaries of said lands are steep ridges whose summits are covered with dense brush. On the easterly and southerly sides the property is inclosed by fences, which together with natural barriers on the north and west are sufficient to turn stock when placed thereon for pasturage.

In 1898 the property was owned by Harriet Jane Ink, a widow. In that year, in consideration of money and development work to be done by the respondent and his associates, she agreed to convey to them a one-half interest in the property. By a deed executed pursuant to the agreement the respondent became a tenant in common with his associates and their common grantor, from whom the plaintiff holds by quitclaim.

The court found that since 1913 the respondent's acts of ownership had been open, unequivocal, and adverse to all persons, that he had the property assessed to himself as sole owner in 1914, and had paid all taxes levied against the property since that time; that his claim of sole ownership was known to his cotenants; that almost continuously from 1913 to 1931 he had by written instruments leased the property for pasturage or mining and had collected and retained the rentals for his own use without any objection on the part of his cotenants, who resided in the vicinity and were charged with knowledge of his notorious acts.

[1] The finding is supported by the testimony of the respondent and other witnesses. The evidence discloses that as early as 1913 the respondent told Mrs. Ink and his other cotenants that inasmuch as the property had been sold for delinquent taxes he had elected to redeem it; that the other cotenants had ceased to pay any attention to the property, and that he would thereafter claim it as his own; that since that time and until the commencement of this action in November, 1930, he had full, complete, absolute and independent control over the land. The court concluded that ouster or disseisin of his cotenants had been accomplished as contemplated by law (Oglesby v. Hollister, 76 Cal. 136, 18 P. 146, 9 Am.St.Rep. 177; 1 Cal.Jur., pp. 542 et seq.), and that adverse possession had ripened into title as provided by section 325 of the Code of Civil Procedure.

[2, 3] It was not necessary, as contended by the appellant, that the entire tract be inclosed by fence in order to comply with section 325 if, as here shown, the fences constructed, together with the natural barriers, were sufficient inclosures to turn cattle for pasturage. Goodwin v. McCabe, 75 Cal. 584, 17 P. 705. Possession by

the respondent's tenants was his possession. Weyse v. Biedebach, 86 Cal.App. 712, 261 P. 1086.

We find no error in the record.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; LANGDON, J.; SEAWELL, J.; CURTIS, J.; EDMONDS, J.

8 Cal.2d 364

PACIFIC COAST JOINT STOCK LAND BANK OF SAN FRANCISCO v. CLAUSEN et al.

Sac. 5004.

Supreme Court of California.

Feb. 26, 1937.

1. Infants 🔑111

Judgment against a minor not represented by a guardian is voidable by the minor upon reaching majority.

2. Guardian and ward 🔑129

Where infant defendant was over 14, and her duly appointed guardian was also a defendant, and service was made on the minor, it was not necessary that service should be made twice on the guardian, once as defendant and once as guardian of the minor (Code Civ.Proc. § 411).

3. Infants 🔑111

Where minor defendant, having duly appointed guardian, had no defense to action for foreclosure of mortgage, it was not necessary that guardian should procure counsel, file pleadings, or appear in court in order to represent the ward and preclude her from avoiding the judgment on reaching majority.

4. Infants 🔑111

Where minor nearly 19 years old, and having a general guardian, was served with summons in an action to foreclose a mortgage, and her mother, who was her guardian, and a sister were similarly served but made no defense, failure to require appointment of guardian ad litem or compel general guardian to make appearance did not entitle minor to avoid judgment upon reaching majority in absence of any claim that she had a valid defense.

◆

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by the Pacific Coast Joint Stock Land Bank of San Francisco against Petra Julia Clausen and others. From a judgment denying a motion by defendant Violet E. S. Clausen to set aside a judgment of foreclosure, she appeals.

Affirmed.

W. Coburn Cook, of Turlock, for appellant.

Edward Johnson, of Los Angeles, and Preston & Braucht, of Merced, for respondent.

LANGDON, Justice.

In 1931 plaintiff brought an action in the superior court of Merced county to foreclose a mortgage on land owned by the defendants. Defendant Violet E. S. Clausen was the owner of a one-fifth interest. Defendant Petra Julia Clausen, the mother of Violet Clausen, and the duly appointed guardian of her person and estate, owned an interest. A brother of Violet Clausen, and several other persons, also owned interests. Summons was personally served on all the defendants. None appeared, and their defaults were entered and a foreclosure decree rendered November 16, 1932. The property was then sold, and a commissioner's deed given to the purchaser January 3, 1934.

In 1934, when plaintiff sought to gain possession, defendant Violet Clausen moved to set aside the judgment of foreclosure on the ground that she was a minor of the age of 18 years and 10 months at the time of service, and that she was not represented by any guardian or guardian ad litem. The lower court denied the motion, and said defendant appealed.

[1, 2] The general rule that a judgment against a minor not represented by a guardian is voidable by the minor upon reaching majority is of course well settled. Field v. Hughes, 131 Cal.App. 144, 20 P.(2d) 990. However, it is not quite clear what constitutes such "representation." In the instant case, the statute governing service of summons (Code Civ.Proc. § 411), was fully complied with. Under that section, if the minor is under 14, service

must be made on him personally, and also on his parent or guardian; but "in all other cases to the defendant personally." Hence there is no jurisdictional defect in the present case. The appellant objects that her mother was not served twice, once as an individual defendant, and once as guardian of the appellant, but this, as the section shows, was not essential to jurisdiction of the appellant. Appellant's further objection is that her mother did not make an appearance on her behalf, and hence, though her guardian, did not represent her as such. We are not impressed with this argument. We do not understand the law to be that a guardian, having no defense in a suit against a ward, must nevertheless procure counsel and file pleadings or appear in court, at the expense of the ward's estate, in order to "represent" the ward. In the present case there is not the slightest indication that there was a meritorious defense to the foreclosure suit, and the decision of the guardian to default, which was also the decision of every other defendant, seems to have been a reasonable one.

[3, 4] It has been held in this state that even where the minor had no general guardian, the failure to appoint a guardian ad litem was not jurisdictional, but merely irregular, and that where it did not appear that the minor's interests were substantially prejudiced thereby, there was no reversible error. Thus, in King v. Wilson, 116 Cal. App. 191, 2 P.(2d) 833, a minor over 20 years of age sat through a trial, represented by counsel, and failed to disclose his nonage until after judgment. His request for a new trial was denied. See 22 Cal.L.Rev. 576. In the instant case we have a situation where a minor, nearly 19 years old, and having a general guardian, is served with summons in an action involving her property; the guardian, her mother, and her sister are similarly served; all parties apparently decide that there is no defense and they default; now she attacks the judgment without any showing that her guardian was negligent or fraudulent, and without any claim that a valid defense to the action existed at the time of suit.

We are of the opinion that if there was any error in failing to require the appointment of a guardian ad litem, or in failing to compel the general guardian to make an appearance in court, it was not prejudicial to any substantial right of the appellant, and hence did not constitute reversible error.

The judgment is affirmed.

We concur: WASTE, C. J.; EDMONDS, J.; CURTIS, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.

---

8 Cal.2d 361

WOODARD v. METROPOLITAN LIFE INS. CO. et al.

Sac. 5054.

Supreme Court of California.

Feb. 26, 1937.

1. Gifts 🔑49(1)

Evidence that insured said that he would give group policy to his sister, who asked to be named beneficiary, whereupon insured returned group policy and took out new life policy payable to sister, who paid premiums and had possession of policy for the two years preceding her death, together with insured's statements that he was going to give or had given policy to sister, *held* to justify inferences of intent to make gift and delivery of life policy.

2. Gifts 🔑49(3)

Direct evidence of delivery of subject of alleged gift, such as life insurance policy, *held* unnecessary; delivery being inferable from proof of possession by donee, together with donor's declarations indicating delivery.

3. Appeal and error 🔑996

Inference to be drawn from provisions of life policy reserving right to change beneficiary and specifying that beneficiary's interest should vest in insured if surviving beneficiary *held* to create no more than conflict with inferences from insured's declarations, made both before and after beneficiary's death, indicating that he had given policy to beneficiary, and hence lower court's finding must be sustained on appeal.

In Bank.

Appeal from Superior Court, Yolo County; J. G. Bruton, Judge.

Action by John D. Woodard, as executor of the last will of Mabel Woodard, deceased, against the Metropolitan Life Insurance Company and Grace Hanson, as administratrix of the estate of George O. Griffes, deceased. Judgment for plaintiff, and the last-named defendant appeals.

Affirmed.

C. C. McDonald, of Woodland, for appellant.

A. G. Bailey, of Woodland, for respondent.

LANGDON, Justice.

This is an action to enforce an alleged gift of a policy of life insurance.

George O. Griffes, the insured, first was insured under a group policy while an employee of the Shell Company, with a sister, Kate Lewis, as beneficiary. He left the employ of the company and went to live with this sister. He told her she could have the policy if she would pay the premiums, but she said that she could not, whereupon he stated that he would give it to his sister, Mrs. Mabel Woodard. Shortly afterward he spoke with Mrs. Woodard, who asked that he change the named beneficiary on the policy if she was to pay the premiums. Griffes instead returned the group policy and took out a new life policy, specifying Mabel Woodard as beneficiary. The policy reserved the right to change the beneficiary, the right to assign the policy, and further provided that, if the beneficiary died before the insured, her interest should vest in him, unless otherwise provided or indorsed on the policy.

Mabel Woodard died July 13, 1934. The insured died on February, 1935. Since Mrs. Woodard predeceased him, she lost all interest in the policy as beneficiary. However, her husband and executor, plaintiff herein, claimed the proceeds of the policy on the theory that the insured had made a gift of the policy to Mrs. Woodard during her lifetime, whereby she became the owner thereof. Defendant Grace Hanson, administratrix of the estate of the insured, opposed this claim. The defendant insurance company paid the money into court and was discharged from liability.

The lower court found that the insured had made the gift as claimed, and gave judgment for plaintiff. Defendant appeals, contending that the evidence is insufficient to prove a gift.

[1] The record shows that Mrs. Woodard paid $735.40 in premiums on the policy; and that the same was in her possession from July, 1932, until she died. Plaintiff, Kate Lewis, and Ed Dickey, a friend of the insured, testified to declarations of the insured, some to the effect that he was going to give the policy to Mrs. Woodard, and some later statements to the effect that he had given it to her. For example, after Mrs. Woodard's death, Kate Lewis asked the insured why he did not change the beneficiary's name to Mrs. Woodard, and the insured replied, "It will go in Mabel's Estate." There is no evidence that the insured claimed any interest in the policy after the transaction, and the witness Dickey testified that, though he had conversations with him regarding his property, he never mentioned the policy. The foregoing evidence, while it perhaps does not make a very strong case, is nevertheless sufficient, where there is little conflicting evidence, to justify the inferences of intent to make a gift and delivery. See Skellenger v. England, 81 Cal.App. 176, 253 P. 191; McEwen v. New York Life Ins. Co., 42 Cal.App. 133, 183 P. 373; Crane v. Reardon, 217 Cal. 531, 20 P.(2d) 49; 28 C.J. 681, § 87; 28 C.J. 659, § 60.

[2] Defendant argues that there is no evidence of delivery at all, and that the most that the plaintiff showed was possession of the policy by the purported donee, without any evidence as to how she obtained it. But under the authorities cited above direct evidence of delivery is not essential, and it is possible to infer it from proof of possession together with the donor's declarations indicating delivery.

Defendant also contends that the dates of the declarations show that they only referred to the group policy and not to the later individual policy. However, in speaking of the policy, the donor always dealt with the subject in general terms, without specifying either instrument, and the donative intent may be inferred as to the particular instrument which finally came into the possession of the donee.

[3] Defendant finally urges that the terms of the policy, reserving the right to change the beneficiary and specifying that the interest came back to the insured in the event of prior death of the beneficiary, shows conclusively that the insured did not intend to make a gift of the policy. But it does not appear that the insured, after death of the beneficiary, took any steps to

assert his interest; and the inference to be drawn from these formal provisions of the policy at most creates a conflict with the inferences from the donor's declarations. When such a conflict appears, the lower court's finding must be sustained.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; CURTIS, J; SEAWELL, J.; EDMONDS, J.

---

8 Cal.2d 303

UNION BANK & TRUST CO. OF LOS ANGELES v. SECURITY-FIRST NAT. BANK OF LOS ANGELES.

SAME v. CITIZENS NAT. TRUST & SAVINGS BANK OF LOS ANGELES.

L. A. 15983.

Supreme Court of California.

Feb. 19, 1937.

1. Bills and notes 🔑6

Under statute, check drawn to payee who may be actual existing person but who is not intended to have any interest therein is "bearer" paper, as respects forgery thereof (Civ.Code, § 3090, subd. 3).

[Ed. Note.—For other definitions of "Bearer," see Words & Phrases.]

2. Bills and notes 🔑6

Employee with authority to sign checks drawn on employer who obtained cashier's checks payable to parties designated by employee, for checks drawn on employer and signed by employee, was "person making checks so payable," and hence, under statute, cashier's checks were "bearer" paper, where employee never intended that proceeds of such checks should be delivered to payees designated therein (Civ.Code, § 3090, subd. 3).

[Ed. Note.—For other definitions of "Person Making it so Payable," see Words & Phrases.]

3. Principal and agent 🔑160½

Act, intent, and knowledge of employee with authority to sign checks drawn on employer, in obtaining cashier's checks payable to fictitious persons, for checks drawn on employer and signed by employee, were binding on employer, giving bank perfect defense to any claim made on it by employer, and making bank's refund to depositor merely a voluntary contribution not resting on any legal obligation (Civ.Code, § 3090, subd. 3).

4. Bills and notes 🔑6

Cashier's checks payable to fictitious persons which were obtained by employee with authority to sign checks drawn on employer, for checks drawn on employer and signed by employee, were "bearer" paper negotiable by delivery, and hence employee's indorsement on cashier's checks of names of such fictitious payees did not constitute "forgery" which would render bank in which employee deposited checks and which guaranteed prior indorsements, liable to bank issuing such checks (Civ.Code, § 3090, subd. 3).

[Ed. Note.—For other definitions of "Forgery," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Actions by the Union Bank & Trust Company of Los Angeles against the Security-First National Bank of Los Angeles and against the Citizens National Trust & Savings Bank of Los Angeles, which were consolidated for trial and were by stipulation combined for the purposes of this appeal. From the judgment, the plaintiff appeals.

Affirmed.

Prior opinion, 57 P.(2d) 1332.

Loeb, Walker & Loeb and Walter S. Hilborn, all of Los Angeles (Herman F. Selvin and Walter S. Hilborn, both of Los Angeles, of counsel), for appellant.

Jennings & Belcher, of Los Angeles, for respondent Security-First Nat. Bank of Los Angeles.

Mills, Hunter & Dunn and Edward C. Mills, all of Los Angeles. (Louis E. Kearney, of Los Angeles, of counsel), for respondent Citizens Nat. Trust & Savings Bank of Los Angeles.

PER CURIAM.

We granted a hearing and transferred this cause to this court after decision of the District Court of Appeal, Second Appellate District, Division 1, because we entertained serious doubt concerning the question of whether the cashier's checks here involved were in truth "bearer paper." There are respectable authorities relied upon by appellant which would sustain their contention to the contrary, but we have concluded that the better reasoning looks to the result reached by the District Court of Appeal. In the first place, it is to be observed that the faithless officer in this case was one of the cosigners of checks and that he was acting within his authorized capacity when designating the payees of the cashier's checks. Further, the rule discussed which converts what on its face appears to be negotiable instruments payable to a designated person into "bearer paper" is a limitation upon the liability of depositories because otherwise those who put checks and drafts into circulation would have it in their power by collusive understandings incapable of proof to conduct illegitimate transactions and hold the depository liable upon proof of the forgery of the name of a payee never intended in fact to be a payee. An extended discussion of the case is not necessary by reason of the exhaustive opinion in the Goodyear Case (Goodyear Tire & R. Co. v. Wells Fargo Bank, etc., Co., 1 Cal.App.(2d) 694, 37 P.(2d) 483) referred to in the opinion of the District Court of Appeal, speaking through Mr. Justice Pro Tempore White, which we adopt as our opinion herein, as follows:

"In the court below these actions were consolidated for trial, and are by stipulation combined for the purposes of this appeal.

"Although there are two defendants, the facts and issues raised are so similar that the cases may be treated as if there were but one action. The two actions will therefore, except when otherwise necessary, be referred to in the singular, such designation, for the purposes of this decision, including both actions.

"Appellant sued respondent to recover the principal amount of 22 cashier's checks aggregating $17,965.26, all drawn by appellant upon itself as drawee, and delivered to one Guy G. Williams.

"The controversy arises out of the following facts: Guy G. Williams, during the period here in question, from March 28, 1930, to November 22, 1932, was a director and the assistant secretary of the Walter H. Leimert Company, and a director and the assistant secretary of the Westside Land Company. These companies maintained bank accounts with the appellant, Union Bank. Under the arrangement existing between said companies and the appellant, Union Bank, two signatures were required on all checks drawn by said companies upon their respective accounts with the appellant, Union Bank. Williams was one of the authorized signers of checks for both companies. About December 1, 1932, Williams' employers discovered that he had misappropriated corporate funds. Of the amount of such defalcations that are in question here, Williams accomplished his perfidy in the following manner—he would prepare checks to the order of the appellant, Union Bank, drawn upon the accounts of his employers, and signing them himself, procured the necessary countersignatures. These checks, properly signed and countersigned, he presented to appellant, Union Bank, and, upon a written requisition signed by him on behalf of his employers, procured cashier's checks drawn by appellant upon itself to the order of the payee designated by Williams in the requisition. The payees of such cashier's checks upon which this action is predicated were H. M. Hawkins and Harry Christensen, both actual persons, either then or formerly known personally to Williams, but to whom Williams never delivered any of the checks in question. Instead, Williams himself in each instance indorsed the checks, first in the name of the payee thereof and then in his own name, and deposited the checks so indorsed to his own account in the respondent banks, after which the latter bank stamped each check with the clearing house indorsement, 'all prior indorsements guaranteed,' and received from appellant, Union Bank, the amount of each of the aforesaid 22 checks, for which total amount, with interest, appellant sued respondent. It is conceded that at no time did Williams make any disclosure to the appellant, Union Bank, that he in fact intended to appropriate to himself the proceeds of the cashier's checks delivered to him, and appellant, Union Bank, made payment to respondent upon the faith of the guaranty of prior indorsements stamped on the checks by respondent bank, making no investigation to determine whether the signature of the original payee as indorsed on the checks was genuine. It further appears that during the entire period of Williams' defalcations, appellant, Union Bank, rendered monthly statements to Williams' employers, and as a part thereof returned to said employers all canceled checks, including those upon which the cashier's checks herein mentioned were obtained. After discovery of Williams' defalcations, appellant, Union Bank, without litigation, paid to Williams' employers the amount obtained by Williams through his aforesaid misappropriation of the cashier's checks. The trial court rendered judgment in favor of respondent, and from that judgment appellant prosecutes this appeal.

"Appellant assails the judgment on several grounds, and we will first discuss the question raised by appellant as to whether the cashier's checks were bearer paper, negotiable by delivery, and whether the indorsement thereof by Williams of the payee's name constituted forgery of the character that operated to bind respondent; and also whether appellant was liable to its depositors for the issuing or cashing of these cashier's checks, or was a mere volunteer in making refund to its depositors without resorting to any defense it might have to an action by such depositors. If respondent's contentions on these questions are upheld, such ruling, in our opinion, would be determinative of this appeal.

"The first question, therefore, is: When is a check a 'bearer' check? The applicable statutory provision is subdivision (3) of section 3090 of the Civil Code, which reads as follows:

"'The instrument is payable to bearer— * * *

"'(3) When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable.'

[1] "The outstanding case on this subject (Seaboard Nat. Bank v. Bank of America, 193 N.Y. 26, 85 N.E. 829, 831, 22 L.R.A. [N.S.] 499) lays down the rule that the intention to make the instrument payable to a fictitious person 'must * * * exist as an affirmative fact in the mind of the drawer of a draft at the time of its delivery.' In the construction of this particular language it has been recognized that 'fictitious or nonexisting person' literally construed is not sufficiently embracive to cover all situations in which the instrument is 'bearer' paper within the meaning of that language. Thus it has been definitely established, and the rule has been consistently followed, that a check drawn to a payee who may be an actual existing person but who is not intended to have any interest therein is 'bearer' paper. In Bank of England v. Vagliano Bros., L.R. [1891] A.C. 107, at page 152, we find the following: '* * * Where, then, the payee named is so named by way of pretense only, without the intention that he shall be the person to receive payment, is it doing violence to language to say that the payee is a fictitious person? I think not. I do not think that the word "fictitious" is exclusively used to qualify that which has no real existence.'

"In Norton et al. v. City Bank & Trust Co. (C.C.A.) 294 F. 839, 844, we find the following: 'Nevertheless, the law is now well settled that a negotiable instrument is drawn to a fictitious payee whenever the payee named in it has no right to it, and its maker does not intend that such payee shall take anything by it.' And again, in Snyder v. Corn Exchange Nat. Bank, 221 Pa. 599, 606, 70 A. 876, 878, 128 Am.St. Rep. 780, the court says: 'The intent of the drawer of the check in inserting the name of a payee is the sole test of whether the payee is a fictitious person. * * * It is clear, then, that, when the Legislature declared that a check payable to a "fictitious or nonexisting person" is to be regarded as payable to bearer, it meant a fictitious person to be one who, though named as payee in a check, has no right to it, or the proceeds of it, because the drawer of it so intended, and it therefore matters not whether the name of the payee used by him be that of one living or dead, or of one who never existed.' Citing Phillips v. Mercantile Nat. Bank, 140 N.Y. 556, 35 N.E. 982, 23 L.R.A. 584, 37 Am.St.Rep. 596, Coggill v. American Exchange Bank, 1 N.Y. 113, 49 Am.Dec. 310. This line of reasoning was quoted with approval by this court in an exhaustive, learned, and well-considered opinion prepared by Mr. Justice Roth sitting pro tempore in this court, in the case of Goodyear Tire & R. Co. v. Wells Fargo Bank & Union Trust Co., 1 Cal.App.(2d) 694, 700, 701, 702, 37 P.(2d) 483, 493.

[2] "Therefore, when, as in the instant case, Williams never intended that the proceeds of the cashier's checks should be delivered to the payees therein named, it became immaterial whose name or what name he directed be inserted.

"But, says appellant, the faithless employee, Williams, did not make or sign the cashier's checks in question, nor was he an employee of the appellant, Union Bank, which appears as drawer and drawee on the checks in question; that Williams did not sign, nor had he any authority to sign, any cashier's checks. But the answer to this contention lies in the fact that, while it is true that the maker of the cashier's checks in question was the appellant, Union Bank, still it was the faithless employee's (Williams') intent that must govern, because the bank made the cashier's checks payable to the parties designated by Williams. The appellant's intent was to make the cashier's checks payable to the parties that Williams intended them to be payable to. Williams, therefore, was the real drawer and 'the person making it so payable' as to each cashier's check.

[3, 4] "Remembering that Williams was authorized to sign checks drawn on his employer's account at appellant, Union Bank, he therefore, within the scope of his authority, presented to appellant, his employer's banking depositary, checks of his employer drawn upon and payable to appellant. With these checks he purchased the cashier's checks sued upon; all of which were issued by appellant Union Bank upon the written requisitions of Williams' employer, signed by the former on behalf of the latter. The appellant, Union Bank, followed the instructions implicitly; it executed its cashier's checks to a payee designated by Williams, with the former of whom it was unacquainted, of whom it had no knowledge, and concerning whom it had no intent. Regarding the payee named, appellant had no interest save that of following Williams' instructions, and the latter's intent was that a fictitious payee be named. Authorized as Williams was to sign checks drawn on his employer's depositary, if he had cashed such checks and obtained money, surely it would not be contended that the depositary would be liable to the depositor. How, therefore, can the depositary be held liable when, instead of obtaining cash on the checks, the faithless employee obtained cashier's checks? The intended fictitious payee was the creature of Williams' mind, and, while the appellant, Union Bank, was the nominal maker of the cashier's checks, still Williams was the person who actually drew the bill and was the person making the cashier's checks payable to a fictitious payee; and, since he acted within the scope of his authority, his act, intent, and knowledge, although adverse to and a fraud upon his principal, are nevertheless binding upon the latter. In paying out in cashier's checks, appellant did what was intended by Williams, an intent binding upon his employer; and in our opinion, therefore, under the authority of the Goodyear Case, supra, appellant had a perfect defense to any claim made against it by its depositor.

"In the case of Rancho San Carlos, Inc., v. Bank of Italy Nat. Trust & Sav. Ass'n, 123 Cal.App. 291, 11 P.(2d) 424, 426, 'the person making it [the check] so payable' was not even a signer. The nominal maker signed a blank check and delivered it to an employee, thereby clothing the employee with power to designate the payee and fix the amount. The nominal maker did not know that the check was drawn to a fictitious payee. The trusted employee did. The court held the employee to be 'the person making it [the check] so payable', saying, 123 Cal.App. 291, at page 295, 11 P.(2d) 424, 426: '* * * and in principle the same rule should apply where the person who actually makes the check payable is expressly or impliedly authorized to complete it in that manner.' The court then goes on to cite other cases in which the name of the payee was left blank and afterwards inserted, in which it was held that the checks became 'bearer' paper upon the insertion of a fictitious payee by one other than the signer of the check.

"To our minds, it is at once apparent that the Goodyear Case and the instant case are identical down to the point of the presentation of the employer's checks to the appellant, Union Bank, by Williams. In the Goodyear Case the defrauding agent demanded and obtained from the depositary the amounts of the corporation checks in cash. In the instant case Williams elected to receive payment by means of a cashier's check in which he himself designates, and the bank writes in, a payee's name which is 'fictitious.' We thus see that the only difference between the cases is that in one the defaulting agent asked for and received cash, and in the other he asked for and received a cashier's check bearing a fictitious name.

"Appellant attempts to distinguish the Goodyear Case from the instant case, arguing that the checks here sued upon were not the checks of the depositor, but were cashier's checks purchased with the checks of the depositor; and further, upon the ground that Williams' fraud, while binding upon his employer, was not binding upon the appellant, Union Bank, because Williams was the officer and agent, not of appellant, but of the appellant's depositor. In our opinion, the attempted distinction is without merit. Under the authority of the Goodyear Case, supra, the acts of the officer (Williams) of the depositor are held to be the acts of the depositor. In that case it was held that the officer of the depositor bound the depositor in procuring the payment of checks by the bank, although the checks were made to fictitious payees and were indorsed by the officer with the names of such fictitious payees, and although the officer was acting in fraud of his employer. We therefore conclude that the cashier's checks in question here were 'bearer' paper, negotiable by delivery, and the indorsement thereon by Williams of the name of a 'fictitious' payee did not constitute forgery of the character that operates to bind respondent.

"In the Goodyear Case, supra, the depositor was denied relief in a case where a faithless employee caused checks to be issued to a fictitious payee, indorsed the latter's name thereto, and obtained the amount of such checks from the depositor's bank. By the same token, we feel that in the instant case, where, instead of obtaining cash from the depositor's bank, the faithless employee, upon similar checks which he was authorized by his employer to sign, obtained cashier's checks, there rested upon the bank no obligation to restore to its depositor moneys so paid out, and the restoration by appellant, Union Bank, to the depositor of such sums constituted a voluntary contribution upon the part of such bank, not resting upon any legal obligation in the premises. In commenting upon such a rule, this court, in the Goodyear Case, supra, quoting with approval from Norton v. City Bank & Trust Co. (C.C.A.) 294 F. 839, 845, said that it is 'neither arbitrary nor fanciful, but is both just and equitable. The owner of the funds trusts its agent. It tells the bank to pay out its funds on his order. As between him and the bank, the latter is bound to pay whomsoever he will. If any particular check is paid to a person whom he intended to receive it, the bank has done precisely what it was instructed to do. In such cases as that here involved, it is true that the agent has proved false to his trust, and some innocent person must be the loser. Should it not be the one who gave him the power which he misused?' That the faithless employee obtained cashier's checks, rather than cash as in the Goodyear Case, from the defrauded employer's bank, does not, in our opinion, alter the rule.

"In view of the conclusions reached, as aforesaid, it becomes unnecessary to discuss or decide other questions raised on this appeal."

For the foregoing reasons, the judgment appealed from is affirmed.

* * *

19 Cal.App.2d 356

HAMMERSLEY v. SUPERIOR COURT IN AND FOR SAN MATEO COUNTY.

Civ. 10481.

District Court of Appeal, First District, Division 1, California.

Feb. 26, 1937.

Prohibition 🔑9

Prohibition will not lie where lower court has jurisdiction to determine question involved.

Petition by Ruth B. Hammersley for a writ of prohibition directed to the Superior Court of the State of California, in and for the County of San Mateo.

Writ denied.

Simeon E. Sheffey, of San Francisco, for petitioner.

PER CURIAM.

Petition for prohibition. The lower court has jurisdiction to determine the question involved. Prohibition therefore will not lie. Bullard v. Bullard, 189 Cal. 502, 506, 209 P. 361; Kelsey v. Miller, 203 Cal. 61, 88, 263 P. 200.

Writ denied.

19 Cal.App.2d 305

Ex parte NIELSEN.

Cr. 1946.

District Court of Appeal, First District, Division 1, California.

Feb. 23, 1937.

Divorce 🔑269(9)

Where husband had secured divorce for fault of wife and there was no issue of marriage, he was not in contempt for failure to pay alimony, since order for alimony was unauthorized and void and there could be no contempt for its violation.

◆

Proceeding in the matter of the application of Hanna Nielsen for a writ of habeas corpus for and on behalf of Gustaf Stephen Nielsen, her son, who was held by the sheriff of the City and County of San Francisco for failure to comply with terms of an order concerning payment of alimony.

Petitioner discharged and bail exonerated.

Samuel D. Hamburg, of San Francisco, for petitioner.

Raymond D. Williamson and Don Carlos Barrett, both of San Francisco, for respondents.

TYLER, Presiding Justice.

Petition for habeas corpus on behalf of Gustaf Stephen Nielsen. It appears therefrom that the said Nielsen is held by the sheriff of the City and County of San Francisco for failure to comply with the terms of an order concerning the payment of alimony. It further appears that the action for divorce was brought by Nielsen against his wife on the ground of cruelty. Defendant Alice McAvoy Nielsen filed her answer and a cross-complaint to said action. Thereafter Nielsen filed an answer to the cross-complaint. The action was brought on for trial and judgment went in favor of plaintiff Nielsen and against defendant Alice, his wife, on the ground of extreme cruelty on the part of the wife. There was no issue of the marriage. By the interlocutory decree of divorce, the court awarded the community property to the defendant wife and ordered Nielsen as plaintiff to pay to her the sum of $40 per month for a period of six months, and thereafter the further sum of $30 per month for a like period, as and for alimony and support, and the further sum of $25 as and for counsel fees. The attorney's fee was paid, but Nielsen, having failed to comply with the order with reference to alimony, was cited to show cause why he should not be punished for contempt of court in failing so to do. Upon a hearing he was adjudged guilty of contempt and ordered imprisoned in the county jail until such time as he should comply with the order.

It is petitioner's claim in support of the present application that the court having granted a divorce to plaintiff Nielsen for the fault of the wife, there is no authority in law by which the court can at the same time compel him to pay her alimony; that as such order is void there can be no contempt for its violation. We see no escape from this contention. Lampson v. Lampson, 171 Cal. 332, 153 P. 238; In re McKenna, 116 Cal.App. 232, 2 P.(2d) 429; McKannay v. McKannay, 68 Cal.App. 701, 230 P. 214.

The petitioner is discharged and his bail exonerated.

We concur: CASHIN, J.; KNIGHT, J.

In re GRIVEL'S ESTATE. *

GRIVEL v. WARDLAW.

Civ. 11186.

District Court of Appeal, Second District, Division 1, California.

Feb. 24, 1937.

Hearing Granted by Supreme Court April 22, 1937.

1. **Executors and administrators** 🔑465

Any property of deceased person which comes under control of administrator while he is acting as such, even though property belongs to partnership of which decedent was member during his lifetime, must be accounted for by such administrator in course of his administration of such estate.

2. **Executors and administrators** 🔑507(2)

Order charging estate of administrator of estate of deceased member of partnership with sum of $17,500 *held* sustained by findings that administrator came into possession of cotton belonging to partnership under agreement with surviving partner that he would pay $17,500 note owed by partner-

---

*For subsequent opinion see 74 P.2d 759.

ship but failed to do so, and proceeds from sale of cotton were paid out by administrator's agent for other purposes.

◆

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Proceeding in the matter of the estate of Rene Grivel, deceased, by Leon R. Grivel, administrator with the will annexed of the estate of Rene Grivel, against John R. Wardlaw, administrator of the estate of Charlie T. Wardlaw, deceased, former administrator with will annexed of the estate of Rene Grivel. From an order making certain charges against the estate of Charlie T. Wardlaw, and against his sureties, as administrator with the will annexed of the estate of Rene Grivel, John R. Wardlaw appeals.

Affirmed.

Sherman Anderson and Guy Richards Crump, both of Los Angeles, for appellant.

Edgar T. Fee and Franklin J. Cole, both of Los Angeles, for respondent.

YORK, Justice.

The decisions of the Supreme Court in this same estate, entitled Matter of the Estate of Grivel, Deceased, appearing in 199 Cal. 351, 249 P. 184, and in 208 Cal. 77, 280 P. 122, and the decision of this court in the same estate appearing in 128 Cal.App. 186, 17 P.(2d) 172, reference to which decisions is hereby made, make unnecessary a statement in detail of the matters which have already been determined. The issue left undetermined by these decisions is that which relates to the accounting for 271 bales of cotton. In fact, it was so conceded at the time of the hearing in the trial court. As we see it, there is no need to discuss any of the questions raised, except as to the propriety of the order made by the trial court relating to these bales of cotton.

The trial court found that Charlie T. Wardlaw, the deceased administrator with the will annexed, received said bales of cotton during his lifetime and while he was acting as administrator with the will annexed of the estate of Rene Grivel, deceased, and the order of the trial court from which this appeal is taken charges John R. Wardlaw, as administrator of the estate of Charlie T. Wardlaw, deceased, on his supplemental and amended account with the sum of $17,500 with interest, and decrees that "said sum is chargeable against the Estate of Charlie T. Wardlaw, deceased, and against his sureties as Administrator with the Will Annexed of the Estate of Rene Grivel, deceased."

Appellant claims that the findings of fact do not support the conclusions of law or the judgment that Wardlaw, as administrator, or otherwise, came into possession of any property of the Grivel estate in the form of cotton, or the proceeds from the sale of cotton, and contends that the findings conclusively show that the cotton received by Wardlaw was at all times until sold the property of the partnership of Grivel and De Nancy and not the property of the Grivel estate.

[1] Any property of a deceased person which comes under the control of his administrator, while he is acting as such, even though the property belongs to a partnership of which the decedent was a member during his lifetime, must be accounted for by such administrator in the course of his administration of such estate.

Those portions of the findings of fact made by the trial court which are material to the question here involved are as follows:

First: "That Charlie T. Wardlaw, during his lifetime and while he was acting as administrator with the will annexed of the Estate of Rene Grivel, deceased, received and came into custody as such administrator of 271 bales of cotton, which were the property of Rene Grivel and Henri De Nancy, a partnership."

Second: "That Henri De Nancy, as surviving partner of the partnership of Grivel and De Nancy, entered into an oral agreement with Charlie T. Wardlaw, as Administrator with the will annexed of the Estate of Rene Grivel, deceased, who was also at that time the general manager of the Colorado River Land Company, in which it was agreed that De Nancy would deliver to Wardlaw, administrator as above stated, every alternate bale of cotton harvested from the partnership sub-lease subsequent to the death of Grivel, without charge for picking, hauling, ginning or pressing, and that Wardlaw would accept such delivery of each alternate bale of cotton so harvested and delivered as full payment of land rentals owing the 'Long Ranch' and/or their lessees or landlord, and also that out of said cotton the said Charlie T. Wardlaw, Administrator, would satisfy in full the note of $17,500 owing the Globe Oil Mills Company, a corporation. That said oral agreement was performed by Henri De Nancy, by the delivery of 251 bales of cotton to O. G. Hopkins, pursuant to instructions given by Charlie T. Wardlaw. That Charlie T. Wardlaw procured the delivery to himself as such administrator with the will annexed, an additional 20 bales of cotton belonging to the partnership from the Globe Oil Mills Company, a corporation, who were then holding it for the account of the partnership, upon the assurance of Charlie T. Wardlaw, Administrator, that he would pay the partnership note of $17,500.00, from the proceeds of the sale of the partnership cotton."

Third: "That 271 bales of cotton, the property of the partnership of Grivel and De Nancy, so coming into the hands of Charlie T. Wardlaw, as Administrator of the Estate of Rene Grivel, deceased, were pursuant to his instructions shipped in his name and sold on the New Orleans market on or about the month of March, 1919, for a total net return of $39,906.00. That said monies were deposited in the First National Bank of Calexico, California, in the name of O. G. Hopkins."

The findings then proceed to show that neither the decedent Grivel, nor the partnership of Grivel & De Nancy was indebted to Hopkins, and that De Nancy dealt with Hopkins as the agent, employee, and representative of Charlie T. Wardlaw, administrator; that none of the proceeds of the sale of the partnership cotton was applied to the payment of the $17,500 note or rentals owing the "Long Ranch," but that the whole of said sum of $39,906 was paid out by said Hopkins to other persons and for other purposes, "all with the full knowledge and consent of Charlie T. Wardlaw, all of which was in violation of the agreement of said Charlie T. Wardlaw, with the said Henri De Nancy, surviving partner of Grivel and De Nancy, co-partners."

It was further found that the Globe Oil Mills Company brought suit against Henri De Nancy to enforce collection of the partnership note in the sum of $17,500; that judgment was recovered by the plaintiff in said action, and the sum of $13,587.19, the property of the partnership of Grivel & De Nancy on deposit in certain banks, was attached and applied on account of said judgment indebtedness. No creditors' claims for rentals owing, or for or on account of said promissory note for $17,500 were ever filed by "Long Ranch," Colorado River Land Company, or the Globe Oil Mills Company, in the matter of the estate of Rene Grivel, deceased.

[2] The evidence adduced at the trial of this action was conflicting. However, there was sufficient evidence to support each of the findings criticized by appellant. The findings are sufficient to support the "order and decree" rendered; therefore, the "order and decree" appealed from is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

COPP v. MILLEN et al. *

Civ. S. C. 20.

District Court of Appeal, Second District, Division 1, California.

Feb. 26, 1937.

Hearing Granted by Supreme Court April 26, 1937.

Mortgages 🔑186(5)

In assignee's suit to foreclose mortgage, finding that at time assignee satisfied original mortgage and accepted new note and mortgage sued upon she had actual notice of unrecorded contract of sale executed by mortgagor *held* supported by evidence rendering unrecorded contract superior to new mortgage (Civ.Code, § 1217).

◆

Appeal from Superior Court, Los Angeles County; Arthur Coats, Judge.

Action by Cora Lord Copp against Vellzora Millen and Winfield Russell. Judgment for defendant Russell, and plaintiff appeals.

Affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

Walker R. Flint, of Los Angeles, for respondent.

WHITE, Justice pro tem.

This is an action to foreclose a mortgage, dated September 10, 1929, which was executed by defendant Vellzora Millen to secure a note for $1,458.41 in favor of appellant as wife of Andrew J. Copp, Jr

---

*For subsequent opinion see 77 P.2d 1093.

The mortgage was recorded October 15, 1929, with instructions that when recorded it be returned to Andrew J. Copp, Jr. The defendant Vellzora Millen became the owner of the real property in question, under grant deed from said Andrew J. Copp, Jr., on July 15, 1923; the latter at the same time taking back from the purchaser, as security for the purchase price, a mortgage and trust deed covering the property in the respective amounts of $1,250 and $885.58. Both of these last-named instruments were recorded September 8, 1923. Thereafter, on November 1, 1923, the defendant Vellzora Millen entered into a contract with respondent Winfield Russell, under the terms of which Vellzora Millen agreed to sell the property to respondent Russell for the sum of $3,500, payable $750 upon execution of the agreement and $35 or more monthly until the entire sum of $3,500 had been paid. This agreement was never recorded. Respondent Russell went into possession of the property about January 1, 1924, remaining in possession thereof continuously, with the exception of several months in 1929, when he was in the East, but during his absence the property was rented by him. Respondent Russell complied with the terms of his contract and made payments thereunder in full, completing said payments on May 4, 1931.

On May 7, 1927, Andrew J. Copp, Jr., the holder of defendant Vellzora Millen's notes, mortgage and deed of trust, assigned the same to his wife, Cora Lord Copp, appellant herein. The record indicates that Mrs. Millen failed to make her payments, and, when the statute of limitations was about to bar the two notes, appellant, in September, 1929, agreed with Mrs. Millen to renew said notes. Accordingly, on October 15, 1929, appellant caused a satisfaction of said mortgage and a reconveyance under said deed of trust to be recorded, taking from defendant Mrs. Millen on the same day a new note, which appellant contends was for the unpaid balance due on the purchase price notes, in the amount of $1,458.41; this last-mentioned note being secured by a mortgage on the real property here in question which was recorded October 15, 1929. The satisfaction and reconveyance, it will be noted, were recorded nearly six years after the execution of the unrecorded contract of sale and purchase between defendant Mrs. Millen and respondent Russell. The recitals in the release of the mortgage and the reconveyance under the deed of trust declared that the debts due under the mortgage and deed of trust were paid. Appellant produced testimony at the trial that such recitals were made by mistake and inadvertence on the part of the parties signing the instruments, and that the new note of September 10, 1929, upon which this lawsuit was predicated, was for the balance remaining unpaid on the original two notes, and was executed for the purpose of granting to defendant Mrs. Millen an extension of time within which to liquidate said obligations. The action now before us, instituted May 25, 1934, was commenced to foreclose the last-named mortgage of September 10, 1929. The trial court rendered a personal judgment in favor of plaintiff and against defendant Vellzora Millen, the maker of the note, but denied to plaintiff the right to foreclose her mortgage as against defendant Russell, decreeing that the right of defendant Russell to possession and ownership of the real property in question was superior to and prior to any rights of plaintiff by virtue of her last-named mortgage, of September 10, 1929. From the judgment rendered in favor of defendant Russell plaintiff prosecutes this appeal.

In urging a reversal of the judgment, appellant presents several grounds, but we shall first consider her claim that the trial court erred in holding that at the time she satisfied the original mortgage and trust deed and accepted the note and mortgage sued upon, she had actual notice of the unrecorded contract of sale of the property in question between defendant Mrs. Millen and respondent Russell, and that said contract was binding upon appellant. We do this because, in our opinion, if such holding of the trial court finds legal support in the evidence, it is determinative of this appeal. Section 1217 of the Civil Code declares: "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof." In the matter before us we have the simple and familiar case of the owner of real property executing two conflicting instruments affecting it, both for a valuable consideration; the latter of which instruments in date of execution is recorded before the former. The statutory rule in such cases is that the right of the holder of the second instrument, first recorded, is superior, unless the holder of the second instrument had notice of the existence of the rights of the holder of the first, unrecorded, instrument.

Randall v. Allen, 180 Cal. 298, 299, 300, 180 P. 941. It is apparent from the foregoing facts that the all-important and controlling point in the case was that of notice on the part of appellant of the rights of respondent under his prior but unrecorded sale agreement. If appellant had such notice, then respondent's contract would be superior to the former mortgage, otherwise it would not.

We have examined the record and find therein evidence of sufficient substantiality, if believed by the trial court, to amply support a finding that appellant did have actual notice of respondent's rights under his contract. The defendant Mrs. Millen testified that she paid to Mr. Copp part of the down payment of $750 made by respondent and turned over to Mr. Copp all of the monthly instalments received by her under respondent's contract. This witness also testified: "At one time, while Mr. Russell was away a few months, I got behind in my payments to Mr. Copp. I told Mr. Copp as soon as Mr. Russell paid me I would make up the payments. I do not know when that was for sure, but it was in 1928 or 1929." This witness also testified that on another occasion she was present in Mr. Copp's office with her sister-in-law, Cora Saubert, and respondent Russell, at which time she introduced Mr. Russell to Mr. Copp in the reception room of the latter's office, saying, "This is the man I have sold lot fifteen to." She also testified: "I told Mr. Copp that I thought I had made a good deal with Mr. Russell and that I had been turning over his payments to him. I had told Mr. Copp before this about selling the place to Mr. Russell. I don't know how long after I sold to Mr. Russell before I told Mr. Copp." The witness Mrs. Millen was corroborated in this testimony by evidence given by Cora Saubert and respondent Russell. There is no question but what Mr. Copp was appellant's agent in this transaction, because the latter testified: "I left the entire details to my husband. * * * My husband acted as my agent. I did not tell him what to do. What he did was all right with me."

While it is true that Mr. Copp in his testimony states that he does not recall the conversations above mentioned, nevertheless he does not deny they occurred. In our opinion, the evidence above quoted, if believed by the court, and apparently it was, clearly shows that defendant Mrs. Millen did discuss with Mr. Copp, appellant's agent, at various times, the sale to Russell and the fact that Mrs. Millen was getting monthly payments from Russell under her contract for the sale to him of lot 15, which money she was turning over to Mr. Copp.

In addition to the foregoing, we have the undisputed evidence that from approximately the time when the unrecorded contract of sale to respondent Russell was executed, up until the commencement of this action, respondent had exclusive and uninterrupted possession of the property in question, and that such possession was open, notorious, and visible; because, with the exception of a few months when respondent was in the east, he personally occupied the premises in question. This, in our opinion, was possession of a character which would put a prudent person upon inquiry that respondent Russell, rather than defendant Mrs. Millen, was the owner or had rights in the premises. If respondent be charged with notice by reason of the recordation of the original mortgage and trust deed, then by the same token he was entitled to assume that the recitals contained in the releases of said instruments, to the effect that the debts represented thereby were liquidated, were correct. That respondent had no actual notice of any rights or interests claimed by appellant or her husband is manifest from his testimony, as follows: "The first that I heard that Mr. Copp claimed an interest in this property was when I made my last payment on my contract." And again, "I do not know anything about the execution of this mortgage or its recordation. I never recorded my contract; it was left at the bank. * * * I never received any word from either Mr. Copp or Mrs. Millen about the claim made here, until after I demanded my deed."

The foregoing conclusions at which we have arrived make it unnecessary to discuss or decide other points raised.

The judgment appealed from is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

19 Cal.App.2d 376

COLENG v. RAMSDELL et al.

Civ. 1655.

District Court of Appeal, Fourth District, California.

Feb. 26, 1937.

Rehearing Denied March 25, 1937.

Hearing Denied by Supreme Court April 26, 1937.

1. Automobiles ⚷194(2)

In action against automobile dealer for injuries arising from negligent operation of automobile by auditor employed by dealer, that dealer had right to discharge auditor at any time was not controlling as to whether auditor was independent contractor or servant, where auditor also had right to terminate relationship.

2. Master and servant ⚷318(1)

There may be a general control arising from an interest in the final result of employment which does not indicate a master and servant relationship, where such right of control relates only to result and is so restricted or limited that it does not apply to manner or means by which work is accomplished.

3. Automobiles ⚷194(2)

Auditor employed by automobile dealer to audit books and perform related work monthly in two cities for agreed compensation without fixed time for performing work or definite period of employment was an "independent contractor" and dealer was not liable for auditor's negligent operation of automobile in going to one of two cities, notwithstanding dealer occasionally requested auditor to visit such city, since dealer merely had interest in result of work, and had no right to control or direct manner of performance.

Whether one is "independent contractor" or "servant" largely depends upon whether other party has right of control over means employed to accomplish work or whether he is interested only in result of that work. When one is performing work in which another is beneficially interested, latter is permitted to exercise certain measure of control for definite and restricted purpose without incurring responsibilities or acquiring immunities of a "master" with respect to person controlled, for control of master must reach into details of performance and reserve to master right to direct manner in which details are to be carried out.

[Ed. Note.—For other definitions of "Independent Contractor," "Master" and "Servant," see Words & Phrases.]

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by George Coleng against R. V. Ramsdell and another. From a judgment for plaintiff, defendant O. L. Cowen appeals.

Reversed as to appellant.

Parker & Stanbury, Harry D. Parker, Raymond G. Stanbury, and Vernon W. Hunt, all of Los Angeles, for appellant.

Wilson & Coughlin, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for personal injuries. The plaintiff alleged that he was struck by an automobile owned and driven by the defendant Ramsdell, who was alleged to have been the agent and employee of the defendant Cowen. A jury returned a verdict in favor of the plaintiff and against both defendants, and the defendant Cowen has appealed.

The appellant was a dealer in Ford automobiles in San Bernardino with a branch place of business in Barstow. Ramsdell, who was an auditor, had performed certain auditing services for Cowen for some eight years prior to 1934. For approximately one year, including most of 1934, he acted as office manager for the appellant in San Bernardino at a regular salary, during which time he did no auditing work. After about a year in that capacity he decided to return to his independent audit practice and agreed with the appellant that he would continue the auditing service which he had rendered prior to the time he worked as office manager. About that time, and on January 8, 1935, he drew up and signed an agreement which was accepted by Cowen, reading as follows:

"In accordance with our conversation I propose to audit San Bernardino books monthly beginning November at the former charge of $25.00 per month, spending as much time as necessary to give you satisfactory results.

"I also propose to keep and audit Barstow books as at present for a monthly charge of $35.00 per month. Any additional branch setups which may added to the organization in the future would be handled by me in the same manner as Barstow except possibly a small variation in the monthly charge to compensate for difference in size."

Cowen employed another office manager, and the new arrangement was in effect at the time of the accident, on September 14, 1935. Ramsdell took up his former audit practice, auditing books for other firms as well as the appellant. With respect to the San Bernardino business of the appellant, Ramsdell made monthly "test" audits or "checks" and occasionally made special reports, compiled lists of accounts receivable, and "took off this or that" as requested by the appellant. Similar auditing work was done in connection with the Barstow office and, in addition, certain reports were mailed from Barstow to Ramsdell's home in San Bernardino. At his own convenience he would post these into a set of books which he kept at his home. All of this work was done by Ramsdell at such times as he chose either at home, at the San Bernardino office, or at the Barstow office, and sometimes on evenings, Sundays, or holidays. There was no stated time when he should do the work, although he was supposed to get out a report for the appellant every thirty days, usually between the 10th and the 15th of the month. The appellant's work usually had precedence over other work during that time and, if the report was not out by the 15th, he continued until the report was completed. On several occasions the appellant went to Ramsdell's home in the evening and asked him to make out a special report, which Ramsdell usually did. On some occasions when such a report was asked for Ramsdell informed the appellant that he was unable to do the work for a few days, but would do so as soon as he could. At times the appellant asked Ramsdell to go to Barstow to make certain reports, and at times when Ramsdell was at Barstow the appellant asked him to come to San Bernardino to report on something there. By mutual understanding the appellant furnished Ramsdell gasoline for trips to Barstow and paid his hotel expenses while there. Occasionally it was necessary for Ramsdell to go to Barstow to get some information in order to do his auditing and usually he himself decided when he should go. Ramsdell would come in at various times, whenever it was convenient to him, to make his audits and would work as long or as short a time as he pleased.

On the day of the accident Ramsdell had been doing some auditor's work at appellant's San Bernardino office. About 7 o'clock p. m. he went out to dinner and decided to go to Barstow for the purpose of getting some data he needed. The appellant did not know that he intended to go to Barstow on this occasion. After dinner, Ramsdell started out in his own automobile with the intention of stopping at his own home in San Bernardino to leave a fishing pole and then proceeding to Barstow. To go to his home would take him about a block away from the usual route to Barstow. While he was on his way to his home the accident occurred which resulted in this action.

The most important question presented is whether Ramsdell, at the time, was acting as an independent contractor or as an employee of the appellant. This question largely depends upon whether the appellant had a right of control over the means employed by Ramsdell to accomplish his work or whether he was interested only in the results of that work. The general rules applicable are thus summarized in Winther v. Industrial Acc. Comm. (Cal.App.) 60 P.(2d) 342, 344: "The term 'independent contractor' has been defined as 'one who renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work, and not the means whereby it is to be accomplished.' Moody v. Industrial Acc. Comm., 204 Cal. 668, 670, 269 P. 542, 543, 60 A.L.R. 299. In arriving at a determination of whether one person is an employee of another or whether the status of the former is that of an independent contractor, one of the best tests to be applied to the factual situation which is presented is the right of control. Hillen v. Industrial Acc. Comm., 199 Cal. 577, 250 P. 570. When the essential object of the employment is the performance of certain work, the relation of master and servant does not exist unless the employer reserves the right to direct the mode and manner in which the work shall be done. Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 P. 721."

The respondent contends that the evidence is sufficient to show not only a right of control in the appellant, but the actual exercise of this right. In support thereof it is argued that the appellant had the power to discharge Ramsdell since the contract was not for a definite time; that Ramsdell's employment had been continuous for about ten years; that the appellant paid Ramsdell's expenses on trips to Barstow; that at times the appellant told Ramsdell to go to Barstow and to return from Barstow; that Ramsdell made special reports, although such a service was not particularly mentioned in the contract; that at times Ramsdell worked in Cowen's office and used his equipment both at San Bernardino and at Barstow; that Ramsdell's compensation was paid monthly and not by the job; that his compensation was paid whether or not there was any work to be done during a particular month; that the appellant's work had preference during the early part of the month; that at the time of the accident Ramsdell had certain of the appellant's books in his car; and that Ramsdell was required to do his work to the satisfaction of the appellant.

[1-3] In Luckie v. Diamond Coal Co., 41 Cal.App. 468, 183 P. 178, it is pointed out that the right of discharge at any time, while a circumstance which may be important in a doubtful case, is not a controlling factor. This is especially true in a case like this where either party could terminate the contract at any time, at least at the end of the month, and where the right of discharge or termination of the service fits in equally with the theory of an independent contract. All of the matters relied upon by the respondent are consistent with the status of an independent contractor, as applied to these parties, and none of them indicate any right of control on the part of the appellant over the mode or manner in which Ramsdell was to perform his work. The most that can be said is that any control which appears to have been exercised by the appellant indicates an interest in the results rather than in any details or the manner in which the work should be performed. It is now well settled that there may be a general control arising from an interest in the final result which does not indicate a master and servant relationship, where such right of control relates only to the result and is so restricted or limited that it does not apply to the manner or means by which the work is accomplished. Bohanon v. James McClatchy Pub. Co. (Cal.App.) 60 P.(2d) 510; Winther v. Industrial Acc. Comm., supra. In the last-named case, this court said:

"Whether the control which an employer has the right to exercise over the manner in which the work is to be performed is best expressed through its modification by the word 'authoritative,' or by the word 'unqualified' or by the word 'complete,' it is clear from the decisions that it must be a control which reaches into the details of performance and reserves to the employer the right to direct the manner in which these details are to be carried out. Such control is not manifested by a ranch owner who has contracted with another to pay a certain sum per ton for the picking of fruit and who does no more than direct the employees of the person with whom he has made the contract to pick the fruit clean and remove leaves from the field boxes. When one person is performing work in which another is beneficially interested, the latter is permitted to exercise a certain measure of control for a definite and restricted purpose without incurring the responsibilities or acquiring the immunities of a master with respect to the person controlled."

In our opinion, any right of control which was retained or exercised by the appellant falls within the rules laid down in the cases just cited. Ramsdell was employed as an auditor under a contract for his services as such, and the appellant was interested only in the results and not in the details of his work or the means used. While he was keeping certain books relating to the business conducted at Barstow, although another bookkeeper was employed there, this was closely related to his work as an auditor and was performed under the same contract, which was for an independent service rather than being one between an employer and employee. Ramsdell was free to do his work at times and places to suit his own convenience, the appellant had no right to control the manner in which the work was to be done, and was interested only in the results obtained. Ramsdell was as much engaged in business for himself, in performing the work called for in his contract with the appellant, as is a lawyer who engages to do certain work for a client upon a regular monthly retainer. The fact that he might occasionally deem it advisable to go to Barstow in order to obtain information needed for his work, or that he might be asked to do this in order to enable him to make desired reports as to what the books showed, indicates only an interest in the results of the work and is far from sufficient to indicate that the appellant had any right to direct Ramsdell where to go or to control the manner in which he drove his automobile on this occasion.

For the reasons given, the judgment against the appellant is reversed.

We concur: MARKS, J., JENNINGS, J.

19 Cal.App.2d 306

O. T. JOHNSON CORPORATION et al. v. PACIFIC ELECTRIC RY. CO.

Civ. S. C. 34.

District Court of Appeal, Second District, Division 1, California.

Feb. 23, 1937.

Railroads ⚷82(3)

Where agreement by grantors to convey right of way for railroad provided that if railroad ceased to use land for railroad purposes for six months it should revert to grantors, and that railroad should run passenger trains on certain schedules between certain hours each day, discontinuance by railroad of passenger service after eighteen years *held* not to entitle grantors to reconveyance, since railroad was obligated only to devote property to railroad uses, including inauguration in good faith of passenger service with intention of maintaining passenger service permanently.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the O. T. Johnson Corporation and the A. P. Johnson Company against the Pacific Electric Railway Company. From a judgment in favor of the defendant following an order sustaining demurrer without leave to amend, the plaintiffs appeal.

Affirmed.

Kiggens & Hoffman, of Los Angeles, for appellants.

Frank Karr and C. W. Cornell, both of Los Angeles, for respondent.

SHINN, Justice pro tem.

Appeal by plaintiffs from a judgment in defendant's favor following an order sustaining a demurrer without leave to amend.

On November 1, 1913, O. T. and A. P. Johnson entered into an agreement with Pacific Electric Railway Company to convey to the latter a right of way for a railroad. The agreement recited that the railroad, if constructed within the time mentioned in the agreement, would be of benefit to the parties of the first part, grantors, and that the party of the second part, as a consideration for the construction of said railroad, required the parties of the first part to pay a bonus per lineal foot of line across the property of the grantors, and to convey a parcel thereof for railroad purposes. The agreement read in part as follows: "3. As a further condition of the conveyance of said right of way and the payment of said bonus, it is agreed between the parties hereto as follows:" (here followed provisions for the completion of the road with certain connections and for the commencement of regular operation of passenger cars over said railroad within a given time, and for the locating of certain stations and the building of depots on the land). It was then provided: "(c) That upon the completion of said railroad and the commencement of operation of passenger cars thereon and thereover, regular local passenger cars or trains shall be operated each way (East and West making direct connections to and from Los Angeles) over said line through the said property of the parties of the first part at intervals of not greater than one hour between the hours of six o'clock a. m. and eight o'clock p. m. of each day making not less than fifteen local trains to be operated each way every twenty-four hours." It was provided that certain sidings should be constructed and maintained; that the grantors should by their deed reserve certain rights of way; that the grantee should construct, maintain, and repair certain culverts and drainage facilities, should grade its land in a certain manner, should construct certain crossings, and pay for crops damaged. It was provided that the land should be used only for railroad purposes. The agreement then read: "It is further agreed that if the said land so to be conveyed for such right of way shall at any time hereafter be used for other than railroad purposes by the party of the second part, or if the party of the second part, its successors or assigns, shall discontinue the use thereof for railroad purposes, or if any of the foregoing conditions shall be violated by the party of the second part, its successors or assigns, the title to the said land shall revert to the parties of the first part or their assigns. 7. The parties of the first part, upon the signing and delivery of this instrument, agree to execute a deed to said right of way, which deed shall contain the following conditions and restrictions, to-wit: It is understood that the strip of land herein conveyed shall be used for railroad purposes only, and in the event the party of the second part, its successors or assigns, shall, for a period of six months, cease to use said land for railroad purposes, then and in that event the title to said land shall ipso facto revert to and revest in said parties of the first part, their successors or assigns and shall be deposited in escrow with the Title Insurance & Trust Company, to be delivered to the party of the second part, provided the party of the second part shall, within the time hereinbefore limited, have completed its said railroad as hereinbefore required and shall have commenced the operation of its cars in accordance with the foregoing requirements. 8. If the party of the second part shall fail to construct said railroad within the time hereinbefore limited, or if it shall fail to commence the operation of its cars over said tracks as hereinbefore required, this agreement shall be void and of no further effect whatever, time being of the essence hereof."

On November 18, 1915, the right of way was conveyed to Pacific Electric Railway Company, the grantors reserving the right to construct and maintain across said right of way certain streets, pipe lines, and electric lines in such manner as would not interfere with the use of the property by the railway company. The conveyance stated that it was made subject to certain "conditions," namely, that the land granted should be used only for railroad purposes; that the railway company should, at its own expense, construct and maintain and repair crossings over its right of way where streets and roads crossed the same; that the railway company should at its own expense construct and maintain culverts and other drainage facilities to carry storm waters along the right of way and culverts necessary for irrigation ditches and natural watercourses across the strip of land. The deed then provided: "In the event that the party of the second part, its successors or assigns shall for a period of six months cease to use said strip of land for railroad purposes, or use said land for any purpose other than railroad purposes; or if any of the foregoing conditions upon which this conveyance is made shall be violated by the party of the second part, its successors or assigns, the title to the said land shall revert to the parties of the first part or their assigns. To Have and To Hold to the said grantee its successors and assigns, the right of way aforesaid, subject to the foregoing conditions. Nothing in this instrument contained shall be deemed to supersede, vary or annul any provision contained in the certain written agreement bearing date the first day of November, 1913, between said O. T. Johnson and A. P. Johnson, as parties of the first part and said Pacific Electric Railway Company as party of the second part; but each and all of the covenants and agreements of the party of the second part as contained and set forth in said agreement of November first, 1913, shall be deemed to remain and continue in full force and effect."

The deed was executed by plaintiff corporations, successors in interest to O. T. Johnson and A. P. Johnson. The railroad was constructed in accordance with the agreement, presumably prior to the delivery of the deed. From that time forth defendant operated cars and trains for the carriage of passengers until on or about October 16, 1933, when it ceased to operate any cars or trains for the carriage of passengers over said right of way, and thereafter has not resumed the operation of passenger cars or trains, although it has been for many years last past and is now operating cars over said road for the carrying of freight as a common carrier. Because of the discontinuance of passenger service, plaintiffs made demand upon the railway company for a reconveyance of the land, upon the theory that the discontinuance of passenger service constituted a breach of a condition of the conveyance, which resulted in a reversion of title to plaintiffs. The railway company refused to make the conveyance, to plaintiffs' alleged damage in the sum of $15,000, one-half of which was sought by each plaintiff as compensation for taking for public use the reversionary interest in said land. The demurrer of defendant was sustained without leave to amend, and from the resulting judgment in defendant's favor plaintiffs appeal.

Plaintiffs' theory is that the agreement imposed upon the company the obligation to maintain passenger service perpetually, under the schedule stated in the agreement, and that the agreement should be construed as creating a reversionary right in the land conveyed upon discontinuance of such passenger service. The defendant contends that the duty of continued operation of passenger trains was not attached to the conveyance as a condition subsequent and that its entire obligation, as far as the passenger service is concerned, was satisfied when it completed the railroad and commenced the operation of passenger trains and cars upon the stipulated schedule. In sustaining the demurrer, the trial court upheld the contentions of the defendant.

We shall first consider the provisions of paragraph 3 (c), which cover the subject of passenger service. The requirement found there is that trains should be run on a certain schedule between certain hours of each day. Plaintiffs construe this provision as one calling for perpetual operation of passenger trains, as if the words "each day" mean for all time. But as we read the phrase, it means only that there should be a daily service. It relates to the frequency of service rather than to its duration. No time for the continuance of the service was specified. The agreement was to become void if the railroad was not completed and passenger service was not commenced, as agreed, within a certain time. Those conditions had to be met before the deed would be delivered. It was intended that a regular passenger service should be inaugurated and it was so provided, and it was quite appropriate that there should be set forth a schedule of operation of passenger trains which the parties had agreed upon. But we are of the opinion that the provisions of subparagraph (c) cannot be construed as requiring the continuance of a daily service forever. The obligation sought to be imposed upon the company is an exacting one, even if it be construed as a covenant only. It would hold the company to the continued operation of passenger trains to meet the convenience of plaintiffs, even against its own best interests or necessities. Of course, plaintiffs might have exacted those terms and defendant might have agreed to them, but it seems that if such had been the contract upon so important a matter, the intention would be found expressed in definite and unequivocal language. We do not find such expression in paragraph 3 or in any other part of the agreement.

As there was no express provision in the agreement, or in the deed, that passenger service should be continued perpetually, the position of plaintiffs cannot be maintained unless it be on the theory that an agreement to devote land to a particular use implies an agreement to perpetually devote it to that use. The authorities are strongly against such a construction.

In Hasman v. Elk Grove Union High School, 76 Cal.App. 629, 245 P. 464, 465, land had been conveyed to a school district by deed containing the following language: "Provided the same shall be used for the purpose of maintaining thereon a high school; otherwise, the above described property shall revert to and become the property of the party of the first part, his heirs, or assigns." The land was used for a high school for some twenty-nine years and when this use was discontinued the administrator of the estate of the grantor brought action to compel a reconveyance. It was held that the high school had been maintained upon the land as required by the condition of the conveyance, and as the deed did not provide for a reversion upon a discontinuance of the use, but only upon failure to use it, the condition had not been violated. The authorities were fully reviewed in that case. Upon authority of the Hasman Case it was held in Booth v. County of Los Angeles, 124 Cal. App. 259, 12 P.(2d) 72, that a deed stating "This conveyance is made for the purpose of a road or highway, to revert to said J. J. Harshman, his heirs and assigns if not so used" required only that the land be put to use as a road or public highway and not that it should be perpetually used as such.

It was held in Texas & Pacific Railway Company v. City of Marshall, 136 U.S. 393, 10 S.Ct. 846, 34 L.Ed. 385, quoted with approval in the Hasman Case, that an agreement of a railway company to "permanently establish its eastern terminus and Texas office at the city of Marshall" had been complied with when the terminus and office had been so located and maintained in good faith for a period of eight years. In Mead v. Ballard, 74 U.S. (7 Wall.) 290, 19 L.Ed. 190, it was held that the maintenance of University buildings for a period of nine years was a compliance with the covenant of the deed that the University should be "permanently" located upon said land. The same rule of construction was followed in Bryan v. Louisville & N. R. Co. (C.C.A.) 244 F. 650, in Jeffersonville, Madison & Indianapolis R. R. Co. v. Barbour, 89 Ind. 375, and in Scheller v. Tacoma Ry. & Power Co., 108 Wash. 348, 184 P. 344, 7 A.L.R. 810. In the last case the covenant was that the grantee should build, erect, and operate a narrow gauge railway upon grantor's land and should at all times operate and maintain said narrow gauge railroad, either by itself or assigns, between its terminal points, and should establish and maintain stations upon or near the land and stop trains of said railroad at such stations on all trips. These covenants were held to have been complied with by the operation of the railroad as agreed for a period of twenty-five years.

The reason adopted by the courts in the cases cited is stated in the Hasman Case as follows: "Had it been the intention of Kerr that the property should revert upon the discontinuance of its use for high school purposes, it would have been so easy to have so stated, in plain and simple language, that it must be inferred from the terms actually employed that such was not his intention."

In the present case, as we have seen, there was no agreement that the passenger service should be a perpetual one or that the schedule of passenger service should be maintained by the railroad company for any definite length of time, and in this respect the contracts considered in the cases we have cited implied more strongly that the land should be devoted to a perpetual use than did the contract which we have before us. And applying the reasoning of these cases to the obligation of the company under the agreement, we are obliged to say that if plaintiffs had sought to bind the company to a perpetual use of the railroad for the carrying of passengers, they should have used, and no doubt would have used, language which would have stated that obligation in certain and definite terms such as they employed in expressing the obligation of the company to build its road and to commence the operation of trains thereover upon a definite schedule and within a definite time. This they failed to do. We are therefore of the opinion that the lower court correctly held that the obligation of the company was met by the building of the road and the maintenance of passenger service as agreed for a period of some eighteen years.

The briefs are devoted in large part to a discussion of the question whether the obligation to maintain passenger service was intended merely as a covenant of the company or as a condition, upon breach of which title was to revert to the grantors. The argument is necessarily predicated upon the assumption that the company had undertaken to maintain perpetual passenger service over the right of way. As, in our view of the case, the company was obliged only to devote the property to railroad uses, including the inauguration in good faith of passenger service, as specified in the agreement, with the intention of maintaining the same permanently, there are removed from the case all questions which might arise under present conditions if the obligation of the company had been to maintain a perpetual passenger service.

In considering those provisions of the agreement and the deed which state the conditions upon which the grant was to be made, and was made, we find nothing which can be construed as placing the company under the duty, conditional or otherwise, of maintaining the scheduled passenger service perpetually or for as long as the land is used for railroad purposes.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

19 Cal.App.2d 384

KEYSTON et al. v. BANTA-CARBONA IRR. DIST. et al.

Civ. 5682.

District Court of Appeal, Third District, California.

Feb. 27, 1937.

Hearing Denied by Supreme Court April 26, 1937.

Mandamus 🔑5

Where an action at law was pending in the superior court involving practically the same questions, and brought by three of the four petitioners for a writ of mandate to require an irrigation district to transfer the proceeds of assessments to a bond interest fund and pay coupons therefrom, though the parties were not identical, the writ was denied on the grounds that there was another action pending, that superior court was better able to determine the conflicting facts, and that petitioners had a plain, speedy, and adequate remedy in the superior court.

◆

Original petition by George N. Keyston and others for writ of mandate directed to Banta-Carbona Irrigation District and others.

Peremptory writ denied.

Bronson, Bronson & Slaven, of San Francisco, for petitioners.

Hankins & Hankins, of San Francisco, and A. L. Cowell, of Stockton, for respondents.

PER CURIAM.

These petitioners, who are the owners and holders of coupons of certain bonds of the above-entitled district, are seeking by this writ of mandate to compel respondents to transfer to the bond interest fund of the district, all moneys which constitute the proceeds of assessments heretofore levied for bond interest, and to pay out said moneys to holders of coupons entitled thereto.

Since the issuance of the bonds to which these coupons were attached, the district, it is alleged, has regularly levied assessments on the lands within its boundaries for the purpose of paying the obligations of the district, including the accumulated interest on the bonds, and has collected large sums on account of said interest charges, which, however, have not been carried in a bond interest fund but have been deposited in the general fund or in some special fund, and although sufficient money has been received to pay all the interest on the outstanding coupons, respondents have refused to transfer such fund to the bond interest account or to pay these coupons belonging to petitioners.

To this petition respondents have demurred on the ground of uncertainty, and of insufficiency of facts to justify the issuance of the writ, and have also answered, interposing a plea in abatement, alleging that an action is now pending in the superior court of the state of California in and for the county of San Joaquin seeking the same relief, and based essentially upon the same subject-matter as set forth in the petition for the writ.

As we view the situation we need not consider any of the various points raised except that presented by the plea in abatement. While it is true one action filed in the superior court of San Joaquin county entitled Mason v. Banta-Carbona Irrigation District and E. Draper, Treasurer of Banta-Carbona Irrigation District, being numbered among the records thereof as 27487, wherein the petitioners sought, by writ of mandate, to compel the respondents therein to pay certain matured interest bearing coupons, has been dismissed; but there is still pending in the courts of San Joaquin county, an action entitled Keyston et al. v. Banta-Carbona Irrigation District, and being numbered therein 27527. This latter proceeding was brought by three of the four petitioners who are here seeking this writ, praying for a judgment against the Banta-Carbona Irrigation District for the amount due them on certain interest coupons of bonds issued by the district, and will involve a consideration of practically the same questions presented in the petition for the writ now before this court.

It is true that the action still pending in San Joaquin county is an action at law, and the petitioners or parties plaintiffs and defendants are not identical with the parties in the present action, but it does appear that generally they are the same and that in order to present the issues sought to be raised by the petition filed in this court the issues there suggested must be considered and determined.

It is also asserted by respondents and conceded by petitioners that they are not in accord as to all of the facts in the case before us which would require the taking of testimony by this court directly or through a referee. In accordance with rule 26 of the Supreme Court and District Courts of Appeal, petitioners have set forth in their petition for the writ, a statement of circumstance, which in their opinion renders it proper that this writ should issue originally from this court, but an examination of these circumstances in the light of our study of the record and the facts there presented do not justify our assuming jurisdiction. The attitude of this court is well expressed in the case of Brougher v. Board of Public Works, 205 Cal. 426, 271 P. 487, 493, where the court said:

"Petitioners have advanced no sufficient reason why this court should assume jurisdiction of the proceedings to determine and settle in the first instance the facts involved in this controversy. The matter is now before us simply upon an order to show cause why the alternative writ of mandate prayed for by petitioners should not issue. It has never been the policy of this court to encourage the institution of proceedings herein, particularly where there is a dispute as to the facts involved, when such proceedings could as well have been instituted in the first instance in the superior court of the county where the controversy arose. No good reason appears to us why we should depart from this policy in the present proceeding. The motion of petitioners to file an amended petition, therefore, is hereby denied, and the order to show cause dismissed.

"These orders are made, however, without prejudice to the right of petitioners to seek in the proper tribunal such relief, not inconsistent with the views herein expressed, as they may be advised they are entitled to."

Therefore, in view of the fact that there is an action now pending that will present the question here attempted to be raised and that the superior court is better able to determine all of the conflicting facts than is this court, and that petitioners have a plain, speedy, and adequate remedy in the superior court, the peremptory writ of mandate is denied.

---

19 Cal.App.2d 373

In re WHITTAKER.

STEWART v. HAZEL et al.

Civ. 5648.

District Court of Appeal, Third District, California.

Feb. 26, 1937.

1. Insane persons 🔑38

Appellate court, finding no evidence concerning bond of incompetent's guardian on appeal from order removing him, must hold trial court's finding that bond became worthless and that guardian was advised of surety's insolvency and requested to file sufficient bond was not supported by evidence.

2. Insane persons 🔑38

Probate court, concluding that failure or neglect of incompetent's guardian to file account and inventory within statutory time indicates his indifference or lack of attention to estate's affairs, may remove him, though statutory provisions for his removal on such grounds are not mandatory (Probate Code, §§ 1550, 1551, 1553, 1580).

3. Insane persons 🔑38

Court of Appeal will not interfere with exercise of probate court's discretion to remove incompetent's guardian for indifference or lack of attention to estate's affairs, as indicated by his failure or neglect to file account and inventory within statutory time, unless abuse of such discretion appears (Probate Code, §§ 1550, 1551, 1553, 1580).

◆

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

In the matter of the estate and guardianship of T. C. H. Whittaker, also known as Harry Whittaker, an incompetent. From an order removing Paul Stewart as guardian of the incompetent's person and estate and appointing another in his stead on the petition of Irmabelle Hazel and another, the removed guardian appeals.

Affirmed.

A. T. Stewart, of Los Angeles, for appellant.

Irons & Greene, of Los Angeles, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from an order removing the guardian of the person and estate of an incompetent person and appointing another in his stead.

The principal grounds relied upon for removal of the guardian were, for the failure, for more than five years after his appointment, to file an inventory and appraisement of the estate coming into his hands as guardian, and failure to file an annual or any account or report of his management of the estate during his trust.

It is also alleged the guardian upon qualifying filed a bond in the amount required by the order of the court, but the surety company which furnished the bond thereafter became insolvent, and although such fact was known to the guardian and he was requested so to do, he neglected for more than a year to file a new bond.

Upon the hearing, the court found in accordance with the allegations in the petition, and ordered the removal of the guardian.

[1] This appeal is presented to us upon a bill of exceptions, but respondent has seen fit to file no brief in support of the order. One of the contentions of appellant is that there was no evidence to support the finding of the trial court that the original bond filed by the guardian became worthless and without any value, or that the said guardian was advised of the insolvency of the surety company, or that he was requested to execute and file a good or sufficient bond.

Finding no evidence at all concerning the matter of the bond, we must hold the finding of the court in that particular was not supported by the evidence.

[2, 3] It is a matter of record, however, that for more than five years after his appointment and qualification as guardian he did neglect to file any account and did neg-

lect or fail to file an inventory. Section 1580 of the Probate Code provides that "a guardian * * * may be removed by the court for any of the following causes: * * * (2) For failure to file an inventory or to render an account within the time allowed by law, or for continued failure to perform his duties."

Section 1551 of the Probate Code provides, "If the guardian neglects or refuses to file the inventory within the time prescribed, the court, upon notice, may revoke his letters." Section 1550 of the same code provides that "within three months after his appointment, or within such further time as the court or judge for reasonable cause may allow, the guardian must file with the clerk of the court an inventory and appraisement of the estate of his ward." By section 1553 of the Probate Code, at the expiration of a year from the time of his appointment and as often thereafter as he may be required by the court, a guardian must present his account to the court for settlement and allowance.

While it is true that these provisions are not mandatory, nevertheless, there is reposed in the probate court a wide discretion, and if the court in the exercise of that discretion, has come to the conclusion that such failure or neglect indicates an indifference or lack of attention upon the part of the guardian to the affairs of the estate, he may remove the guardian, and this court will not, unless it appears there has been an abuse thereof, interfere with that discretion.

In re Newell's Estate, 18 Cal.App. 258, 122 P. 1099, it was held in effect that the probate court, having supervision of the estate of deceased persons, was vested with the power to remove an executor when in its discretion such step was necessary for the protection of the estate, and that power will not be interfered with by an appellate court if it does not appear that such discretion had been abused.

In the Estate of Graber, 111 Cal. 432, 44 P. 165, dealing with the failure of an executor to file an inventory of the estate as required under section 1450 of the Code of Civil Procedure as it then stood, the court there held that the trial court had judicial discretion to refuse to revoke letters testamentary for failure to file the inventory and appraisement of the estate in the time limit, and the action of the court will not be disturbed upon appeal unless there has been a gross abuse of discretion.

It is but fair to state that no charge is here made nor is there any evidence of any financial misdealings or any attempt to profit from the estate on the part of the guardian, but apparently the court was convinced that the failure of the guardian to comply with the plain provisions of the law in regard to the filing of an inventory and the rendering of an accounting indicated such an indifferent attitude toward the management of the estate and its affairs as to justify the replacement of the guardian upon the request of those personally interested.

Finding no error in the order of the trial court, the same is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

---

19 Cal.App.2d 332

SCHRADER v. CITY OF LOS ANGELES et al.

Civ. 11249.

District Court of Appeal, Second District, Division 2, California.

Feb. 25, 1937.

Hearing Granted by Supreme Court April 26, 1937.

1. Municipal corporations 🔑213

Under charter providing that, within six months' probationary period, departmental head may discharge probationary employee on assigning in writing reasons therefor, and if not "thus" discharged appointment should be deemed complete, assistant gardener *held* not effectively discharged within probationary period where reasons therefor were not assigned in writing until several days after expiration of such period, and hence assistant gardener's appointment to classified service became complete and civil service commissioners had jurisdiction to order his restoration; word "thus" meaning in the way just indicated.

[Ed. Note.—For other definitions of "Thus," see Words & Phrases.]

2. Statutes 🔑206

Court should, if possible, adopt construction giving effect to all parts of statute (Code Civ.Proc. § 1858).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceeding by William H. Schrader for a writ of mandate against the City of Los Angeles and others, to compel petitioner's restoration to employment as assistant gardener and the payment of his salary during the period of alleged wrongful discharge. From a judgment entered on the denial of a motion for the issuance of an alternative writ, petitioner appeals.

Reversed.

Jacob Forst, of Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, for respondents.

WOOD, Justice.

Petitioner, an assistant gardener in the employ of the City of Los Angeles, appeals from a judgment entered upon the denial of his motion, made upon notice, for the issuance of an alternative writ of mandate to compel his restoration to employment and the payment of his salary during the period of his alleged wrongful discharge. No evidence was received and no findings were made by the trial court.

From the allegations of the complaint it appears that petitioner was a probationary employee working under the superintendent of parks and the commissioners of the department of parks of the City of Los Angeles. Under the provisions of the city charter his probationary period was six months. During this period the superintendent of parks attempted to discharge him but did not assign in writing the reasons for the discharge to the board of civil service commissioners until after the expiration of the probationary period. Several days after the expiration of the six months' period, written reasons for the discharge were filed with the board of civil service commissioners. Thereafter an order was made by the civil service commissioners upon sufficient findings, in which the restoration to duty of petitioner was ordered.

Section 109 of the charter of the City of Los Angeles provides: "At or before the expiration of the period of probation, the head of the department or office in which the candidate is employed may discharge him upon assigning in writing the reasons therefor to said board (civil service commissioners). If he is not thus discharged during the period of probation, his appointment shall be deemed complete." Section 112 (a) of the charter provides that employees in the classified civil service may be restored to duty by the commission if it be found that the grounds stated for the discharge were insufficient or not sustained.

[1, 2] It is argued by respondents that petitioner was not a civil service employee and that the civil service commissioners were without jurisdiction to order the restoration. It is contended that it was not necessary to assign in writing the reasons for the discharge before the expiration of the probationary period in order to make the discharge effective. This contention does violence to the plain language of the charter provisions. In the construction of a statute "the office of the judge is * * * not * * * to omit what has been inserted." Section 1858, Code of Civ. Proc. Such a construction is to be adopted, if possible, as will give effect to all parts of the statute. The word "thus" is defined in the Standard dictionary: "In the way just indicated." Section 109 of the charter provides that the employee may be discharged upon assigning in writing the reasons for the discharge to the civil service commissioners. Immediately following this language in the section it is provided that if the employee is not "*thus* discharged during the period of probation, his appointment shall be deemed complete." The word "thus" undoubtedly refers to the steps to be taken to make the discharge effective, the assignment of the reasons in writing; and the section definitely provides that the discharge must be brought about during the period of probation. Since petitioner was not effectively discharged before the expiration of the period of six months, his appointment to the classified service became complete and the civil service commissioners had jurisdiction to order his restoration.

The judgment is reversed.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.

HEDDEN v. WALDECK et al. *

WRIGHT et al. v. HEDDEN et al.

Civ. 5772.

District Court of Appeal, Third District, California.

Feb. 27, 1937.

Hearing Granted by Supreme Court April 26, 1937.

1. Fraudulent conveyances ⚷269(1)

Plaintiff's answer to cross-complaint in action to quiet title alleging that deeds relied on by cross-complainant were executed without consideration to defraud creditors *held* sufficient as against contention that evidence on such issue was inadmissible because issue was not raised in original complaint.

2. Pleading ⚷8(15)

Merely alleging in terms that an act was fraudulently done will not be sufficient, since "fraud," for purposes of pleading, is a legal conclusion.

[Ed. Note.—For other definitions of "Fraud," see Words & Phrases.]

3. Pleading ⚷8(15)

Intent to "delay or defraud" a creditor is a question of fact and may be pleaded in so many words without stating the evidence or the specific facts which go to substantiate the charge.

4. Fraudulent conveyances ⚷114

Conveyance is not necessarily fraudulent when it is made in good faith even though it constitutes a preference of creditors.

5. Fraudulent conveyances ⚷295(2)

Fraudulent intention in making conveyance may be established by circumstances surrounding the transaction.

6. Fraudulent conveyances ⚷241(2)

Person is a "creditor" entitled to challenge debtor's conveyance as being executed to defeat creditors, even though creditor's suit to establish his claim may be pending at time of the transfer and judgment therein has not yet been rendered (Civ.Code, § 3430).

[Ed. Note.—For other definitions of "Creditor," see Words & Phrases.]

7. Fraudulent conveyances ⚷76(1)

In determining whether conveyance to debtor's son-in-law was in fraud of creditors where it was contended that conveyance was in payment of son-in-law's services to debtor as attorney, trial court was authorized to determine value of son-in-law's legal services from evidence of the services performed.

8. Fraudulent conveyances ⚷300(1)

Evidence *held* sufficient to justify finding that conveyance by debtor to his daughter and son-in-law while action in assumpsit was pending against debtor was without consideration for purpose of defrauding creditors (Civ.Code, § 3430).

9. Fraudulent conveyances ⚷74(1)

Even if grantor was indebted to his son-in-law for counsel fees at time conveyance to son-in-law was executed, such fact would not be conclusive of validity of transfer so as to preclude setting aside conveyance as in fraud of creditors, since a conveyance is void when it is executed with intent to defraud creditors, even though accompanied with a valuable and adequate consideration.

10. Quieting title ⚷51

Quieting title in plaintiff without providing for an equitable lien thereon to secure an indebtedness claimed to be due cross-complainant *held* not error where cross-complainant claimed title by reason of conveyance in fraud of creditors, since no right may be supported by a void conveyance executed with intent to defraud creditors.

11. Quieting title ⚷47(2)

In action to quiet title wherein cross-complainant alleged that he had acquired title by adverse possession, failure to find that cross-complainant did not acquire title in such manner *held* not reversible error where trial court found that cross-complainant had no interest in property and that plaintiff was owner of a three-fourths interest and entitled to possession and there was no showing of adverse possession (Code Civ.Proc. § 325).

◆

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Fred F. Hedden against Fred A. Waldeck, J. Marion Wright, Helen M. Wright, and another to quiet title wherein defendants J. Marion Wright and Alice M. Wright filed a cross-complaint naming the plaintiff and the other defendants cross-defendants. From an adverse judgment the cross-complainant J. Marion Wright appeals.

Affirmed.

---

*For subsequent opinion see 72 P.2d 114.

J. Marion Wright, of Los Angeles, in pro. per.

Paul A. Tschirigi, of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant and cross-complainant, J. Marion Wright, has appealed from a judgment quieting title in plaintiff to an undivided three-fourths interest in 920 acres of grazing land in Tulare county.

December 29, 1933, a complaint drawn in the usual form was filed in this action to quiet title. The defendants answered the complaint, denying the allegations thereof. The appellant, J. Marion Wright, and wife, also filed a cross-complaint, which is couched in five separate counts, in which they allege that they are the owners of the property which was conveyed for a valuable consideration by Fred A. Waldeck, May 2, 1928. The plaintiff answered this cross-complaint, admitting that Waldeck was the former owner of the land and that he executed the alleged deed of conveyance to his son-in-law, J. Marion Wright, but affirmatively alleges that the deed was executed without consideration for the purpose of defrauding creditors. The circumstances of the alleged fraud are specifically recited. Upon those issues the cause was tried. The court adopted findings in favor of the plaintiff, determining that the purported deed of conveyance was executed without consideration for the purpose of defrauding the creditors of the grantor and that it was therefore void; that the plaintiff is the owner and entitled to possession of an undivided three-fourths interest in the 920-acre tract of grazing land in Tulare county. It was also determined that Alice M. Wright was the owner and entitled to the remaining one-fourth interest in the ranch. From this judgment the defendant J. Marion Wright, has appealed.

The appellant contends that the findings and judgment are not supported by the evidence in regard to the alleged fraudulent conveyance to defeat creditors; that the court erred in receiving evidence of the fraud, since it was not specifically alleged in the original complaint to quiet title; that the deed to appellant was erroneously set aside, since the transfer of title amounted to a mere preference of creditors; and that the court erred in not quieting title in plaintiff subject to a lien upon the property to secure the indebtedness due to appellant.

[1-3] The issues regarding the asserted conveyances of title to the property without consideration and for the purpose of defrauding creditors are adequately pleaded. It is true that the complaint is drawn in the usual form of a suit to quiet title. It merely asserts title in the plaintiff and alleges that the defendants claim some interest in the property which is without merit and prays that they be required to disclose the nature of their claims. The answer formally denies the plaintiff's claim of title and asserts that "J. Marion Wright and Alice M. Wright are the owners of all of said property." A cross-complaint which was filed by Mr. and Mrs. Wright affirmatively sets forth the nature of their claim of title. This cross-complaint affirmatively alleges that for a valuable consideration the property was deeded to them and George Beebe, jointly, by Fred A. Waldeck, May 2, 1928, and that Beebe conveyed his interest in the property to J. Marion Wright, May 19, 1930; that Waldeck, for a valuable consideration, also deeded an undivided one-fourth interest in the 920-acre tract to Benjamin Mead, who subsequently conveyed his interest therein to Alice M. Wright, August 10, 1933; that Alice M. Wright is the owner of an undivided one-fourth interest in the property and that she and her husband own the remaining undivided three-fourths interest in the property; that in addition to their title by deeds, J. Marion Wright acquired title to the remaining three-fourths interest in the property by adverse possession; that the cross-defendants assert some interest in the property and the cross-complaint demands that they be required to disclose the nature of their claims.

To this cross-complaint the plaintiff, Hedden, filed an answer in which he denies the material allegations thereof and affirmatively alleges, in an amendment thereto, that the deeds upon which the appellant relies in support of his asserted title to the property were executed and delivered without consideration and without the intention to thereby convey title to the property, and on the contrary, that the deeds were executed and delivered to J. Marion Wright and his wife, Alice M. Wright, who are respectively the daughter and the son-in-law of the grantor, Fred A. Waldeck, with the intention of defrauding the plaintiff, who was then a creditor of the grantor. It is further alleged in this amended answer to the cross-complaint that the parties to those deeds knew that the grantor possessed no property other than this ranch with which to satisfy an anticipated judgment in a suit in assumpsit which was then pending between this plaintiff and Waldeck, in which suit a judgment was subsequently rendered against him for the sum of $6,000, and that the conveyance was made to thereby defraud the creditor Hedden.

The cross-complaint constitutes an approved pleading in a suit to quiet title. It not only sets out the nature of the title to the property upon which the defendants and cross-complainants rely, but it alleges new matter and asserts facts upon which they ask for affirmative relief denying plaintiff's claim and quieting title to the property in them. In reply to this new matter the plaintiff and cross-defendant, Hedden, specifically and properly alleges that the deeds in question were executed without consideration for the purpose of defrauding creditors. This raises the direct issue of the validity of the deeds upon which the appellant relies. That issue is adequately pleaded in the answer to the cross-complaint with particularity sufficient to meet the requirements of the law with respect to pleading an alleged conveyance of property with the intention to defraud creditors. Adams v. Bell, 5 Cal.(2d) 697, 700, 56 P.(2d) 208; Rossen v. Villanueva, 175 Cal. 632, 634, 166 P. 1004, 1005. In the authority last cited it is said with respect to the particularity required in pleading the transfer of property to defraud creditors: "It is familiar law that a pleading which merely alleges in general terms that an act was fraudulently done will not be held good. Fraud, for purposes of pleading, is a legal conclusion. But the intent 'to delay or defraud' a creditor is a question of fact (Civ.Code, § 3442), and may be pleaded in so many words, without stating the evidence or the specific facts which go to substantiate the charge (20 Cyc. 736; Threlkel v. Scott, 4 Cal.Unrep. 346, 34 P. 851; Anderson v. Bank of Lassen County, 140 Cal. 695, 74 P. 287)."

The cases cited by the appellant in support of his contention that the alleged transfer of title with the intent to defraud creditors is not adequately pleaded may be distinguished from the case at bar for the reason that it appears there were no cross-complaints or other pleadings in those cases which attempted to set up in any form the alleged invalidity of conveyances on the ground that they were executed to defraud creditors. In the present case the cross-complaint is very specific in that regard.

[4-8] We are of the opinion the judgment and findings of the court to the effect that the deeds of conveyance, upon which the appellant relies, were executed and delivered without consideration and for the purpose of defrauding Fred F. Hedden, a creditor of Waldeck, and that they are therefore void and should be set aside, are sufficiently supported by the evidence. The court found that this respondent recovered judgment for the sum of $6,000 against Fred A. Waldeck in a suit in assumpsit, March 25, 1929, which was not paid; that the parties to the deeds of conveyance which are involved in this appeal all knew they were executed and delivered without consideration for the purpose of defeating that judgment; that the judgment debtor possessed no other property with which to satisfy the judgment, and that upon execution issued and proceedings duly had in the assumpsit suit all of the title of Fred A. Waldeck in and to the 920-acre tract of land in Tulare county was conveyed at sheriff's sale to the respondent June 20, 1931.

The court quieted title to the undivided one-fourth interest in the property in Alice M. Wright, the wife of appellant. That feature of the case is not involved in this appeal.

There is evidence to show that the appellant is the son-in-law of Fred A. Waldeck, the common source of title to the property which is involved in this appeal; that Waldeck was possessed of no other property with which to satisfy his debts; that while a suit in assumpsit was pending between the plaintiff and Waldeck, in which a judgment for $6,000 was subsequently rendered against Waldeck, and in anticipation of that result of the litigation, Waldeck conveyed without consideration all of his interest in the land to the appellant and his wife with the purpose of defeating the judgment; that all of the parties to that transfer of title knew it was conveyed without consideration to defraud creditors; that execution was duly issued in the assumpsit case and the entire interest in the land was regularly transferred by the officer at sheriff's sale to the respondent, Hedden, in satisfaction of the judgment, and that the plaintiff is the owner of an undivided three-fourths interest in the 920-acre tract of land in Tulare county, by virtue of the sheriff's sale of property, and therefore is entitled to the possession thereof.

It is true that a conveyance is not necessarily fraudulent when it is made in good faith, even though it constitutes a preference of creditors. But the fraudulent intention may be established by the circumstances surrounding the transaction. One may be deemed to be a creditor entitled to challenge a conveyance of property on the ground that the deed was executed to defeat creditors, even though the suit to establish his claim may be pending at the time of the transfer and that a judgment therein had not yet been rendered. A creditor is one in whose favor an obligation exists, by reason of which he is, or may become, entitled to the payment of money. Section 3430, Civ.Code; Withrow v. National Surety Co., 122 Cal.App. 242, 10 P.(2d) 83. The circumstances in the present case which support the finding that the property was conveyed without consideration for the purpose of defrauding creditors include the facts that Waldeck conveyed 920 acres of land worth approximately $10,000 to his son-in-law, while a suit was pending in which a judgment was subsequently rendered against him for the sum of $6,000 in favor of Hedden. The son-in-law was also an attorney. It is claimed that the land was conveyed to him in payment of attorney's fees for representing Waldeck in certain litigation. The record shows that the appellant received over $2,900 from Waldeck during that litigation, some of which it is claimed was for costs of suit. The court found, in effect, that the fees of appellant's attorney had been paid, for it specifically found that the property was conveyed without consideration. From evidence of the services performed, the court was authorized to determine the value of his legal services. City of Los Angeles v. Los Angeles Inyo Farms Co., 134 Cal.App. 268, 274, 25 P.(2d) 224. There is evidence that the three-fourths interest in the land which is involved in this appeal was worth $7,500. From these, and other facts disclosed by the record, the court was justified in finding that the property was conveyed without consideration for the purpose of defrauding creditors.

[9] Assuming, without so deciding, that the grantor of the real property was indebted to the appellant for counsel fees at the time the conveyance was executed, that fact is not conclusive of the validity of the transfer. A conveyance of property is rendered void when it appears that it was executed with intent to defraud creditors, even though it may have been accompanied with a valuable and adequate consideration. Rossen v. Villanueva, 175 Cal. 632, 635, 166 P. 1004; Swinford v. Rogers, 23 Cal. 233, 235; 27 C.J. 519, § 197. In the text last cited it is said in that regard: "A conveyance or transfer, whether founded on a valuable and adequate consideration or not, if entered into by the parties thereto with the intent to hinder, delay, or defraud creditors, is void as to them."

In the Swinford Case, supra, it is likewise said: "The law is well settled, that a conveyance made with intent to defraud creditors is void though there may have been a full and valuable consideration paid therefor. The fraud taints and vitiates it. (1 Story's Eq., § 369.)"

[10] The court did not err in quieting title to the undivided three-fourths interest in the real property in plaintiff, without providing in the judgment for an equitable lien thereon to secure an indebtedness claimed to be due the appellant. No right, legal or equitable, may be supported by a void conveyance of property which is executed between the parties with the intent to defraud creditors. Butler v. San Francisco Gas & Electric Co., 168 Cal. 32, 39, 141 P. 818; Burke v. Koch, 75 Cal. 356, 17 P. 228.

[11] It is not reversible error that the court failed to specifically find that the appellant did not acquire title to the undivided three-fourths interest in the real property by adverse possession. It is true the appellant did allege in his cross-complaint that he acquired title to the land by adverse possession. The court did find that he had no interest in the property. On the contrary, the court further found that the plaintiff was the owner of the undivided three-fourths interest in the land and entitled to the possession thereof. In accordance with the last-mentioned findings and the judgment it is apparent that a specific finding on the subject of adverse possession would be bound to be adverse to the appellant. The undisputed evidence is that the appellant received his deed under which he claimed title, May 2, 1928. We are directed to no evidence that he ever occupied or exercised acts of ownership over it prior to that date. The land was sold to the respondent at sheriff's sale under execution June 20, 1931. There is no evidence that the appellant conformed to the provisions of section 325 of the Code of Civil Procedure so as to make it possible for him to have acquired title by adverse possession. The findings which

were adopted are therefore tantamount to an adverse finding on that subject, and it is not reversible error to have failed to specifically find that the appellant did not acquire title by adverse possession. Eastman v. Piper, 68 Cal.App. 554, 569, 229 P. 1002.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

---

19 Cal.App.2d 322

In re BRUCE'S ESTATE.

Civ. 1834.

District Court of Appeal, Fourth District, California.

Feb. 23, 1937.

Rehearing Denied March 25, 1937.

1. Executors and administrators ⚷507(1)

Probate court in settling account generally has no jurisdiction to determine rights of parties claiming adversely to estate.

2. Executors and administrators ⚷507(1)

Where title to bank stock mentioned by testator in will as his was claimed by executor in his individual capacity, trial court sitting as probate court had jurisdiction to determine validity of such claim on settlement of final accounting.

3. Executors and administrators ⚷506(3)

Finding of trial court sitting as probate court that bank stock which was disposed of by testator as his own but which was claimed by executor in his individual capacity was held by executor in trust for testator and as part of testator's estate *held* sustained by evidence.

4. Appeal and error ⚷762

Question as to admissibility of certain testimony raised by appellant for first time in reply brief *held* raised too late.

◆

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Proceeding in the matter of the estate of H. S. Bruce, deceased. From an order settling an account of the executor, Lewis Bruce one of the executors, appealed. Affirmed.

John Preston King, of Lindsay, for appellant.

Clarence H. Wilson, of Hanford, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order settling an account of the executors of this estate.

H. S. Bruce died on November 5, 1930. His son Lewis Bruce and one Chester Dowell were appointed executors of his will on December 8, 1930. The inventory and appraisement, filed on March 7, 1931, in setting forth the property belonging to the estate which had come into the hands of the executors, listed 125 shares of stock in a certain bank appraised at $14,000, a note executed by Lewis Bruce appraised at $2,640, and a note executed by Orpha E. Owen appraised at $119.05, a total of $16,759.05.

On December 17, 1935, the executors filed their first account, in which they included the proceeds of 25 shares of this bank stock which had been sold, together with the dividends received from these particular shares, but omitted all reference to the other 100 shares of bank stock or the dividends thereon. On December 20, 1935, two daughters of the deceased filed a contest to this account, demanding, among other things, that the executors be charged with the other hundred shares of bank stock and the dividends thereon. Thereupon the executors filed a supplemental account, sworn to by Lewis Bruce, alleging that this 100 shares of bank stock was not and never had been the property of said estate, but was and at all times had been the property of Lewis Bruce, and that the same had been included as an asset of the estate "by reason of inadvertence and mistake." After a hearing upon the account and the exceptions thereto the court made its order settling the account, finding, among other things, that Lewis Bruce held title to 100 shares of this bank stock in trust for the said H. S. Bruce, and charging the executors with said stock, including all dividends thereon. This appeal was taken by Lewis Bruce from that portion of this order which charged the executors with this 100 shares of bank stock and dividends therefrom.

[1, 2] The appellant contends that the trial court, sitting as a probate court, had no jurisdiction to pass upon the question of ownership or title to this stock. He relies upon the general rule that a

probate court, in settling an account, has no jurisdiction to determine the rights of parties claiming adversely to the estate. Texas Company v. Bank of America, etc., Ass'n, 5 Cal.(2d) 35, 53 P.(2d) 127. This case falls within a well-recognized exception to the rule referred to. Estate of Roach, 208 Cal. 394, 281 P. 607, and cases there cited.

[3] The main question presented is whether the order and the findings to the effect that the bank stock in question was held by Lewis Bruce in trust for H. S. Bruce and is a part of his estate are supported by the evidence. It appears without dispute that the appellant purchased 100 shares of the bank stock in 1909 and that at or near the same time the deceased purchased the other 25 shares. The 100 shares of stock was issued in the name of the appellant. The appellant testified that he used his own funds to purchase this stock, and that at all times he had dealt with the same as his own property and had asserted an absolute ownership therein. Chester Dowell testified that he sold 100 shares of the stock to the appellant and 25 shares to the deceased, that the appellant paid the consideration for the 100 shares, that both the appellant and the deceased were present at the time the stock was sold, and that nothing was then said by the deceased about his owning any interest in the 100 shares or that any of his funds had been used in purchasing the same. Because this evidence was not directly disputed, the appellant contends that it was and is conclusive and that there is, therefore, no evidence to support the findings and conclusions of the court.

The will of the deceased read in part as follows: "My estate consists of a note signed by my son, Lewis Bruce, for $2000.00, one hundred twenty five (125) shares of stock in the Los Angeles-First National Trust and Savings Bank, 100 shares of which are held in the name of Lewis Bruce."

The petition for probate, sworn to by the appellant, listed as one asset of the estate 125 shares of this bank stock, and alleged that it was of the value of $11,500, or thereabouts. Following his testimony at the hearing of the petition for probate of the will on December 8, 1930, the appellant signed a "Testimony of witness on probate of holographic will" in which it was stated that the deceased left personal property, the value and character of which was correctly set forth in the petition for probate of the will and that this property was of the value of $14,000 or thereabouts. At the hearing which resulted in this appeal the appellant, when asked whether the statements contained in the document just referred to were true at the time they were made, replied: "Well, to a certain extent, yes. That is, if I could have carried out the intentions that I had at the time, of giving the estate one hundred shares of stock to probate, such a hearing as we are having today, it would have been a fact, and at that time I expected to do that." The inventory and appraisement was sworn to by the appellant and listed the 125 shares of this bank stock as a part of the property of the estate.

On January 1, 1931, the appellant wrote a letter to his sister, one of the contestants, inclosing a copy of the will and saying in part: "You will see by the copy of the will that there is bank stock to be divided between you, Orpha and I. What would you prefer: That the stock be divided and you keep your share of it, or would you rather it be sold and send you the cash? It is worth $88.00 per share now, has been down to $76.00, and, of course, I cannot tell how much it will be worth at the time the estate is ready to be divided."

On December 7, 1933, the appellant wrote to the same sister, mentioning the price at which the "bank stocks" were then selling and saying that $83 was still due on the cemetery lots and that he had promised to pay half of this from the dividends to be received the next July and the balance from the dividends the next January. It may be observed that the dividends then being paid on this bank stock would amount to but $16.25 on 25 shares, which would be much less than the amount required to pay half of the $83 while the dividends on all of the bank stock would be ample for that purpose.

Chester Dowell testified that while he signed most of the papers in the estate he left the management of the estate entirely to the appellant, that he knew the provisions of the will, and that when he signed the petition for probate and the inventory and appraisement he knew that these documents listed the 125 shares of bank stock as property of the estate. He also testified that at one time when the deceased was involved in divorce proceedings with a former wife "he did tell me that she would never get any of his money and that he was going to dispose of it in a manner some way that she never could get it. He told me that. And I had reasons to believe, just by, you might say guess work, that he had turned it over, whatever it was, to Dr. Bruce, but I never knew it and had nothing to prove it anyway." He further testified that he knew there was an argument in the family at different times before the death of H. S. Bruce as to whom this stock belonged, but that he had no definite knowledge concerning it.

The appellant testified that about 1909, at a time when his father's wife had sued him for divorce, his father handed him cash and securities of the value of $11,000 and that "When I asked him what he wanted me to do with it he said he didn't care what I did with it, that that old woman wasn't going to get any of it. * * *" He further testified that by 1910 he had given $6,000 of this amount back to his father, and that from about 1919 until the death of his father he had regularly given his father amounts equaling half of the dividends received on the bank stock. He also testified that he thought he had told all of the heirs of the estate that only 25 shares of the stock belonged to his father and "that if the estate was allowed to go along until I could, that I would give the estate one hundred shares of stock and would settle it up just as the will says," but that he lost money between 1931 and 1934 and came to the conclusion that he was unable to give the estate anything. He testified that at the time the estate was started he agreed to pay an attorney $400 for his services in probating the estate and that this attorney told him that this was less than the legal fee would be. This is significant, since this fee is considerably larger than the fee provided by law if the 100 shares of stock were not a part of the estate.

A sister of the appellant testified that her father had told her several times that the appellant had bank stock which belonged to the father, that she and the appellant were both present when the will was admitted to probate at which time the will was read aloud in the presence of the appellant, that shortly after the will was admitted to probate the appellant told her "if any of the heirs get cocky and want to settle the estate before I am ready to settle I will claim the one hundred shares of stock," and that the first time she heard the appellant say that this one hundred shares of stock belonged to him and not to the estate was in the latter part of 1933.

The appellant argues that the evidence conclusively shows that certain property was given to him by his father in 1909 and that a constructive trust could not arise, with respect to the 100 shares of stock, since there is no evidence that he purchased the same with funds belonging to his father. While the appellant relies upon portions of his own testimony and upon a portion of that given by the other executor, a substantial conflict is raised by the other evidence referred to which, with the reasonable inferences therefrom, is sufficient to support the findings and order.

[4] In his reply brief the appellant for the first time raises a question as to the admissibility of certain testimony. Not only was this question raised too late, but the evidence in question is merely cumulative and may be disregarded without changing the result.

The order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

19 Cal.App.2d 301

PEOPLE v. ALLEN.

Cr. 2949.

District Court of Appeal, Second District, Division 2, California.

Feb. 19, 1937.

1. Criminal law 🔑1144(13)

On accused's appeal from conviction, evidence must be viewed in light most favorable to prosecutor.

2. Robbery 🔑24(1)

Evidence that as witness was driving on street he saw accused directly in front of his automobile and stopped to avoid striking her, and accused said she was ill and asked to be taken home, and, after getting in automobile, accused stuck something in his ribs and commanded witness to drive down dark street, where she robbed him, *held* to sustain conviction of robbery in second degree.

3. Criminal law ⚿863(2)

Where jury inquired if forcing or conveying in automobile from one point to another for purpose of adultery constituted crime of kidnapping, additional instruction that accused was charged with only one form of kidnapping and it was duty of jury to find whether accused kidnapped witness for purpose of robbing him, and that jury could not go outside the evidence or indulge in speculation, *held* not error.

4. Criminal law ⚿1023(10)

Verdict of jury not being included in orders and proceedings from which an appeal may be taken as provided by statute is not appealable (Pen.Code, § 1237).

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Ruth Allen was convicted of robbery in the second degree, and she appeals.

Affirmed.

Vernon R. Hamilton and Josiah Coombs, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

McCOMB, Justice pro tem.

Defendant was convicted after trial by jury on two counts of robbery of the second degree. The appeal is from the judgments and purportedly from the verdict of the jury.

[1] Viewing the evidence most favorable to the prosecution (People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558), the facts in the instant case are:

September 21, 1936, Mr. Oreb was driving west on Washington boulevard in the city of Los Angeles, when he saw defendant directly in front of his car, and was compelled to stop to avoid striking her. She told him she was ill and asked to be taken home. Immediately after getting into his automobile she stuck something violently in his ribs and ordered him to drive down a dark street, where she robbed him. Shortly before the foregoing incident occurred, following a similar procedure, defendant had robbed Mr. Brunning.

Appellant relies for reversal of the judgment on the following propositions:

First. The evidence is insufficient to sustain the verdict and judgment.

Second. The additional instructions given to the jury upon its request after it had commenced its deliberations were erroneous.

[2] As to defendant's first contention, we have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the findings of fact upon which the verdict of guilty as to each count was necessarily predicated. We therefore refrain from further discussion of the evidence. Thatch v. Livingston, 13 Cal.App.(2d) 202, 56 P.(2d) 549; Koberle v. Hotchkiss, 8 Cal.App.(2d) 634, 48 P.(2d) 104; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399.

[3] The second proposition advanced by defendant is likewise without merit. After the jury had been instructed and retired to deliberate, it returned to the courtroom and the following occurred:

"The Court: Let the record show in the case of People v. Allen, the jury has returned into court. I may state to counsel that I received from the jury the inquiry: 'Would the forcing or the conveying in an automobile from one point to another, for the purpose of adultery constitute the crime of kidnaping?' I am not quite clear what the question is. I think I can answer what you have in your minds here. I stated to you what the law is. There are several forms of kidnaping. The defendant, however, is only charged with one particular form. The charge against the defendant is that she seized and kidnaped the witness named, the young man, who I think was—

"Mr. Leavy: Eric Brunning.

"The Court: — Having in mind the intention of robbing him. Now, as to that question, it is the duty of the jury to find out whether that particular offense was committed or not. In other words, did she kidnap him for the purpose of robbing him, or did she not? That is the only question there. You are not concerned with any other form of kidnaping, because that is the only kidnaping that is charged. Does that answer your question?

"The Foreman: We have a doubt in our minds as to whether there was any intent of robbery at the time.

"The Court: The only thing I can suggest to you is this: Your difficulty may be one of fact rather than one of law. If you should arrive at the conclusion that it was a fact, as Mr. Brunning testified, that as he was at the curb the defendant came up to him, got into the car in the manner in which Mr. Brunning testified, and that she compelled him to drive down the street, the element of kidnaping, standing alone and by itself, so far as the charge is concerned, would be established. I say, if you believe that to be the fact, you would then have to determine what the intention of the woman was when she compelled Mr. Brunning to drive down the street in that manner, Was it her intention to rob him or not?

"The Foreman: If the intention of the woman was for the purpose of having the man commit adultery, would that be kidnaping.

"The Court: I might suggest to you the jury cannot go outside the evidence or indulge in speculations or imaginations or theorize. Your verdict must be based upon the evidence. You have certain evidence here, and you must follow that evidence. It never would be proper for a jury to adopt some theory of a case about which there is no proof. Your verdict can only be based upon the evidence. It there is no evidence as to a matter, you must consider that thing does not exist. There being in this case nothing to indicate any intent to abduct him for the purpose of adultery or for some other immoral purpose, you cannot consider that question at all.

"The Foreman: Couldn't that intent be in her mind at the time she entered the automobile and at the time she arrived at a certain destination change her mind and rob him then and there?

"The Court: I will say if you come to the conclusion there was a robbery, but that the intent to rob was not formed until the moment the robbery was committed, then the crime of kidnaping for the purpose of robbery could not be committed. In other words, the question is: What intent did she have in mind at the time she kidnaped him?

"The Foreman: I think that answers the question."

The learned trial judge's instructions to the jury in response to the questions propounded were full, fair, and accurate statements of the law and no error appears in them.

[4] The verdict of a jury is nonappealable, since it is not included in the orders and proceedings from which an appeal may be taken as set forth in section 1237 of the Penal Code.

For the foregoing reasons, the judgments appealed from are, and each is affirmed, and the purported appeal from the verdict of the jury is dismissed.

We concur: CRAIL, P. J.; WOOD, J.

8 Cal.2d 416

WILSON v. BAILEY et al.

Sac. 4993.

Supreme Court of California.

Feb. 27, 1937.

1. Frauds, statute of 🔑144

Optionor *held* estopped to set up statute of frauds against optionee to defeat oral extension of written option to repurchase property, where oral extension was given prior to expiration of written option, at time when optionee was negotiating with interested third parties for an advance to enable her to exercise option (Code Civ.Proc. § 1973; Civ.Code, §§ 1624, 1698).

2. Vendor and purchaser 🔑187

Where prospective lender refused to advance money to optionee to take up thirty-day option on property because optionor fraudulently leased property out to create cloud on optionee's title, optionor could not take advantage of his own wrong by attacking optionee's tender on ground that it was not made until thirty-one days had elapsed.

3. Vendor and purchaser 🔑170

Where option to have optionor reconvey property to optionee did not provide for optionee to reassume liability on trust deed on property and to relieve optionor of liability thereon, failure of optionee to offer to reassume and to relieve optionor of such liability did not invalidate tender made by optionee.

4. Specific performance 🔑130

In suit to compel reconveyance of property transferred to secure debt, in accordance with option to have property reconveyed on payment of debt, amount specified by defendant optionor in letter as amount due him *held* controlling, without necessity for accounting.

In Bank.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Grace G. Wilson against F. M. Bailey and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

E. S. Mitchell, of Eureka, for appellants.

A. G. Bradford, of Eureka, for respondent.

CURTIS, Justice.

Plaintiff sought by this action to compel a reconveyance by defendants to her of property, formerly owned by her, under a written option by her grantee to reconvey the property to her upon the performance by her of certain conditions. The facts, which are practically undisputed, are as follows: Plaintiff, prior to August 25, 1932, was the owner of a parcel of land in Eureka, Cal., upon which was located a service station. Having become involved financially, upon the 25th day of August, 1932, she entered into an agreement with the defendant F. M. Bailey, whereby she conveyed this real and personal property to him. Defendant, as part of the same transaction, executed an agreement giving her an option to repurchase said real and personal property upon the payment to him of the amount due him at the time of the exercise of the option. By the same agreement as consideration for said conveyance, defendant agreed to assume and pay the deed of trust theretofore executed by the plaintiff in favor of the Bank of Italy, together with all charges in connection therewith, certain assessments upon the property as the installments became due, the taxes due, and the balance of the purchase price upon certain equipment in use at the service station. The agreement provided that in order to pay off the deed of trust against the premises the grantee should have the right "to mortgage or encumber" said real and personal property, and that any encumbrance or mortgage placed against the property should take priority over said option. In accordance with said agreement, plaintiff executed said conveyance and it was recorded. She also executed a bill of sale for the personal property. During the subsequent year, defendant leased said service station to third parties and credited the rent received therefor toward the reduction of the indebtedness owed to him by the plaintiff. In a letter to the bank, dated August 21, 1933, defendant gave the bank authority to furnish plaintiff with information as to the amount due under the trust deed and also furnished in said letter a statement of the amount owing him by the plaintiff on that date. Said statement is in the following figures: "Approximate balances. Bank loan—$1700. Cash Register—$60. Street Assessments—$597.25. Bailey Trading Company—$1006.91. Total—$2766.91." It appears that subsequent to the execution of the written agreement defendant's business had been incorporated under the name of the "Bailey Trading Company." Shortly before the expiration of the option, plaintiff negotiated with the Gilmore Oil Company for the purpose of securing from them an advance by means of which she could pay off defendant and secure a reconveyance of her property. Defendant refused to give a written extension without consulting his attorney. On August 23, 1933, plaintiff and defendant met in front of the bank, and defendant stated to plaintiff that he would not give her an extension in writing, but that he would tell her in front of Mr. Charters, who was vice president and manager of the bank, that he would extend the agreement for thirty days. It should be here noted that there is no dispute that the agreement was verbally extended. Plaintiff's testimony to this effect was corroborated by the testimony of her son who was also present, and by the testimony of Mr. Charters. Mr. Charters testified that plaintiff and defendant came into his office at the bank; that plaintiff asked Mr. Bailey, "Will you give me thirty days' extension on this proposition?" that defendant stated that he would; that plaintiff said, "Will you put it in writing?" defendant said, "No, I will not put it in writing, but I will make the statement in Mr. Charters' presence"; plaintiff made some remark, "Be sure to remember that"; and he (Mr. Charters) replied that his memory was none too good and that he would make a note of it. He testified that he did make a pencil memorandum of it on the bottom of the letter, dated August 21, 1933, which defendant had sent to the bank giving the statement of the amount due from the plaintiff, which memorandum was as follows: "August 23/33. In my presence granted a 30 days extension from August 25, 1933 to Mrs. Wilson to redeem the property. H. F. Charters." The defendant, when interrogated on the witness stand under section 2055 of the Code of Civil Procedure, whether his version of the transaction was the same as that of plaintiff and Mr. Charters, replied that it was. He stated: "My recollection of it was that I stated that I would do nothing for another thirty days." To the question, "The idea, Mr. Bailey, was that this proposition should be held open for another thirty days was it not?" defendant replied, "Correct." The brief of appellant contains the following statement: "On August 25th respondent had failed to exercise the option and asked for a thirty day extension, and appellants refused to extend the same in writing, but did state that they would reconvey at any time within thirty days according to the terms of the agreement." In the meantime, the former lessee of the service station had vacated the service station, and on September 11, 1933, there was recorded at the request of the defendant, a lease by defendant to one Lester Lee, a former employee, which was dated, August 25, 1933, but was not acknowledged by Lee until August 31, 1933. This lease was for a period of one year from September 1, 1933, to September 1, 1934, with an option for an extension of two years more. The Gilmore Oil Company upon learning of this lease refused to advance the necessary funds to the plaintiff by reason of the fact that the existence of the lease would prevent their taking over of the service station for the sale of their products. However, on September 25, 1933, the Gilmore Oil Company deposited in the Los Angeles branch of the Bank of America in escrow the sum of $1,006.91, payable to the defendant upon the clearing up by him of the lease to Lester Lee. On the same day, by wire, the Eureka branch of the Bank of America was instructed to pay out the money to defendant upon compliance by him with the terms of the escrow. And on the same afternoon, defendant was informed by telephone by the attorney for the plaintiff that the money was deposited subject to defendant's withdrawal upon compliance with the terms of the escrow. Upon the trial of the action, judgment was in favor of the plaintiff against the defendants. The court found, "It is true that prior to the 25th day of August, 1933, defendant, F. M. Bailey, verbally extended the said option for an additional period of thirty days and that defendant, F. M. Bailey, is estopped to assert the Statute of Frauds." It further found that, "It is true that defendant, F. M. Bailey, executed a promissory note to Bank of America, a corporation, and secured said promissory note by executing a deed of trust covering the lands and premises hereinbefore described. That in so executing said promissory note and deed of trust said defendant was acting as trustee for plaintiff," and "It is true that on August 25, 1933, F. M. Bailey, rendered to plaintiff a statement showing $1,006.91 due from plaintiff to defendant. That it is true that thereafter and prior to September 25, 1933, plaintiff tendered to defendant, F. M. Bailey, said sum of $1,006.91, being all sums of money due to said F. M. Bailey by virtue of said agreement." The court also found that the defendant had verbally extended the option with reference to the personal property and was estopped to plead the statute of frauds with reference to said extension, and that the written lease to Lester Lee "was entered into fraudulently and without consideration and for the express purpose of creating a cloud upon the title of plaintiff." The judgment provided: (1) That defendants execute to plaintiff a good and sufficient conveyance of the real property; (2) that defendants execute to plaintiff a good and sufficient conveyance of the personal property involved in said controversy; (3) that plaintiff assume the payment of the promissory note and deed of trust executed by defendant F. M. Bailey to the Bank of America, and save defendants harmless therefrom; and (4) that the lease executed to Lester Lee be "and the same is hereby canceled." From said judgment, defendants appeal.

Appellants seek a reversal of said judgment upon the ground that "an option to purchase realty cannot be extended, except by writing, and must be exercised within the time provided." Two questions are thus presented: (1) Is the defendant estopped from relying upon the statute of frauds with reference to the verbal extension of the option given to the plaintiff to repurchase the real and personal property?" and (2) "Was the tender sufficient?" We are satisfied that the answer to both questions is in the affirmative.

It is, of course, well settled, under the provisions of section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure, that certain contracts to be enforceable are required to be in writing, or that some note or memorandum thereof be in writing, subscribed by the party to be charged, or his agent. It is also equally well settled that the facts of a particular case may give rise to an equitable estoppel against the party seeking to set up the statute of frauds and foreclose such party from relying thereon. Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154; Notten v. Mensing, 3 Cal.(2d) 469, 45 P. (2d) 198. And likewise, while it is settled in view of section 1698 of the Civil Code which provides that a written contract may be altered by a contract in writing, or by an executed oral agreement, and not otherwise, that a written contract may not be varied or modified by an executory parol agreement, nevertheless, it is also true that the facts of a particular case may give rise to an equitable estoppel against the party who denies the verbal modification.

Seymour v. Oelrichs, supra, which is the leading case in this state upon the subject of equitable estoppel, sets forth the basis of the doctrine at page 794 of 156 Cal., 106 P. 88, 94, 134 Am.St.Rep. 154, as follows: "The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. It is based upon the principle 'thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme.' 2 Pom.Eq.Jur. § 921. It was said in Glass v. Hulbert, 102 Mass. 24, 35, 3 Am. Rep. 418: 'The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds.' This statement has been accepted as setting forth a plain and satisfactory ground for equitable jurisdiction, together with a clear indication of the proper limitation of its exercise. See Browne on Statute of Frauds, § 457a. In the section last cited, Mr. Browne says: 'A plaintiff * * * must be able to show clearly * * * not only the terms of the contract, but also such acts and conduct of the defendant as the court would hold to amount to a representation that he proposed to stand by his agreement and not avail himself of the statute to escape its performance; and also that the plaintiff, in reliance on this representation, has proceeded, either in performance or pursuance of his contract, to so far alter his position as to incure an unjust and unconscientious injury and loss, in case the defendant is permitted after all to rely upon the statutory defense. After proof of this, the court may well be justified in using its undoubted power, in cases of equitable estoppel, to refuse to listen to a defendant seeking to deny the truth of his own representations previously made.' We can see no good reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present, or for saying otherwise than as is intimated by Mr. Pomeroy in the words already quoted, viz., that it applies 'in every transaction where the statute is invoked.' It is a general equitable principle, a part of the broader equitable doctrine stated in Dickerson v. Colgrove, 100 U.S. [578], 580, 25 L.Ed. 618, and quoted therefrom in Carpy v. Dowdell, 115 Cal. [677] 687, 47 P. [695] 697, as follows: 'The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both.'" This broad rule with reference to equitable estoppel was recently reaffirmed in the case of Notten v. Mensing, supra. The latter case quoted with approval the rule stated in the case of Anderson v. Hubble, 93 Ind. 570, 576, 47 Am.Rep. 394, as follows: "'It is not necessary, in order to the existence of an equitable estoppel, that there should exist a design to deceive or defraud. The person against whom the estoppel is asserted must, by his silence or his representations, have created a belief of the existence of a state of facts which it would be unconscionable to deny; but it is not essential that he should have been guilty of positive fraud in his previous conduct. * * * All that is meant in the expression that an estoppel must possess an element of fraud is that the case must be one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon. * * * There need be no precedent corrupt motive or civil design.'"

[1] The undisputed facts of the instant case present, in our opinion, a proper case for the application of the rule of equitable estoppel. Prior to the expiration of the option, at a time when the plaintiff was negotiating with interested third parties for an advance to enable her to exercise the option for the repurchase of property worth five or six times the amount necessary to redeem, the defendant assured plaintiff that it would not be necessary for her to exercise her option within the given time but that for thirty days he would do nothing in the matter, implying by this statement, according to his own testimony, that he would leave the option open for that period of time. The irremediable change of position by the plaintiff in reliance upon the promise of the defendant justified the trial court in refusing to listen to the defendant seeking to deny the truth of his own representations.

In the case of Notten v. Mensing, supra, it was pointed out that at the trial the burden rested on the plaintiff to prove the oral agreement by full, clear, and convincing evidence, and that if such agreement be proved by full, clear, and convincing evidence, such agreement should be enforced according to its terms. As before noted, there is no question in this case that defendant in fact verbally extended the option. It is not denied. The judgment of the trial court giving effect to the agreement was, therefore, proper.

[2] Appellants attack the sufficiency of the tender both upon the ground that thirty-one days had elapsed prior to the deposit of the purchase price in escrow and the option had only been extended for thirty days, and upon the ground that the plaintiff had not offered to assume the indebtedness of defendant to the Bank of America, evidenced by the promissory note signed by him after he acquired the property, and secured by the deed of trust upon the property. In view of the fact that the Gilmore Oil Company refused to advance money to the plaintiff solely by reason of the fact that the lease to Lester Lee had been placed upon the property and they could not take over the service station, taken in conjunction with the finding of the trial court, supported by evidence, that the lease given by defendant to Lester Lee, his former employee, "was entered into fraudulently and without consideration and for the express purpose of creating a cloud upon the title of plaintiff," defendant is in no position to complain of a one day's delay in exercising the option. He cannot thus take advantage of his own wrong.

[3] With reference to the assumption of defendant's liability to the Bank of America upon the note which he executed in pursuance of the agreement with plain-

tiff, it appears that nowhere in said agreement is there an express agreement on the part of the plaintiff to reassume said liability although there is a provision that any trust deed or mortgage placed upon the property should take priority over the option. The testimony of the district manager of the Gilmore Oil Company was to the effect that he, as representative of the Gilmore Oil Company, had prior to the exercising of the option on September 25, 1933, assured the defendant that the Gilmore Oil Company was willing to and would assume said liability, and that this was agreeable to the bank. And although the option agreement contained no express provision for the assumption of said liability, the trial court in its judgment has provided that the "plaintiff assume the payment of the promissory note and deed of trust executed by defendant, F. M. Bailey, to the Bank of America, and save the defendants harmless therefrom." By reason of the fact that the option agreement contained no provision for relieving the defendant of all liability upon the note and trust deed in the event of a repurchase of the property, defendant cannot now insist that plaintiff could only exercise her option by fulfilling such nonexistent requirement. We are of the opinion that the trial court in making provision in the judgment that the plaintiff assume the payment of the promissory note and deed of trust executed by defendant F. M. Bailey to the Bank of America, and save defendants harmless therefrom has gone as far as it is required to go in order to do equity under the circumstances. In view of the fact that the trust deed is a first lien upon the property and that the property is worth five or six times the amount of the indebtedness to the bank, there is little likelihood of defendant being called upon to make any payment upon his debt. As said before, if by reason of lack of foresight he has failed to include in the option agreement all of the provisions necessary to make him whole upon the exercise of the option, he cannot require as a condition precedent to the exercise of the option, a tender of performance of said missing provisions.

[4] We are likewise satisfied that the trial court was justified in accepting as the amount due to defendant the amount set forth by defendant in the letter of August 21, 1933, to the bank. Although defendant testified that he had expended money subsequent to that date in excess of the credit due from an application of the rent, he made no real effort to substantiate his claim, and it was denied by the plaintiff, who claimed that she did not owe the amount of $1,006.91 claimed by defendant, but was willing to accept that figure as the proper one. Under these circumstances, an accounting was not necessary.

We have decided this appeal upon the issues as presented by the parties, although we are somewhat at a loss to understand why plaintiff did not seek to redeem said property as a deed absolute given merely as security, in which event she would have been entitled to redeem at any time until her right had been foreclosed by an action of foreclosure brought by the defendant.

There seems to be little doubt, in view of the written option agreement which was entered into simultaneously with the conveyance by the plaintiff to the defendant and the fact that the payment of rent was applied by the defendant to the debt owing from the plaintiff, that the conveyance from the plaintiff to the defendant was in fact a mortgage. However, this issue was neither presented to the trial court, nor argued in the briefs of the parties, although there was a passing reference in the respondent's reply brief that "the whole transaction was intended not as an outright sale but as a conveyance for the purpose of securing to Bailey the indebtedness owed to him by Mrs. Wilson." In view of our holding that the option was in fact properly exercised by the plaintiff, it is not necessary for us to discuss the rights and remedies of the parties under a deed absolute which was in fact a mortgage.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; EDMONDS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

8 Cal.2d 311

PAGE v. CITY OF SANTA ROSA et al.

Sac. 5070.

Supreme Court of California.
Feb. 23, 1937.

1. Waters and water courses ⚷203(13)

In landlord's action to restrain municipal utilities board from turning off water furnished tenants of his apartment dwelling, where municipal charter required that water for domestic quantity use in a reasonable quantity be furnished free to inhabitants, presumption that board fixed a standard of reasonableness in amount to be used, that a charge would be made for any excessive use, and that service would be discontinued on nonpayment thereof arose in absence of showing to the contrary (Code Civ. Proc. § 1963, subd. 15).

2. Waters and water courses ⚷203(13)

Landlord could not require municipality to furnish water to his tenants who failed to comply with regulations of utilities board with regard to the distribution of a reasonable quantity of water free for domestic use adopted under authority of municipal charter.

3. Waters and water courses ⚷203(13)

Fact that tenants would move if municipality, required under charter to furnish a reasonable quantity of water free to its "inhabitants," shut off tenants' water for failure of tenants to comply with regulations of municipality, would not entitle landlord to enjoin city from discontinuing service, since tenants were "inhabitants" within charter provision and were entitled to use of water by virtue of their occupancy of the premises and their status as inhabitants, without regard to landlord's ownership.

[Ed. Note.—For other definitions of "Inhabit; Inhabitancy; Inhabitant," see Words & Phrases.]

4. Landlord and tenant ⚷124(1)

At common law there is no duty or obligation on part of landlord to furnish water to his tenants.

5. Waters and water courses ⚷203(13)

Landlord may not complain of refusal of public utility to supply his tenants with water and cannot be held liable for the bills of his tenants therefor.

6. Waters and water courses ⚷203(13)

Landlord *held* not entitled to require municipality to furnish water free to his tenants under charter provision of municipality requiring that a reasonable quantity of water be supplied free for domestic quantity use to its "inhabitants," since tenants were "inhabitants" within charter provision, water was supplied to them in that capacity, and they would be responsible for any excess use while landlord would not.

In Bank.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by C. E. Page against the City of Santa Rosa, a municipal corporation, and the Board of Public Utilities of the City of Santa Rosa. From a judgment of dismissal, the plaintiff appeals.

Affirmed.

A. W. Hollingsworth, of Santa Rosa, for appellant.

Edward T. Koford, City Attorney, of Santa Rosa, for respondents.

SEAWELL, Justice.

The allegations of plaintiff's first amended complaint, whereby he prays for injunctive relief, in substance are that the City of Santa Rosa was and is a municipality, organized and existing under a freeholders' charter and, by virtue of said charter, exercises all its powers of government through the city council; that said city is, and for a number of years last past has been, the owner of a water system, used and maintained for the purpose of supplying the inhabitants of said city with sufficient water for all ordinary, usual, domestic, household, and sanitation purposes; that its Board of Public Utilities at all times herein mentioned was in control of the operation of said water system; that on May 4, 1934, and for many years prior thereto, plaintiff has been, and now is, the owner of a certain apartment dwelling located in said city and, during all of said time, defendants have furnished plaintiff with sufficient water for domestic purposes from said system "that was used in and about the said premises for domestic purposes and said water is necessary to the full enjoyment, health, convenience and cleanliness of the tenants therein"; that all the water supplied by the defendants to said premises and which was used on the premises during the months of February and March, 1934, was used wholly for domestic purposes by families residing on said premises and for no other purpose; that section 25, city charter, provides that "the Board of Public Utilities shall provide for furnishing water in a reasonable quantity free for domestic quantity use." (Respondents' brief supplements the concluding clause of the above sentence by adding the words "but there shall be no free water for other than domestic use.")

Continuing, it is alleged that neither during the month of February nor March, 1934, or at all was any water used on said premises by the occupants thereof or any other person in quantities greater than was necessary for the health, convenience, cleanliness, and comfort of the occupants of the said premises; that on May 4, 1934, defendants, without right, made demand of plaintiff that he pay a tax or charge for water used by him at said premises and threatened to and would, if the sum demanded was not paid (unless restrained by order of court), turn off plaintiff's water supply at said premises, thereby depriving plaintiff of his right to receive a reasonable quantity of water for domestic use on said premises, as provided by said city charter. Plaintiff alleges that his premises will become unsuitable for human habitation and he will be deprived of all beneficial use of said premises. Plaintiff further alleges that the exact quantity of water necessary for reasonable domestic use in said premises is not known to him and it cannot be ascertained; that the amount of water for reasonable use is dependent upon the seasons, weather conditions, the state of health and number of occupants and additions to the families and circumstances over which he has no control.

The prayer is that defendants be restrained from turning off or otherwise interfering with the property of plaintiff and that said tax or demand of defendants be decreed to be void.

Defendants demurred generally and specially. The special demurrer was based on the several grounds set out in separate paragraphs, that said amended complaint was ambiguous, unintelligible, and uncertain, for the reason that it was not alleged in said amended complaint, nor can it be ascertained therefrom, whether plaintiff was or was not in the actual use and occupation of said premises or whether said premises were used and occupied by tenants. The demurrers were sustained on both grounds, without leave to amend, on application made to do so, and judgment of dismissal was entered against plaintiff. Hence this appeal.

We are of the opinion that the order sustaining both demurrers must be sustained.

[1, 2] It is apparent that all the provisions of the charter affecting the main question are not set out. Neither does it appear from the face of the amended complaint what regulatory rules were adopted by the Board of Public Utilities. Section 25 of the charter makes it mandatory upon that board to provide regulations for furnishing water in reasonable quantities free for domestic use. Its language is that "the Board shall provide for furnishing water in a reasonable quantity free for domestic quantity use." It must be presumed that the board obeyed the mandate of the charter provision and adopted rules or schedules allotting to individuals and to families consisting of a definite number the quantity of water which had been determined by rule or order to be reasonable for domestic purposes. Such a regulation would be in the exercise of a function which it is unquestionably within the power of the board to make and the reasonableness of the board's rules has not been questioned in this proceeding. It would also be entirely within the power of the board, upon fixing a definite quantity as a reasonable amount for domestic uses, to make a charge for the use of any water used in excess of the quantity found to be reasonable. Water may be wastefully used in serving domestic uses, and for that and other reasons its use is subject to regulation. The power to determine the question of reasonable care must be reposed in some authorized person, body or commission. That power in the instant case is unquestionably delegated by charter provision to the Board of Public Utilities, and the legal presumption that official duty has been regularly performed is conclusive in the absence of contrary proof. Section 1963, subd. 15, Code Civ.Proc. There is no denial or pretense that it has not performed its duty. Its action in this respect need not be left in doubt, as the fact could readily have been determined by an inspection of the public records of the city. Neither does the amended complaint allege that the quantity fixed by the city was not exceeded by the users. The error of plaintiff is that he has set up his own standard as to the quantity of water that is necessary for domestic uses and he does not traverse the

presumption that the city has fixed a standard of reasonableness and has provided that a charge will be made for any excessive use. The complaint does not contain any allegation that the board has not provided, in case the charge for excessive use is not paid by the user, that a discontinuance of the service will be made.

The owner of the premises cannot compel the city to furnish water to his tenants who are in default in their compliance with the city's rules and regulations, adopted by virtue of charter provisions.

[3] The last paragraph of the amended complaint alleges that said premises "are occupied by tenants of the plaintiff and if said water is turned off as threatened, the said premises will become untenantable and said tenants will be forced to move away and vacate said premises and deprive plaintiff of his income therefrom, and it is extremely difficult to ascertain the amount of compensation which would afford plaintiff adequate relief," etc. The same argument could be made by the owner for the continuance of service to his tenants if the gas or electric current or telephone service were discontinued, for the reason that his tenants had failed or refused to pay for the service. There seems to be no merit in such a contention. The city charter does not limit the use of water to property owners, but extended the right equally to the "inhabitants" of said city. The tenants are inhabitants and occupants of property, and their rights to the use of water is derived by virtue of such occupancy and their status as inhabitants is not dependent upon plaintiff's ownership of said apartments.

No attempt has been made to allege that either the tenants or owner have complied with such rules and regulations as were prescribed by the Board of Public Utilities.

[4] It is plain from an examination of the pleadings that the plaintiff is not an occupant of the premises in question and that he is attempting to act for the real defaulting water users who are his tenants. At common law there is no duty or obligation on the part of the landlord to furnish water to his tenants. Waldron v. International Water Co., 95 Vt. 135, 112 A. 219, 13 A.L.R. 340.

[5] The owner of the premises has no standing to complain of the refusal of the public utility to supply his tenant with water. Neither can he be held liable for the bills of his tenant. Waldron v. International Water Co., supra, citing Brass v. Rathbone, 153 N.Y. 435, 47 N.E. 905; McCarthy v. Humphrey, 105 Iowa, 535, 75 N.W. 314; also City of Onawa v. Mona Motor Oil Co., 217 Iowa, 1042, 252 N.W. 544.

[6] No showing is made that any contractual relations existed between plaintiff and his tenants. The rule in such cases, under a charter which entitles all the inhabitants of a municipality to the use of water, such as the one before us, is that the water is supplied to the inhabitants and not to the owners of the premises. The tenant users of water, in the absence of charter or statutory provisions to the contrary, are responsible for charges made for the excessive use of water by them, and the owner of the premises cannot be held liable or responsible for such excessive or unlawful use solely for the reason that he is the owner of the premises.

Plaintiff has not shown himself entitled to the relief sought.

The judgment of dismissal is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; THOMPSON, J.

---

8 Cal.2d 322

PURINTON v. DYSON et al.

Sac. 5052.

Supreme Court of California.

Feb. 24, 1937.

1. Judgment 🔑443(1)

Equity may afford relief from orders and decrees in probate proceedings for extrinsic fraud.

2. Judgment 🔑443(1)

Where proponent and residuary legatee and executor under will, with knowledge of existence of pretermitted heir, failed to disclose her existence in the petition for probate and gave her no notice of the proceeding with result that a decree was made distributing the residue of the estate to him, the fraud was extrinsic so as to authorize relief in equity.

3. Executors and administrators ⚷75, 314(4)
Wills ⚷270

Proponent of will, who was duly qualified and appointed executor after it was admitted to probate, was charged with utmost good faith to heirs of deceased and to the court, and it was his duty to see that notice of the probate proceeding and proceeding for distribution was given to those whom he knew to be heirs of the deceased (Probate Code, § 328).

4. Judgment ⚷464

Where residuary legatee and executor by failing to disclose to court the existence of a pretermitted heir procured decree distributing residue of estate to him, equity would not set aside the judgment or order but would hold him as a trustee for the pretermitted heir and allow such heir an equitable lien on the property secured, dependent on its identification.

5. Trusts ⚷358(1)

Where residuary legatee and executor procured decree distributing residue to him by failing to disclose existence of pretermitted heir and on his death he had more on deposit in banks than the amount received, relief to the pretermitted heir in equity would not be denied for want of identification of the money as that received under the decree of distribution.

6. Trusts ⚷375(2)

In suit to impress trust on property of decedent who received property under decree of distribution in another estate by failing to disclose existence of pretermitted heir, judgment should not have directed issuance of execution, as property in custody of probate court is not subject to levy or forced sale.

In Bank.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Betty Byron Purinton, a minor, by her guardian ad litem, Helen P. Miller, against Harry H. Dyson, individually, and as executor of Fred Fillmore Schaffer, deceased, and another. From a judgment for plaintiff, the defendant named appeals.

Reversed, with directions.

Crittenden & Hench and Scott Rex, all of Stockton, for appellant.

Charles H. Vance, A. L. Cowell, Gumpert & Mazzera, and C. H. Hogan, all of Stockton, for respondent.

EDMONDS, Justice.

This action is in equity and was brought by respondent, who, it is conceded, is a pretermitted heir of Adeline Potter, to recover her share of the estate of her ancestor which was distributed to Fred Fillmore Schaffer. Schaffer died before this action was brought and respondent named as defendants appellant Dyson, individually and as executor of Schaffer's will, and Carrie Sims, as special administratrix of Schaffer's estate. Respondent recovered judgment against the defendants named, and Dyson appealed.

Adeline Potter died testate in 1932, leaving as her only heirs Thomas G. Purinton, a son, and respondent, who is the daughter of a deceased son. By her will Mrs. Potter bequeathed $100 to her son Thomas Purinton and $50 to appellant Dyson. The residue of her estate was left to Fred Fillmore Schaffer, who was also named as executor.

Schaffer presented the will for probate by a petition in which he stated under oath that the only heir at law of testatrix so far as known to him was deceased's son, Thomas Purinton. The will was admitted to probate and Schaffer was appointed executor. He qualified as executor and thereafter filed his verified first and final account and petition for distribution in which, under oath, he stated that the persons entitled to distribution of the estate were Thomas Purinton, appellant Dyson, and himself, who were the three beneficiaries of the will. In 1932 this account was settled and allowed and a decree of distribution was made by which the small legacies to Purinton and Dyson were ordered paid and the residue of the estate, approximating $9,000 in value, was distributed to Schaffer.

In the following year Schaffer died testate, leaving the bulk of his estate to appellant Dyson, who was named in his will as executor. This will was admitted to probate and Dyson was appointed executor. Carrie Sims later filed a contest of Schaffer's will which resulted in the revocation of its probate. She was then appointed special administratrix of Schaffer's estate and qualified as such, but a new trial of the contest was subsequently granted.

Respondent's case rests upon extrinsic fraud alleged to have been committed by Schaffer in conducting the probate proceedings in the estate of Adeline Potter without disclosing her relationship to the deceased and notifying her of the proceedings. The complaint alleged that at the time Schaffer filed his petition for probate of the Potter will, he knew that respondent was the granddaughter of Mrs. Potter; that she was residing in Los Angeles, Cal.; and that his failure to disclose her existence was for the purpose of defrauding respondent out of her share of the estate. More specifically, it is alleged that a corrupt agreement was entered into between Purinton, Mrs. Potter's son, and Schaffer, whereby Schaffer agreed that if Purinton did not notify respondent that her grandmother had died and allowed the estate to be distributed according to the terms of the will, that Schaffer would make a will in his favor.

The court found these allegations to be true. The case, therefore, presents a situation where according to the findings of the trial court an executor, who was practically the sole beneficiary of the estate, kept an heir in ignorance of the death of her ancestor "with fraudulent design and intent to gain for himself a share of said estate which rightfully and lawfully belonged to" such heir. The trial court also found that neither the respondent nor any member of her immediate family had any knowledge or notice of the death of Mrs. Potter until the day the complaint was filed.

Appellant contends that Schaffer did not disclose respondent's existence because he was in ignorance of it. From this premise he argues that as the decree of distribution in the Potter estate was made by the court under the same mistaken belief, respondent can have no relief from the decree because it was not procured by extrinsic fraud. But the court found that Schaffer's actions were not due to any ignorance or mistaken belief, but were in pursuance of a fraudulent plan to defraud respondent of her share of the estate. In other words, the findings of the court are that Schaffer's acts were those of commission and not those of omission. There was ample evidence to support these findings and they are conclusive upon this appeal.

The legal question then presented is whether the acts of Schaffer as found by the trial court constituted extrinsic fraud which will allow respondent to maintain the action.

[1, 2] It is well settled that equity may afford relief from orders and decrees in probate proceedings for extrinsic fraud. Caldwell v. Taylor, 218 Cal. 471, 475, 23 P.(2d) 758, 760, 88 A.L.R. 1194. But appellant insists that any fraud practiced by Schaffer was intrinsic. The theory of this contention is, principally, that fraud to be extrinsic must be practiced directly upon the plaintiff in such an action. He cites as authority for his position the language of the leading case of United States v. Throckmorton, 98 U.S. 61, 66, 25 L.Ed. 93, where it was said that an action in equity will lie where "by some fraud practiced directly upon the party seeking relief against the judgment or decree that party has been prevented from presenting all of his case to the court." The rule laid down by that case, this court said in Caldwell v. Taylor, supra, "has become the well-recognized and standard definition of extrinsic fraud."

In the early case of Sohler v. Sohler, 135 Cal. 323, 326, 67 P. 282, 283, 87 Am.St.Rep. 98, extrinsic fraud was said to consist "in the failure to give legal notice to the adversary, the prevention of him or his witnesses from attending the trial, and the like." In Caldwell v. Taylor, supra, where the entire subject was exhaustively considered, the court said: "The main requirement to establish extrinsic fraud is that the unsuccessful party was prevented by his adversary from presenting all of his case to the court. One of the examples given is that of a party who is prevented from appearing in court." And in Bankers' Trust Co. v. Patton, 1 Cal.(2d) 172, 173, 175, 33 P.(2d) 1019, 1020, the general rule was summarized as follows: "It is assumed that the willful suppression in bad faith of material facts in probate proceedings by which the plaintiff and other creditors would be deprived of property and assets to which they would otherwise become entitled in satisfaction of their claims would constitute an extrinsic fraud against which equity could grant relief by charging the distributees as trustees, even though the decree of distribution itself be not disturbed."

However, it is difficult to see how fraud could be practiced more directly upon one entitled to present his rights to a court than by keeping him in ignorance of the proceedings. It is true that in most cases of extrinsic fraud the defendant has said something directly to the person whose rights were involved amounting to representations that it was not necessary for such person to take any part in the proceedings. In other cases, acts have been held to amount to such representations. But the rule allowing the maintenance of an action in equity for extrinsic fraud should not be limited so strictly as to require as a basis evidence of representations made directly to the one defrauded.

[3] In this case notice of the hearing of Schaffer's petitions was required to be served upon the heirs of the testator either personally or by mail. Section 328, Probate Code. Schaffer as the proponent of the will in the first instance and as the duly qualified and appointed executor thereof after it was admitted to probate was charged with the utmost good faith to the heirs of the deceased and to the court. It was his duty to see that notice of the proceedings was given to those whom he knew to be heirs of Mrs. Potter. The same situation was considered in the case of Zaremba v. Woods (Cal.App.) 61 P.(2d) 976, 980. There the executor of a will also presented a petition stating that the deceased left no heirs. It was claimed, as it is here, that his representation amounted to intrinsic but not extrinsic fraud. But the court held that the allegation constituted extrinsic fraud, saying: "There is a clear line of demarcation, however, between a statement made in the petition for the probate of the will which would limit the giving of notices to heirs, and testimony in court to the effect that there were no such heirs, after the heirs had been notified of the proceeding for the probate of the will, as provided by the different sections of the Probate Code."

Whatever may have been the motive of Schaffer, whether it was induced by the agreement which the court found he made with Mrs. Potter's son, or by some other reason, his acts in suppressing all information concerning respondent and representing Thomas Purinton to be the only son of the deceased, amounts to fraud practiced directly against the respondent. They furnish abundant foundation for a judgment holding him to have been a trustee for the property which should have been distributed to the respondent but which he wrongfully received.

Finally, appellant contends if respondent is entitled to recover, the judgment rendered does not correctly fix the respective rights and liabilities of the parties. The record shows that at the time the judgment in this case was rendered, there had been no distribution of Schaffer's estate. Appellant Dyson insists that there can be no judgment recovered against him and Sims individually because they have not received anything from the Schaffer estate.

[4] The judgment in an equitable action of this nature does not set aside the judgment or order attacked, but holds the one who fraudulently secured the property under it as a trustee for the person defrauded. Sohler v. Sohler, supra; Simonton v. Los Angeles T. & S. Bank, 192 Cal. 651, 658, 221 P. 368. The plaintiff in such an action is also allowed an equitable lien on the property which the defendant secured, dependent upon its identification. Walsh v. Majors, 4 Cal.(2d) 384, 49 P. (2d) 598. Under the facts shown Schaffer was a trustee for the respondent of the amount which he received from the Potter estate. This property never belonged to Schaffer and it therefore never became part of his estate and it is not chargeable with his debts or expenses of administration. The judgment ordered "that said defendants forthwith pay over to the plaintiff" the sum of $4,851 with interest amounting to $1,054 and costs "and that execution be issued hereon * * * in favor of the plaintiff Betty Byron Purinton and against said defendants and against the property of the Estate of Fred Fillmore Schaffer, Deceased."

[5] The evidence shows that there was distributed to Schaffer from the estate of Mrs. Potter certain items of jewelry appraised at $50.25; household furniture appraised at $50; a lot appraised at $650, and cash in the amount of $8,490.78. The same articles of jewelry and the lot are inventoried in the Schaffer estate. But although Schaffer had more than $8,750 on deposit in Stockton banks at the time of his death, appellant contends that this money cannot be identified as having been received from the Potter estate, hence respondent cannot recover any money judgment. It would be a strange rule of law which, under these circumstances, would deny respondent relief and give to the legatees of Schaffer the money which he fraudulently secured.

[6] But the judgment rendered must be modified. "The property in the custody of the probate court is not subject to levy or forced sale, and any execution issued and sale thereunder are void." 11B Cal. Jur. p. 349. Upon the facts as found by the trial court, respondent is entitled to a

judgment against appellant Dyson, as executor of the last will and testament of Fred Fillmore Schaffer, Carrie Sims as the special administratrix of the estate of said deceased, and Dyson individually declaring that the respondent is the owner of an undivided one-half interest in and to the jewelry and household furniture and the real estate distributed to Schaffer by the decree of distribution made November 10, 1932, in the estate of Adeline Potter, and that at the time of his death he held the said property and also the sum of $4,245.39 with interest thereon at the rate of 7 per cent. per annum from November 10, 1932, in trust for the respondent. Walsh v. Majors, supra. The judgment is reversed with directions to the trial court to modify its judgment in accordance with the views herein expressed and enter judgment accordingly, respondent to recover costs on appeal.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; SEAWELL, J.; CURTIS, J.; THOMPSON, J.

STOCKWELL et al. v. McALVAY et al.*

L. A. 14793.

Supreme Court of California.

Feb. 26, 1937.

Rehearing Granted March 25, 1937.

1. Attorney and client ⚷72

In suit by judgment debtor and wife to set aside sheriff's sale of stock allegedly owned by them, evidence *held* to show that judgment debtor and judgment creditor were responsible for acts of their attorneys during negotiations preceding such sale, and hence parties were bound thereby.

2. Equity ⚷65(2)

Judgment debtor's fraudulent transfer of his home and corporation stock to his wife, verification of false statement of his assets to induce creditor to compromise judgment, and filing of petition in bankruptcy, although solvent, *held* to preclude court of equity from setting aside sheriff's sale of corporation stock allegedly owned by judgment debtor and wife, especially where some of stock had been transferred to innocent purchaser who was not made party to action.

In Bank.

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Suit by B. C. Stockwell and husband against B. D. McAlvay and others. From a judgment for plaintiffs, defendants appeal.

Reversed.

Prior opinion, 57 P.(2d) 957.

Joseph L. Lewinson and Morris E. Cohn, both of Los Angeles, for appellants.

Newby & Newby, Dee Holder, and Nathan Newby, all of Los Angeles, for respondents.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Second Appellate District, Division 2. Upon further consideration, we are satisfied that the decision of said court correctly determines the issues, and we accordingly adopt the following opinion of Mr. Justice Wood as the opinion of this court:

"This is an appeal by defendants from a judgment in favor of plaintiffs setting aside a sheriff's sale of stock of Consumers Salt Company.

"A statement in some detail of the complicated affairs of the parties is necessary to an understanding of the problem before us. Plaintiffs, V. E. Stockwell and B. C. Stockwell, are husband and wife. Defendants Irwin and Rose are attorneys for defendant McAlvay. On June 19, 1925, McAlvay obtained a judgment against V. E. Stockwell in the sum of $16,000, based upon charges of fraud in the sale of real estate. After the accrual of the cause of action upon which the last-mentioned judgment was based, and after suit had been threatened, V. E. Stockwell transferred his residence property to his wife. In a separate action in the Superior Court a judgment was rendered on April 13, 1926, in which the court held that the deed was 'executed by said V. E. Stockwell with intent to delay and defraud his said creditor, said B. C. McAlvay.' In that action the court further ruled that title to the property was in the trustee in bankruptcy hereinafter referred to. Execution was issued on the judgment of June 19, 1925, and on October 1, 1925, the sheriff levied upon 225,000 shares of stock of the salt company, shown by the records of the company to be in the name of B. C. Stockwell. Defendant V. E. Stockwell had caused the stock to be transferred to his wife's name on July 9, 1925. The stock was sold by the sheriff to McAlvay on November 17, 1925, for the sum of $50. It is not charged that the sale was not made in accordance with law. Between October 1, 1925, and November 17, 1925, certain negotiations were conducted by and between Attorney Rose for McAlvay and Attorney Newby for V. E. Stockwell. On October 22, 1925, V. E. Stockwell verified a petition to be filed in bankruptcy proceedings, appending thereto a list of his property, but without including the 225,000 shares of stock levied upon or the residence property. This petition was exhibited by Newby to Rose on October 28, 1925, with the assertion that Stockwell had stated that the list included all of his property. Rose was informed that Stockwell did not wish to commence bankruptcy proceedings, but that he would do so unless McAlvay accepted the property mentioned in the list in satisfaction of the judgment. Rose undertook to investigate the properties listed, and not being satisfied with the value of the properties, he ordered the sale to proceed. On the day immediately after the sale V. E. Stockwell filed a petition in bankruptcy, in which he scheduled the properties mentioned in the list which had been exhibited to Rose, not including the residence or the shares of stock sold by the sheriff. On November 19, 1925, V. E. Stockwell was adjudged bankrupt, and on December 17, 1925, Kyle Grainger was appointed trustee.

---

*For subsequent opinion see 74 P.2d 504.

"McAlvay commenced an action on November 27, 1925, under the provisions of section 328 of the Civil Code, as it was then in force, to quiet title to the shares of stock. Compliance was made with the requirements of the statute. The salt company and Mrs. Stockwell were made defendants. V. E. Stockwell filed no pleading in the action, but he appeared as a witness for his wife and testified that he did not own or claim any interest in the stock. Upon the first trial of the quiet title action judgment was rendered against McAlvay, but his motion for new trial was granted and upon a second trial judgment was rendered, September 16, 1927, in which it was held that B. C. Stockwell had no interest in the stock and that it was the property of McAlvay. This judgment was affirmed on appeal. McAlvay v. Consumers' Salt Company, 112 Cal. App. 383, 297 P. 135, 139. The reviewing court, after discussing the charge of inadequacy of price in connection with the evidence in the case, said: 'No fraud and no unfairness except as to the amount paid is urged against the plaintiff, and the testimony was not such as to compel the finding that the price paid rendered the transaction unconscionable. Such was not the view of the trial court, and no reason appears for disturbing its conclusion.'

"The trustee in bankruptcy took no action to recover the shares of stock. McAlvay filed with the trustee his claim based on the judgment of June 19, 1925, with a credit of the amount paid for the stock at the sheriff's sale. Mrs. Stockwell from her separate funds deposited with the trustee the sum of $25,000 and authorized the trustee to pay from this deposit all claims against the bankrupt estate, including fees of the trustee. From this sum all claimants, including McAlvay, were paid in full. The sum deposited was more than sufficient to pay all claims and expenses. By agreement between Mr. and Mrs. Stockwell, all of the assets were to become the property of Mrs. Stockwell.

"Between the dates of the first and second trials of the quiet title action plaintiffs commenced the present action, October 27, 1926, and prayed that the sale of November 17, 1925, 'be set aside as fraudulent.' Some of the stock had been transferred to Rose and Irwin and they were made parties defendant. In the original complaint it was alleged that the shares were the 'sole and separate' property of Mrs. Stockwell. Upon the trial in June, 1932, the complaint was amended and the allegation made that the stock was the property of 'plaintiffs.' The allegations upon which plaintiffs obtained judgment are, in substance, that the attorney for McAlvay falsely pretended to be investigating the value of the properties listed in the bankruptcy petition which had been exhibited to him, that he thereby prevented V. E. Stockwell from taking steps to prevent the sale and from filing the bankruptcy petition before the sale of the stock, and that the sale was conducted without notice to plaintiffs. Counsel for both parties earnestly assert that their conduct was entirely proper. Some of the specific findings are favorable to defendants, but the general findings on the issue of fraud are in accord with plaintiff's allegations. The court also found that the stock at the time of the sale was of the value of not less than $60,000.

[1] "The briefs contain much discussion concerning the conversations and negotiations prior to the sale and the findings made thereon, but we consider it inappropriate to set these matters forth at great length. The question is raised whether McAlvay was bound by the acts of his attorneys during the negotiations. Mr. Newby argues that McAlvay was bound by the acts of his attorneys, but that V. E. Stockwell was not so bound. He states on one page of his brief that, 'The transaction complained of in the instant case was the fraud of appellants Irwin and Rose and the responsibility of McAlvay for that fraud to the extent of the benefits which he received from it;' on another page that, 'The final and conclusive answer to the whole defense, based upon said equitable maxim, is that defendants were not in the transaction upon which the instant suit is based, dealing with Stockwell personally at all. On the contrary, they were dealing with an independent person, to-wit, Nathan Newby, who trusted them and relied upon their acts and was misled thereby;' and on another page, 'Of course the fraudulent execution sale had then taken place and Newby very keenly resented the fact that he had been overreached in that matter.' The rule of responsibility applies alike to both of the litigants. Under the circumstances shown in evidence, both parties were unquestionably responsible for the acts of their attorneys.

"The main contentions of defendants are: That plaintiffs must be denied relief because they come to a court of equity with unclean hands; that the judgment in the quiet title action is res judicata, that said action was in rem and that the two Stockwells having conspired and co-operated together, V. E. Stockwell is bound by the judgment; that the trustee in bankruptcy alone had authority to sue to set aside the sheriff's sale; that the action is barred by the statute of limitations and by laches; and that the evidence does not support the findings which in turn are insufficient to sustain the judgment. Our determination of the first of these contentions disposes of the appeal and makes unnecessary a discussion of the other questions involved.

[2] "An examination of the complicated facts of this litigation discloses the familiar case of a judgment debtor attempting to evade a court judgment by placing his property in the name of his wife. No other reasonable conclusion can be reached. By fraudulent methods Mr. Stockwell persistently attempted to prevent his judgment creditor from receiving that which the court had awarded. In so doing, he brought himself to a position of financial loss, a position which resulted from his own unfair conduct and from which a court of equity is prevented from extricating him by the fundamental rule that he who applies to the court must do so with clean hands. He fraudulently transferred his residence property and corporation stock to his wife; he verified a false statement of his assets and caused it to be exhibited to counsel for his creditor with the threat that if the false list of property be not accepted he would file a petition in bankruptcy; although solvent at all times and possessed of ample means to pay his debts he fraudulently filed a petition in bankruptcy and fraudulently omitted to list all of his property in the bankruptcy proceedings; all of which was done in an effort to defeat the McAlvay judgment. Mr. Stockwell failed in his effort to induce McAlvay by use of the fraudulent bankruptcy petition to accept a portion of his property in settlement and now asks the court to relieve him from the consequences of his own fraudulent conduct in causing the stock to be placed in his wife's name. This a court of equity will not do. As well stated in Allstead v. Laumeister, 16 Cal.App. 59, 116 P. 296, 298: 'The harshness of such consequences falls upon one who would fraudulently conceal his property so as to escape the just demands of those having a claim upon it. * * * A court of conscience cannot consistently with the very principles which have occasioned its existence lend its aid to relieve a party from the results of his own fraud.' See, also, Powell v. Bank of Lemoore, 125 Cal. 468, 58 P. 83; Clark v. Bell (1905) 40 Tex.Civ.App. 39, 89 S.W. 38; Dunne v. Cunningham, 234 Mass. 332, 125 N.E. 560.

"Part of the stock sold at sheriff's sale was transferred by McAlvay to Irwin, who in turn pledged the stock as security with one Henry Merton. Mr. Merton has not been made a party to this action. Nevertheless, the court adjudged that certificate No. 53 for 112,500 shares issued to and held by Henry Merton 'be declared null and void' and Merton was commanded to deliver the certificate to the clerk of the court. This part of the judgment was manifestly erroneous. The rights of Merton as an innocent holder for value must be protected and in any event the court was without jurisdiction to order him to deliver the certificate without his being made a party to the litigation.

"The judgment is reversed."

KEY NUMBER SYSTEM

8 Cal.2d 347

In re CORNAZ' ESTATE (three cases).

Sac. 5050.

Supreme Court of California.

Feb. 26, 1937.

Rehearing Denied March 25, 1937.

1. Executors and administrators 🔑221(4)
Insane persons 🔑62

Evidence *held* sufficient to sustain court's finding that one filing claims against decedent's and incompetent's estates for support transferred his property to decedent and wards in consideration of their agreement to support him for life.

2. Contracts 🔑309(1), 311

Agreement of two brothers and sister to support their blind brother for life, in consideration of transfer of all his property to them, *held* not personal promise or agreement terminated by death of one promisor and incompetency of others.

3. Insane persons 🔑62

Insane persons' blind brother *held* entitled to enforce payment of claims against their estates for support, which they agreed to furnish him for life in consideration of transfer of his property to them, as against contention that insane persons' creditor cannot enforce claim which will render them insolvent and charge on state, where they had no dependents and would have considerable estate after payment of claims.

4. Executors and administrators 🔑202(1)
Insane persons 🔑62

Allowance of $60 per month against estates of decedent and two incompetents for support of their blind brother, who was over 70 years old, had weak heart, had recently been hospital patient and might need further medical attention at frequent intervals, *held* not excessive.

5. Insane persons 🔑65

Insane persons' guardian is charged with duty of honestly and fairly administering affairs of their estates, as well as protecting them against fraudulent claims, but should call creditor's attention to just claim, of which guardian has knowledge, such as claim for support, which wards agreed before becoming incompetent to furnish claimant.

6. Insane persons 🔑38

Supreme Court is concluded by probate court's rulings, supported by evidence, on fact questions as to insane persons' guardian's expectation of remuneration for keeping one filing claim for support and mismanagement of wards estates, assigned as grounds for guardian's disqualification.

7. Executors and administrators 🔑236
Insane persons 🔑62

Probate court's order, impounding lump sum of $7,190 for payment of $60 monthly to support decedent's and two incompetents' blind brother, having life expectancy of 9.47 years, as agreed by them in consideration of his conveyance to them of property worth between $10,000 and $12,000, instead of finding present value of future sum computed in order to determine amount of his claims when made, *held* not inequitable.

8. Executors and administrators 🔑236
Insane persons 🔑62

Claims against decedent's and incompetents' estates for allowance of stated sum monthly to their blind brother, whom they had agreed to support for life in consideration of his conveyance of all his property to them, *held* within probate court's equity jurisdiction, so as to authorize its order impounding lump sum from which to make such payments (Probate Code, § 953).

9. Courts 🔑200¼

Superior court, sitting in matters of probate, is court of general jurisdiction, and may bring to its aid full equitable and legal powers, vested in it as superior court, in determining questions arising in administration of estate.

10. Executors and administrators 🔑35(15), 221(4)
Insane persons 🔑38, 62

Probate court's order, allowing claims against decedent's and incompetents' estates for reasonable monthly payments to their blind brother, whom they had agreed to support for life in consideration of convey-

ance of his property to them, and denying petition to revoke letters of administration and guardianship and appoint petitioner as administrator and guardian, *held* proper.

In Bank.

Appeal from Superior Court, Shasta County; H. S. Gans, Judge.

In the matters of the guardianship of the persons and estates of Nonie Cornaz and Frank Cornaz, incompetent persons, and the estate of George Cornaz, deceased. From orders disallowing objections to allowance of the claims of Lewis Cornaz, sustaining an order allowing such claims, and denying the petition of Fred E. Haynes to revoke letters of administration and guardianship granted to L. B. Koehler and appoint petitioner as administrator and guardian, petitioner appeals.

Affirmed.

Carter & Barrett, of Redding (Daniel S. Carlton, of Redding, of counsel), for appellant.

John A. Spann and L. C. Smith, both of Redding, for respondents.

SEAWELL, Justice.

The questions presented in these several appeals, being common to all the cases herein, were consolidated for the purposes of trial and appeal and are submitted upon one record.

The members of the Cornaz household involved in this appeal consisted of three brothers and two sisters, to wit, George, Frank, Lewis, Nonie, and Mrs. Julia Hivley. George, Lewis, Frank, and Nonie had, prior to the death of George in 1934, acquired and owned in a manner hereinafter described a stock ranch consisting of several hundred acres of land, situate in a mountainous area near the town of Burney, county of Shasta, where they lived as a family and contributed their joint efforts to cattle raising. All grew into old age on the stock range except the married sister, Mrs. Julia Hivley, who seems to have withdrawn from the others in early life and made her home in the city of Sacramento. At the time of George's death, 1934, Mrs. Hivley, the eldest of the family, was 75 years of age, and Nonie, the youngest, was 55 years of age. The three brothers and sister, Nonie, were mountain people of simple and frugal habits. None of the four had ever married. They spent their years in a primitive, communitylike fashion. George was the dominant member and business head of the family group. Mrs. Hivley was estranged from the three brothers and sister for some 15 years prior to George's death. So far as the record discloses, she added nothing to the estate in which she hopes to share as an heir. In 1924, Lewis Cornaz, having completely lost his eyesight and being thus rendered helpless and unable to perform further services, deeded in September of that year his undivided thirteen-fortieths interest in and to the real property which primarily forms the basis of the controversy herein to his brothers, George and Frank, and his sister Nonie. By bill of sale he also conveyed title to 40 head of stock cattle owned by him to George, all of which was done in consideration of the promises made by said two brothers and sister that they would care for, support, and maintain him during the remaining years of his life. He was then approximately 58 years of age and resided on the ranch with said brothers and sister thereafter until the death of George, which occurred at the town of Burney, February 14, 1934. George died intestate. Letters of administration of his undivided interest in the lands and estate above referred to were issued to L. B. Koehler, who was the husband of Celia Cornaz Koehler, a deceased sister of said brothers and sister. A son, Roderick, is the only issue of the marriage of said Koehler and Celia Cornaz Koehler, deceased, who in 1934 was approximately 20 years of age.

Within 4 months after the death of George, both Frank and Nonie were adjudged to be insane persons and each was committed by the superior court of the county of Shasta to the Napa State Hospital for the Insane. L. B. Koehler, brother-in-law of said insane persons, was by orders of said superior court appointed guardian of the person and estate of each. As to Frank, letters were issued May 21, 1934, and as to Nonie letters were issued June 18, 1934.

Lewis continued to live at the ranch home until shortly after the death of George and the commitment of said brother Frank and sister Nonie to the state hospital. There being no one left of the original household able to care for him, he was taken by his brother-in-law, L.

B. Koehler, into his home, where he has since resided. His entire estate consisted of a Liberty Bond in the sum of $500. Each of said brothers owned a $500 Liberty Bond which they had purchased many years past. The two brothers and sister who had taken over his entire estate, real and personal, which was of the estimated value of from $10,000 to $12,000, in consideration of their agreements to furnish him shelter and the necessities of life so long as he should live, having been rendered simultaneously unable to perform their contracts by the intervention of death in the one case and the dual visitations of insanity in the other case, said brother-in-law, by reason of his knowledge of the aforesaid agreements and promises and the affairs of the family into which he had married, undertook to do what his two brothers and sister had agreed to do but were rendered unable by said misfortunes to comply with the covenants of their agreements.

The appellant in these appeals is Fred E. Haynes, a stranger to the blood, as the nominee of Mrs. Julia Hivley, a sister of decedent George, Lewis and the two incompetents.

Lewis filed claims against the administrator of George's estate, and also against the estates of the two incompetents, to enforce payment for his support and maintenance at the rate of $60 per month during the remainder of his life which, computed according to the mortality tables, gave him a life expectancy of approximately 9½ years. The total amount which will have been paid at the end of said life expectancy amounts to the sum of $7,190. This sum, apportioned in equal parts to the three estates, amounts to approximately $2,400 from each. Within the time allowed by law a creditor's claim was presented by Lewis to L. B. Koehler as the administrator of the estate of George Cornaz, deceased, and also as the guardian of the estate of said incompetents, respectively. Lewis was at said time of the age of 68 years. The claims, as filed, in each instance described the real property and the water rights, ditches, and water privileges appurtenant to the lands which Lewis deeded to said brothers and sister, together with 40 head of cattle by bill of sale executed September 10, 1924. The consideration set out in said creditor's claims is that the said Lewis Cornaz had, on said September 10, 1924, become blind and was unable to care for his personal needs, and said brothers and sister agreed and warranted to him that if he would execute a deed of said lands to them and convey certain personal property which he then owned that they would, as a consideration therefor, provide him with the common necessities of life, including food, clothing, shelter, and medical attendance, during the remainder of his life and would pay his necessary burial expenses; that said Lewis Cornaz performed all of the covenants of said agreement on his part to be performed and said brothers and sister performed all on their part to the day of George's death, February 14, 1934, but since said day nothing has been contributed by said brothers or sister or from the estates of either or any of them for the support or maintenance of said Lewis. Lewis avers that $60 per month is a necessary and reasonable sum for support and maintenance during the remaining months of his life.

Through his attorney, L. C. Smith, Esq., Lewis gave written notice under date of November 24, 1934, to the heirs and to all persons interested in the estates of said decedent and incompetent persons, in which notice he recited the circumstance of his blindness; the making of said agreements; the conveyance of his property to said brothers and sister; the consideration therefor; the death of George and the incompetency of Frank and Nonie; the failure of compliance with said agreements by reason of the death and incompetency of the other parties thereto; his necessities as to care and maintenance and medical attention and hospitalization when sick; and prayed that the sum of $20 per month be assessed and made a charge against each one of said separate estates (aggregating $60 per month), dating from George's death and continuing to the close of his life. The value of all of said property at the time it was conveyed is alleged to have been between $10,000 and $12,000. Said notice of claim states that the claims had been allowed by the administrator and the guardian of said respective estates and would be presented to the Honorable Albert F. Ross, judge of the superior court of the county of Shasta, at his chambers at the hour of 10 o'clock, December 6, 1934, for approval, at which time all objections against the approval of said claims might be made and considered.

Julius Cornaz, a resident of the state of Oregon and a brother who hitherto had not figured in the family controversy, filed written objections to said claims of Lewis and also to certain items of the accounts. His objections were placed on the grounds that there was no authority in law to present a claim of the kind presented to the guardian of the incompetent persons; that it was barred by the statute of frauds, section 1973, subdivisions 4 and 6, Code of Civil Procedure, and by subdivision 1 of section 339, same Code; that the claims were based upon a purported contract with the incompetents known as a personal contract which does not survive the death or the incompetency of the original party who entered into it.

Fred E. Haynes, as the nominee of Mrs. Hivley, filed petitions asking for the revocation of letters of administration and guardianship of whatsoever kind theretofore issued to L. B. Koehler in said matter and prayed that he be appointed in his stead. He set forth charges of waste and mismanagement on the part of L. B. Koehler and alleged that he represented interests adverse to and inimical to the interests of his wards and their estates. He charged that L. B. Koehler corruptly caused and procured the claims of Lewis to be prepared by his attorney at a time when said Lewis was in his care, custody, and control and was then and there physically and mentally incompetent and incapable of transacting business, thereby violating their trust as guardian and attorney in the premises. A further ground of removal was based on the allegation that L. B. Koehler was never authorized by any competent person who was a relative or heir of said wards or decedent.

In due time, pursuant to notice, the hearing of the objections made to Lewis' claims on said matters came before the Honorable Albert F. Ross, Judge, and after presentation and consideration of the same said objections were disallowed and said claims were approved. The objections to the allowance of Lewis' claims, as well as all other objections made by appellant to the allowance of other claims and items of the accounts came before the Honorable H. S. Gans, judge presiding, and upon hearing he disallowed said objections and sustained the order allowing said claims as set forth in the accounts.

The motions to revoke letters of administration and guardianship in said several estates and for the appointment of appellant in place of L. B. Koehler as administrator and guardian, respectively, were likewise denied and disallowed.

[1, 2] As to the sufficiency of the evidence to sustain the finding that the said transfer of Lewis' property to his two brothers and sister was made in consideration of the agreement that he would be supported and maintained by his grantees so long as he should live, there can be no room for disagreement. Mr. Koehler, the brother-in-law, who had intimate personal knowledge of the family affairs and who was selected as the personal representative of all the parties whose estates are involved herein, testified to conversations had with all of the brothers and the sister Nonie with respect to the conveyances made by Lewis and the consideration for the same in effect as found by the court. George Darrah, a member of the board of supervisors of Shasta county, intimate friend and adviser of George and a friend of the family for more than 30 years, knew from conversations with George, Frank, and Lewis and Nonie that said agreement and transfer had been made and the purposes for which they were made. Nonie, who had been released from the state hospital, was called by the appellant, and she testified that the claim of Lewis was just and should be allowed in accordance with said agreement. Whether she had been restored to competency does not definitely appear, but she was nevertheless called by appellant and her testimony was wholly intelligent. The deed and bill of sale executed by Lewis—unless it can be said that he voluntarily attempted to pauperize himself—corroborates the uncontradicted testimony of the witnesses above named. The finding of the probate court on the issue of the transfer and its purpose could not have been made otherwise than as made by the court. The contention that the agreement of the two brothers and sister was a personal promise or agreement of the nature that dies with the promisor is not tenable. There is nothing in the agreement which could not be performed by an ordinary person for hire. The supplying of food, shelter, and

the necessities of life does not call for any peculiar skill or art on the part of the promisor. The allowance of a fixed sum of money would be a full and practical compliance with all that the promisors agreed to do in the circumstances of this proceeding. We are of the opinion that all that the brothers agreed to do was to furnish the means by which Lewis would be assured the reasonable care and attention that a blind person should receive and be furnished the necessities of life that are fit and suitable for a person in his situation. Anything in the way of actual personal attention on the part of the promisors was not a major or vital consideration of the agreement, but, if it be so, it was an advantage which he had a right to waive. The contract was entered into with the express purpose of protecting Lewis during his remaining years against want, and its validity was not made to depend upon the contingency of death as to any other party to the agreement. It is not probable that said promisors gave any heed to or had any knowledge on the subject sufficient to advise them as to whether said matter should have been taken care of by a trust arrangement or whether their obligations would be enforceable in the probate court against their estates. The central purpose was to provide the blind brother with the necessities of life so long as *he* should live.

[3] Appellant asks, as one of the questions presented, whether a creditor of an insane person may enforce payment of a claim against his estate when the payment of such claim will render the insane person insolvent and thus a charge upon the state. Appellant has cited us to 32 Corpus Juris, 708, 709, and 14 Ruling Case Law, 579, and to one or two cases outside our jurisdiction which hold that in cases where the ward has a family the court will not necessarily apply the estate of the ward in payment of his debts. It is said the property of the ward will not be applied to the payment of his general indebtedness, as distinguished from claims for his present maintenance, until a sufficient fund is set aside for his support and that of his family. The leading case relied on is Lemly v. Ellis, 146 N.C. 221, 59 S.E. 683. No authority of this state bearing upon the question is cited. The question is really not involved in this case. First, it is shown that none of the persons involved in this controversy have either wife or child or dependents; second, it appears that each one except Lewis will have an estate, after the payment of Lewis' claim, approximating $10,000; third, we can conceive of no decision that, in the circumstances of this case, would make a blind person who possesses reason a charge on the public in order to conserve the estate of incompetent persons, especially when a considerable portion of the incompetents' estate was created by the impecunious blind person. The fact that the wards in this case are amply able to pay their obligations makes it unnecessary to discuss the rights of general creditors. We may here add that Frank, since this appeal was taken, has died and nothing further will be required for his support. His estate will furnish a considerable addition to the estate of the other living incompetent.

[4] The attack on the finding of the court that $60 per month is excessive for the support of a blind person, who in addition to his affliction is past 70 years of age and whose heart has been weakened by an attack of pneumonia and the toll of years, is without merit. The court may exercise its own knowledge in such commonplace matters. Lewis was recently a patient at a hospital and may need further medical attention at frequent intervals. His necessities will probably multiply in many ways as the days go by.

[5] Appellant claims that Mr. Koehler, the guardian, has taken an interest in Lewis' welfare which is antagonistic to his duties as guardian of the incompetents. This arises largely from the fact that Koehler knew of the agreements to convey said properties and the reciprocal duty of furnishing support to Lewis. It was claimed that he supplied his attorney with evidence tending to establish said claims and supported them generally. If the guardian of the incompetents had knowledge that Lewis had a just claim against their estates, it was his duty to disclose all that he knew to Lewis. A guardian is not charged alone with the duty of protecting his ward's estate against fraudulent claimants, but he is also charged with the duty of honestly and fairly administering the affairs of the estate. If he has knowledge of an outstanding claim which should in justice be paid, we know of no reason why he should not call it to the attention of the cred-

itor, in the circumstances shown to exist in the instant case. To conceal the facts, or to do less than the guardian did in the instant case, would tend to impute a lack of a sense of justice on the part of a guardian which would question his fitness to fulfill the duties of his office.

[6] We have also considered the objections made to the effect that the guardian who took Lewis into his home expected to be remunerated for his keep, and other charges with respect to the mismanagement of the said estates which appellant assigns as grounds which justify the disqualification of the guardian and administrator from acting as such officer. The probate court passed upon all of these questions of fact, overruling appellant's objections thereto and, its rulings being supported by the evidence, we are concluded thereby.

[7] Appellant vigorously assails the order impounding $7,190 from which sum $60 per month will be paid for the support and maintenance of Lewis. The case of Inyo Chemical Co. v. City of Los Angeles, 5 Cal.(2d) 525, 55 P.(2d) 850, is strongly relied upon by appellant as an authority holding that it was error for the court to set aside a lump sum payable on the day of order made; that it should have found "the present value of the future sum computed in order to determine the amount of claims at the time made." Appellant, by way of illustrating his criticism of the lump sum theory, shows that the yearly interest on the sum of $7,190 would yield at the rate of 6 per cent. $431.40 per annum. No method could be devised in a case such as this that would be free of difficulties. The court here was attempting to make respondent Lewis secure in an income sufficient for his support. There is nothing grossly inequitable, or at all inequitable, about the order impounding approximately $2,400 to be paid by each estate. There is evidence to the effect that the value of the property which Lewis conveyed was between $10,000 and $12,000. If Lewis had been charged the rates based on appellant's figures as to what would be a reasonable charge for his keep while in the care of said brothers and sister for the full period of 10 years, said aggregate sum would fall far below the value of the lands and livestock which Lewis parted with, to say nothing of the profits which the brother and sister reaped in the transaction. Add to this the most that he can receive at the rate of $60 per month for a period of 9.47 years, and it would still be less than the value of the property which he parted with.

[8, 9] The Inyo Chemical Company Case is wholly different from the instant case in its facts. That case was one involving the value of 90,000 tons of destroyed trona estimated at the selling price of the ore less the cost of production extending into the future for a period of 36 years. The court awarded as damages the total profits which would have been made during said period as profits to be paid in a lump sum. This court held that the trial court adopted an erroneous method of computing damages and ordered the case reversed, with instructions "to take competent evidence to establish the present value of those profits." Here the impounded fund had its inception in property furnished by Lewis. The trona case sounded in damages. The trona case was an action at law; the instant case is within the equity jurisdiction of the probate court. Section 953, Probate Code (formerly section 1648, Code.Civ.Proc.), provides that "If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require." Miller v. Miller, 171 Cal. 269, 152 P. 728, 729, presents a situation wholly different from the one before us. There two actions were brought by the mother and the sister, respectively, of E. O. Miller, deceased. The actions were based on the rejection of claims against the estate of E. O. Miller, deceased. Said E. O. Miller and his two brothers signed a writing by which each agreed to deposit $480 in a certain bank on October 15 of each year. From this fund the mother and sister were to draw $75 and $50, respectively, on the first day of each month. The concluding paragraph of said instrument read: "We consider this agreement binding upon us while living and chargeable against our several estates in case, we should predecease said or either of said beneficiaries."

During the lifetime of E. O. Miller the payments were regularly made, and after his death one payment was made on behalf of the estate. Before the 15th day of the following October the plaintiffs filed claims against E. O. Miller's estate. The court held the claims were for "moneys to become due and payable" each year as "per the attached agreement." The claims were rejected and suit was instituted to establish the right of each plaintiff to the allowance of her demand as a contingent claim against the estate.

The matter came before the court upon demurrer. This court held that, while it was proper to present a contingent claim before it became due, an action thereon may not be maintained until after the happening of the contingency. It was therefore held that the action was prematurely brought. Another reason given for the court's decision was that the claims were of such a nature that the court could not by any possibility determine what the segregated amount would be, if absolute. The decision reasoned that, if the claimants should have died before the next installment should have been due, under the agreement nothing would ever have been payable by the estate, in view of the contract and obligations created by it. Among the many points of distinction between the Miller Case and the instant case, it will be observed that there was nothing due in the Miller Case, while in the instant case there was a considerable sum due on a continuing claim at the time it was allowed. Death of Lewis alone could terminate payment. The mortality tables, which have in recent years become universally adopted as the method of determining life expectancies, made it reasonably certain that Lewis' expectancy of life was 9.47 years. The vital and material distinction between the two cases is pointed out in the Miller Case itself. It is there expressly stated that the equity side of the court may be invoked to protect the owners of contingent claims which were mature after the period within which distribution may take place. It there expressly said: "These complaints before us are not bills in equity. While each asks for a determination of the status of the claim upon which suit is brought, each is frankly based upon a rejected demand for moneys not yet due, and there is neither pleading nor prayer with reference to the condition of the estate, the ability of the defendants to provide for future payments, nor the desirability of creating a fund to meet the annual demands of the plaintiffs. * * * There was no breach until the date of payment arrived." Everything pointed out as lacking in the Miller Case appears at large in the instant case. The claims set forth in detail the circumstances in which the agreements were made, the condition of the estates affected thereby, the ability of the personal representatives to provide for future payments, and the desirability and necessity of creating a fund to meet the demand of the claimant. The claims present a complete bill in equity. The probate court, while sitting in matters of probate, is a court of general jurisdiction, and in determining any question arising in the administration of an estate, which it is authorized to decide may bring to its aid "the full equitable and legal powers with which, as a superior court, it is invested." In re Estate of Bell, 168 Cal. 253, 141 P. 1179, 1180; Verdier v. Roach, 96 Cal. 467, 31 P. 554. In Sime v. Hunter, 50 Cal.App. 629, 195 P. 935, with the Miller Case before it, it is held that, in a suit in equity setting forth the condition of the estate, the ability of the personal representative to provide for future payments, and the necessity for creating a fund to meet the demands of the claimant, the court may, in accordance with section 1648, Code of Civil Procedure (section 953, Probate Code), create a fund to meet the demand. In Newman v. Burwell, 216 Cal. 608, 15 P.(2d) 511, 513, we made reference to the Miller Case, and held that that case offered no obstacle to the conclusion arrived at in the Newman Case for the impounding of a fund sufficient to meet the monthly installments accruing between the time of the decedent's death and the time when the minor daughter, the beneficiary under the order, should reach her majority. The differences pointed out as to the controlling facts of the two cases were that in the Miller Case there was neither "pleading nor prayer with reference to the condition of the estate, the ability of the defendants to provide for future payments, nor the desirability of creating a fund to meet the annual demands of the plaintiffs." The decision then proceeds to say that the Newman Case is one in equity to establish the claim and to impound a fund with which to pay off the same as the installments accrue. It expressly says that which is true of the instant case, that the pleadings or claim contain all the necessary allegations referred to in the Miller Case and holds that the court had the power to impound the fund as prayed for by appellant.

[10] Respondent, as additional grounds for the affirmance of the orders herein, calls to our attention the finding of the probate court to the effect that there was an equitable compromise made as between the attorney of Lewis and the guardian. This is based on the substantial grounds that a trust arising out of an express contract existed in favor of Lewis, and, if his claim was repudiated, he would be entitled to bring an equitable action to impress said trust upon the properties held by said wards. That such an action, aside from its merits, would have retarded the settlement of said estates in which all the actors were well advanced in years, is obvious. The court was fully informed as to the likelihood and merits of such an action and was influenced by that contingency, as well as by the justice of the matter. That the probate court was satisfied that the guardian and administrator was acting in good faith at every step of the proceedings and for the best interests of all parties herein is made certain by its findings. The matter originally came before Hon. A. F. Ross upon presentation for the allowance of said claims. Later the settlement of the account was heard by Hon. H. S. Gans. Much time was given by each to the consideration of said matters.

If appellant's prediction that Lewis will not survive the expectancy of nine and a half years should come true, the residue of the impounded fund will revert as assets of said estates. If he should live that long, it cannot be said that $60 per month for his maintenance is an extravagant allowance. We are of the view that the decision follows the lines of natural justice, and is in harmony with the modern trend of decisions dealing with the question of contracts entered into for the support and maintenance of the aged, sick and unfortunate.

It may finally be said that both judges who heard the matter were familiar with every phase of said controversies, and each was fully considered by them in several chambers proceedings, all parties being present, and in formal court sessions. Both judges arrived at the same conclusion. In summing up the entire matter the court stated in its opinion that the guardian had acted openly and with consultation with counsel and court with a desire to solve the questions presented for the best interests of said parties to the proceedings, and that it would be for the best interests of said parties to continue his trust, "watched and counselled as he will be by both court and counsel."

Upon an examination of the case as disclosed by the record we are in agreement with the court's conclusion.

The orders and matters herein appealed from are affirmed.

We concur: WASTE, C. J.; CURTIS, J.; THOMPSON, J.; SHENK, J.; LANGDON, J.; EDMONDS, J.

8 Cal.2d 286

BROCK & CO. v. BOARD OF SUP'RS OF LOS ANGELES COUNTY et al.

L. A. 15996.

Supreme Court of California.

Feb. 15, 1937.

Rehearing Denied March 15, 1937.

1. Taxation ⇨98

Doctrine of mobilia sequuntur personam is not a conclusive guide as to the situs for tax purposes of tangible personalty, and such property may be taxed in locality where it has an established permanent situs, irrespective of the owner's domicile.

2. Taxation ⇨98

"Situated," as used in statute providing that taxable property shall be assessed in place in which it is "situated," connotes a more or less permanent location or situs, and the requirement of permanency must attach before tangible personalty which has been removed from the domicile of the owner will attain a situs elsewhere (Pol.Code, § 3628).

[Ed. Note.—For other definitions of "Situated," see Words & Phrases.]

3. Taxation 🔑260

Statute regarding situs of taxable property seeks to state rule of permanent situation as between rival taxing powers when tangible personalty has been removed from the locale of the owner's domicile to another county or district within the state and would not apply to relieve merchant from taxation at permanent situs of jewelry stock which he had removed from state before tax date for purpose of exhibit and sale as well as to escape taxation (Pol.Code, § 3628).

4. Constitutional law 🔑283

Taxation in the state of the owner's domicile of tangible personalty which has been permanently removed therefrom is a violation of due process (Const.U.S. Amend. 14).

5. Taxation 🔑98

As regards situs of part of jewelry merchant's stock which he removed from state for purpose of escaping taxation and offering jewelry for sale, fact that there had been similar excursions in other instances irrespective of tax period would not show removal was permanent, if removal was in fact temporary except as to merchant's motive of evading taxation.

6. Taxation 🔑98

Taxpayer is under no duty to maintain personalty permanently in a jurisdiction where it will be subject to the taxing power, but it may be removed to a nontaxing jurisdiction and escape the imposition of taxes if such removal is permanent.

7. Taxation 🔑98

Personalty is taxable at its permanent situs even if removed therefrom if removal is intended to be temporary only.

8. Taxation 🔑98

Absence from state of jewelry stock which merchant had removed from state prior to tax date to avoid taxation and display stock for a short period for purposes of advertising and making future contracts with potential customers with the intention of then returning the jewelry to merchant's general stock within state *held* a "temporary absence" which was ineffective to defeat tax at the place of permanent situs of the jewelry within the state.

[Ed. Note.—For other definitions of "Temporary Absence," see Words & Phrases.]

9. Taxation 🔑98

For purposes of taxation, state of origin remains the permanent situs of personalty, notwithstanding occasional excursions of personalty to foreign parts.

10. Taxation 🔑98

Fact that jewel which was included in stock which jewelry merchant removed from state for joint purpose of evading taxation and offering stock for sale was left without the state after other property was returned *held* not to render such jewel nonassessable in county from which it was removed where all of the jewelry was taken without the state for a temporary purpose.

11. Taxation 🔑85

Jewelry stock which merchant removed from state for joint purpose of escaping taxation and offering for sale *held* not "consigned for sale" to any person within statute exempting personalty consigned for sale to any person within the state from taxation (Pol.Code, § 3638).

12. Taxation 🔑500

Evidence *held* to support finding that jewelry stock which merchant removed from county prior to tax date never became a part of wealth of place to which it was removed and that stock was taken there for a limited period as regards right to tax property at place from which it was removed.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Brock & Co. against the Board of Supervisors of Los Angeles County, state of California, and others to cancel assessment on part of personalty of plaintiff. From an adverse judgment, the plaintiff appeals.

Affirmed.

Prior opinion, 58 P.(2d) 412.

Rehearing denied; EDMONDS, J., dissenting.

Holbrook Taylor, Tarr & Reed, W. Sumner Holbrook, Jr., and John H. Dawson, all of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondents.

SHENK, Justice.

The plaintiff is engaged in the business of selling jewels and jewelry in the county of Los Angeles. As of March 4, 1935, its jewelry stock was assessed pursuant to section 3628 of the Political Code at a value of $390,745. It objected to the assessment to the extent of $143,465, which was the value of a portion of its stock located on the tax day in Honolulu, Territory of Hawaii. For the purpose of testing the question whether that portion of its jewelry was assessable in Los Angeles county, the assessment was split and a separate personal property tax was levied against the $143,465 item. The plaintiff brought this action to cancel the assessment on that part of the merchandise on the ground that said merchandise was without the jurisdiction of the state on the tax day and that the assessment was in violation of the due process clause of the Federal Constitution (Const.U.S. amend. 14). The trial court concluded that the taxable situs of the merchandise was in Los Angeles county and that the plaintiff was not entitled to the cancellation. The plaintiff has appealed from the judgment which followed.

There is no dispute as to the essential facts. On February 22, 1935, the plaintiff shipped to Hawaii about half of the stock of its more valuable jewelry and precious gems. George C. Brock, its vice president, and Orville Joy, a salesman, embarked on the same boat which transported the gems and jewelry. On arrival in Honolulu the merchandise was deposited in a vault of the Hawaiian Trust Company. From March 4th to 14th, both dates inclusive, the jewelry was on display at the vault of the trust company to certain wealthy residents of the territory to whom its presence was made known by telephone message. None of the jewelry was sold there. All of it was returned to the plaintiff's stock in Los Angeles on March 22d following, with the exception of one ruby bracelet valued at $5,000, which was left in Honolulu with a local concern for purposes of sale, but which at the time of the trial herein had not been sold. The intention in taking the stock to Honolulu was two-fold: One purpose was the exhibit of the stock and the possible sale of any portion thereof to wealthy residents of Honolulu, for the duration of the stay of Messrs. Brock and Joy, and the return of all unsold to the company's general stock in Los Angeles. The other was frankly conceded to be to reduce the plaintiff's personal property taxes in Los Angeles county. Personal property was not subject to tax in Hawaii except by way of a sales transfer tax, and this fact was known to the plaintiff prior to the departure from California. The question presented in this case is whether the foregoing facts establish such an interruption of the permanent situs of the stock at the owner's domicil in Los Angeles county as would withdraw it from the jurisdiction of this state on March 4, 1935.

[1-3] The plaintiff invokes the language of section 3628 of the Political Code providing that "* * * all taxable property shall be assessed in the county, city * * * or district in which it is situated." It places its main reliance on Brown v. Houston, 114 U.S. 622, 5 S.Ct. 1091, 29 L.Ed. 257, Pittsburg, etc., Coal Co. v. Bates, 156 U.S. 577, 15 S.Ct. 415, 39 L.Ed. 538, and Frick v. Pennsylvania, 268 U.S. 473, 45 S.Ct. 603, 69 L.Ed. 1058, 42 A.L.R. 316, in support of its interpretation of the language quoted to the effect that property is taxable in the city or county if it is present there on the tax date, that is, that the property involved here was not taxable in Los Angeles county because it had been taken from that county and from the state to the territory of Hawaii, where on the tax date it was present for the purpose of exhibit and sale.

The doctrine mobilia sequuntur personam is no longer a conclusive guide as to the situs for tax purposes of tangible personalty, and such property now, by statute or otherwise, is taxable in the locality where it has an established permanent situs, irrespective of the owner's domicil. Buck v. Beach, 206 U.S. 392, 400, 401, 27 S.Ct. 712, 51 L.Ed. 1106, 11 Ann.Cas. 732; Wheeler v. Sohmer, Comptroller of New York, 233 U.S. 434, 34 S.Ct. 607, 58 L.Ed. 1030; Frick v. Pennsylvania, 268 U.S. 473, 490–493, 45 S.Ct. 603, 605, 606, 69 L.Ed. 1058, 42 A.L.R. 316; Safe Deposit & T. Co. v. Virginia, 280 U.S. 83, 93, 50 S.Ct. 59, 61, 74 L.Ed. 180, 67 A.L.R. 386; City Bank Farmers' Trust Co. v. Schnader, 293 U.S. 112, 55 S.Ct. 29, 79 L.Ed. 228.

By the above-cited section of the Political Code property in this state is taxable where it is "situated." But in its application to personal property that term has a broader concept than that urged by the plaintiff. It connotes a more or less permanent location or situs, and the requirement of permanency must attach before tangible property which has been removed from the domicil of the owner will attain a situs elsewhere. People ex rel. P. M. S. Co. v. Commissioners of Taxes, 64 N.Y. 541; Commonwealth v. Union Pac. R. Co., 214 Ky. 339, 283 S.W. 119, 49 A.L.R. 1091; 2 Cooley, Taxation (4th Ed.) pp. 978, 982; 61 Cor.Jur. pp. 224, 241; 26 R.C.L. pp. 278, 279. Furthermore, section 3628 of the Political Code seeks to state the rule of permanent situation as between rival taxing powers when tangible personal property has been removed from the locale of the owner's domicil to another county or district within the state. People v. Niles, 35 Cal. 282; City of Oakland v. Whipple, 39 Cal. 112; Rosasco v. County of Tuolumne, 143 Cal. 430, 77 P. 148; 24 Cal.Jur., pp. 112, 119.

[4, 5] The taxation in the state of the owner's domicil of tangible personal property which has been permanently removed therefrom is a violation of the due process clause of the Federal Constitution. Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 26 S.Ct. 36, 50 L.Ed. 150, 4 Ann. Cas. 493; Frick v. Pennsylvania, 268 U.S. 473, 45 S.Ct. 603, 69 L.Ed. 1058, 42 A.L.R. 316; Johnson Oil Co. v. Oklahoma, 290 U.S. 158, 161, 54 S.Ct. 152, 153, 78 L.Ed. 238; 2 Cooley, Taxation (4th Ed.) p. 975 et seq.

The plaintiff attempts to justify its contention that the removal of a portion of its stock of jewelry to Hawaii was for a permanent purpose, namely, for exhibit and sale, and not temporarily for the purpose of tax evasion, by analogizing the factual situation to previous similar instances of seasonal exhibits and displays for purposes of advertising, sale, and the like, irrespective of the tax period, held in Chandler, Ariz.; Palm Beach, Fla.; in the territory of Hawaii in 1934, and in Palm Springs, Del Monte, and Santa Barbara in this state. The analogy is not helpful in determining whether the removal was permanent. Notwithstanding the motive of evasion, if the goods otherwise were transported to Hawaii for a temporary purpose and such temporary removal did not destroy the permanency of the situs in this state, it would follow that similar excursions in other instances likewise would effect no interruption of the permanency of the situs in Los Angeles county.

[6, 7] The defendants contend that the present case is governed, in part at least, by decisions holding that the board of supervisors has the power to inquire into assertedly colorable transactions, for the purpose of preventing tax evasion. The defendants cite Whiting Finance Co. v. Hopkins, 199 Cal. 428, 435, 249 P. 853; Whiting Finance Co. v. Hopkins, 115 Cal.App. 756, 2 P.(2d) 461; Automobile Acceptance Corporation v. Hopkins, 121 Cal.App. 168, 8 P.(2d) 509, and similar decisions holding that the power to tax may be applied to taxable assets temporarily converted into tax exempt securities solely for the purpose of tax evasion. See, also, Mitchell v. Board of Commissioners of Leavenworth County, 91 U.S. 206, 23 L.Ed. 302; Superior Oil Co. v. Mississippi, 280 U.S. 390, 50 S.Ct. 169, 74 L.Ed. 504; Boessow v. Johnson, 10 Cal. App.(2d) 578, 52 P.(2d) 505; Helvering v. Gregory (C.C.A.) 69 F.(2d) 809; 61 Cor. Jur. p. 173. The principles involved in such cases, however, are inapplicable here. There is no duty to maintain property permanently in a jurisdiction where it will be subject to the taxing power, but it may be removed to a nontaxing jurisdiction and escape the imposition of taxes if such removal be permanent. Selliger v. Kentucky, 213 U.S. 200, 29 S.Ct. 449, 53 L.Ed. 761; Commonwealth v. Solliger, 126 Ky. 66, 98 S.W. 1040; Cf. Helvering v. Gregory (C.C. A.) 69 F.(2d) 809, 810; Wyndmoor Building & Loan Ass'n v. Power Building & Loan Ass'n, 121 Pa.Super. 236, 183 A. 367. But if the removal is intended to be temporary only, obviously the purpose, if exclusively for tax reduction, fails, for the property remains taxable at its permanent situs. Buck v. Beach, 206 U.S. 392, 27 S.Ct. 712, 51 L.Ed. 1106, 11 Ann.Cas. 732. Cf. Helvering v. Gregory, supra.

[8, 9] No serious contention is made that the valuable stock of jewelry involved here was intended to be removed permanently to the territory of Hawaii. It is clear from the evidence that no hopes were entertained of consummating any sale while the merchandise was in Honolulu. The plaintiff's vice president testified that the consummation of a sale of such valuable gems and jewelry is not the work of a day, a week, or a month, or even a year. It was definitely the intention of the plaintiff's officers to carry that portion of the stock to Honolulu, display it during a short period for purposes of advertising and making future contacts with wealthy potential customers, and then to return it to the general stock in Los Angeles, all of which was done with the exception of the return of one bracelet which remained with a jeweler in Honolulu because of the possibility of its

sale to a prospective customer. We entertain no doubt that under the decisions this amounted to no more than a temporary absence from home which was ineffective to defeat the imposition of the tax at the place of the permanent situs. As stated in New York ex rel. N. Y. Central & H. R. R. Co. v. Miller, 202 U.S. 584, at page 597, 26 S.Ct. 714, 717, 50 L.Ed. 1155, "Using the language of domicil, which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts." People ex rel. Kursheedt Mfg. Co. v. Feitner, 32 Misc. 84, 66 N.Y.S. 179. Cf. Standard Paving Co. v. County Board of Equalization, 135 Okl. 15, 273 P. 201, and Griggsry Const. Co. v. Freeman, 108 La. 435, 32 So. 399, 58 L.R.A. 349.

Cases such as General Oil Co. v. Crain, 209 U.S. 211, 28 S.Ct. 475, 52 L.Ed. 754 (see, also, Carson Petroleum Co. v. Vial, 279 U.S. 95, 49 S.Ct. 292, 73 L.Ed. 626; Minnesota v. Blasius, 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131; Merchants' Transfer Co. v. Board of Review, 128 Iowa, 732, 105 N.W. 211, 2 L.R.A.(N.S.) 662, 5 Ann.Cas. 1016), wherein is involved the question whether goods in interstate commerce have come to a definite, even though temporary, stop or resting place so as to have become incorporated into the general mass or bulk of property in the state and therefore subject to its protection and taxing power, are not helpful in determining the character of the stay in Hawaii of the merchandise involved here. In those cases the temporary nature of the stop or rest was not governed, as it was here, by the intention to return the goods to the state of origin when the purpose of the excursion was completed, but there the property had permanently left the home state. In the same category is the case of Brown v. Houston, 114 U.S. 622, 5 S.Ct. 1091, 29 L.Ed. 257, relied on by the plaintiff. There the question was whether coal consigned from Pennsylvania to New Orleans for sale at the latter port was taxable there. It was held that it had come to a definite stop and had become a part of the general mass of property in the state of Louisiana so as to be subject to tax. There was nothing to distinguish it from goods belonging to citizens of the locality, as there was in the present case where any possible sale of the jewelry was purely incidental to the purpose of display and return to the owner's domicil. The same comments dispose of the case of Pittsburg, etc., Coal Co. v. Bates, 156 U.S. 577, 15 S.Ct. 415, 39 L.Ed. 538, which was decided on the authority of Brown v. Houston. There is nothing in the case of Frick v. Pennsylvania, supra, which supports the plaintiff's contention that the jewelry had acquired a permanent situs in Hawaii. In the Frick Case the permanent situs of tangible personalty in another state was not disputed. The question for determination was whether it could be subjected to an inheritance transfer tax imposed by the state of the decedent's domicil when it had acquired a permanent situs elsewhere. It was held that the state could tax only so much of the personalty as was under its jurisdiction. In the present case the state's jurisdiction was not lost by virtue of the temporary excursion to the territory of Hawaii.

[10] There is no merit in the contention that the assessment was void because it included the $5,000 ruby bracelet, which the plaintiff contends was nonassessable in Los Angeles county because it was left for sale in Hawaii. The same facts and intention control the taxability as to the bracelet as the other jewelry, all of which was taken to Hawaii for a temporary purpose. If later that purpose was changed, that fact may be controlling at the next tax date, but it did not change the status of the property on the tax date here involved.

[11] The plaintiff argues that an affirmance of the judgment herein would be inconsistent with section 3638 of the Political Code providing that personal property consigned for sale to any person within this state is subject to tax. The facts disclose that the property was not consigned for sale to any person within the meaning of that section.

[12] The findings of the court that the jewelry was taken to Hawaii for a limited period and that it never became a part of the wealth of that island are fully supported by the evidence and in turn support the judgment.

The judgment is affirmed.

We concur: WASTE, C. J.; EDMONDS, J.; CURTIS, J.; LANGDON, J.; THOMPSON, J.; SEAWELL, J.

8 Cal.2d 339

FIRST NAT. BANK OF SANTA ANA v. KINSLOW et al.

L. A. 15597.

Supreme Court of California.

Feb. 25, 1937.

1. Execution 🔑188

Amendatory statute providing for determination of title to "property" levied on where claim of third party showing right to possession is filed, and for "taking, keeping and holding" of property by sheriff *held* inapplicable to realty, in view of other statutes amended at same time which made such procedure applicable to proceedings involving only personalty, and in view of construction given by legal profession for many years to statute and to prior statutes in substantially same form (Code Civ.Proc. §§ 17, 692, subd. 3; §§ 89, 519, 549, 689, as amended by St.1933, pp. 1811, 1857, 1865, 1887).

2. Execution 🔑283

Remedy of person claiming to be owner of realty sold under execution for debt of another, if he wishes to put in issue the legality of sale, is action to quiet title, since purchaser at execution sale acquires only judgment debtor's interest, and third person loses no right by execution sale (Code Civ. Proc. § 692, subd. 3).

3. Statutes 🔑218

Where statute providing for determination of title to property levied on which was claimed by third party was effective in substantially same form during almost entire history of state, construction of statute by legal profession, as disclosed by fact that no attempt had been made to apply such statute to realty, was strongly indicative that only reasonable construction of statute was that it was applicable only to personalty (Code Civ.Proc. § 689, as amended by St.1933, p. 1887).

In Bank.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Suit by the First National Bank of Santa Ana against Lenora E. Kinslow, defendant, and Walter T. Kinslow and another, third party claimants. From a judgment for plaintiff, defendant and third party claimants appeal.

Reversed, with directions.

Prior opinion, 55 P.(2d) 594.

Arthur E. Koepsel and L. W. Blodget, both of Santa Ana, for appellants.

Forgy, Reinhaus & Forgy and S. M. Reinhaus, all of Santa Ana (A. M. Bradley, of Santa Ana, of counsel), for respondent.

CURTIS, Justice.

The controlling question on this appeal is whether section 689 of the Code of Civil Procedure, as amended by St.1933, p. 1887, providing for the filing of a third party claim applies to executions against real property claimed by a third person. Said section as in force during the times herein involved is as follows:

"*Third Party Claims. Undertaking.* If the property levied on is claimed by a third person as his property by a written claim verified by his oath or that of his agent, setting out his right to the possession thereof, and served upon the officer making the levy, such officer must release the property if the plaintiff, or the person in whose favor the writ of execution runs, fails within five days after written demand, to give such officer an undertaking executed by at least two good and sufficient sureties in a sum equal to double the value of the property levied on.

"Such undertaking shall be made in favor of, and shall indemnify such third person against loss, liability, damages, costs and counsel fees, by reason of such seizing, taking, withholding, or sale of such property by such officer.

"Exceptions to the sufficiency of the sureties and their justification may be had and taken in the same manner as upon an undertaking on attachment. If they, or others in their place, fail to justify at the time and place appointed, such officer must release the property; provided, however, that if no exception is taken, within five days after notice of receipt of the undertaking, the third person shall be deemed to have waived any and all objections to the sufficiency of the sureties. If objection be made to such undertaking, by such third person, on the ground that the amount thereof is not sufficient, or if for any other reason it becomes necessary to ascertain the value of the property involved, the property involved may be appraised by one or more disinterested persons, appointed for that purpose by the court in which the action is pending, or from which the execution issued, or by a judge or justice thereof, or the court, judge or justice may direct a hearing to determine the value of such property. If, upon such appraisal or hearing, the court, judge or justice finds that the undertaking given is not sufficient, a sufficient undertaking shall be given.

"The officer making the levy may demand and exact the undertaking herein provided for notwithstanding any defect, informality or insufficiency of the verified claim served upon him. Such officer shall not be liable for damages to any such third person for the taking or keeping of such property if no claim is served by any such third person, nor, in any event, shall such officer be liable for the holding, release, or other disposition of such property in accordance with the provisions of this section.

"If such undertaking be given, such officer, shall hold the property; provided, however, that if an undertaking be given under the provisions of section 710b, of this code, such property shall be released.

"*Hearing.* Whenever a verified third party claim is served as herein provided, upon levy of execution or attachment, the plaintiff, or the person in whose favor the writ of execution runs (whether any undertaking hereinabove mentioned, be given or not), shall be entitled to a hearing within twenty days from the filing of the application or petition hereinafter mentioned, before the court having jurisdiction of the action, in order to determine title to the property in question, which hearing must be granted by the said court upon the filing of an application or petition therefor. Ten days' notice of such hearing must be given to all parties claiming an interest in the property, or their attorneys, which notice must specify that the hearing is for the purpose of determining title to the property in question. The court may continue the hearing beyond the said twenty-day period, but good cause must be shown for any such continuance. If the plaintiff, or the person in whose favor the writ of execution runs, gives the undertaking mentioned above to have the property held, such third person may initiate similar proceedings to determine title. The court may order the sale of any perishable property held by such officer and direct the deposit of the proceeds of such sale, and may, by order, forbid a transfer or other disposition of the property until the proceeding, herein provided, for the determination of such title, can be commenced, and prosecuted to termination. Such order may be modified or vacated by the judge granting the same, or by the court in which the proceeding is pending at any time, upon such terms as may be just. Upon the termination of such proceedings the court may make all proper orders for the disposition of such property or proceeds." Stats.1933, p. 1887.

The plaintiff, on February, 17, 1934, in an action pending in the Superior Court in the county of Orange, recovered judgment against the defendant herein in a sum exceeding $5,000. Execution upon said judgment was issued on March 27, 1934, and placed in the hands of the sheriff of said county, who by virtue of said execution levied upon real property situated in said county. Thereafter, and on April 12, 1934, a third party claim to said real property was served upon said sheriff by Walter T. Kinslow and Henry M. Kinslow, in which they claimed to be the owners of said real property.

Two days thereafter, that is, on April 14, 1934, the plaintiff herein filed in said Superior Court a document denominated an "Application to Determine Title to Real Property." This document is the basis of the present proceeding. It will be referred to hereafter as the application. The defendant in the original action, Leonora E. Kinslow, and the third party claimants, Walter T. Kinslow and Henry M. Kinslow, demurred to this application on the ground that it was uncertain and ambiguous, and that it failed to state facts sufficient "to warrant the court in granting the relief prayed for in said petition." This demurrer was overruled, and these three persons last named filed an answer to said application. The application set forth the recovery of the judgment against Leonora E. Kinslow, the issuance of an execution thereon, and the levy of this execution by the sheriff of said county upon certain described real property, the filing of a third party claim to said real property by Walter T. Kinslow and Henry M. Kinslow, and certain further facts tending to show that the defendant, Leonora E. Kinslow, was the owner of said real property, and that her conveyance of said real property to Walter T. Kinslow and Henry M. Kinslow was fraudulent and made with the intent to defeat her creditors. The answer of the three Kinslows denied that Leonora E. Kinslow was the owner of said real property. They further denied that the conveyance of Leonora E. Kinslow to Walter T. Kinslow and Henry M. Kinslow was fraudulent or made with the intent to defraud her creditors.

Upon these pleadings, the matter in controversy was set down for hearing. Each party appeared at said hearing in person and by their respective counsel and produced and examined witnesses in all respects as such proceedings are carried on in a regular trial. At the conclusion of the hearing the court, before whom said matter was heard, made its findings and thereafter rendered its judgment. The court found that Leonora E. Kinslow was the owner of said real property, and set aside the conveyance thereof to the third party claimants as fraudulent and made for the purpose of defrauding her creditors. From this judgment, Leonora E. Kinslow and the third party claimants have appealed.

We will now return to the consideration of the question involved herein, that is, whether the provisions of section 689 of the Code of Civil Procedure are applicable to executions upon real property, where the title to the same is claimed by a third party by means of a third party claim.

This is evidently a question of first impression in so far as the appellate courts of this state are concerned. Neither the efforts of this court nor the industry of counsel have been able to find any direct authority bearing thereon. This section of the Code was a part of the original Code of Civil Procedure of this state, adopted in 1872. The original section was taken with only slight modifications from section 218 of the Practice Act. (St. 1853, p. 85.) Section 689 has been amended from time to time. The last amendment with which we are concerned was made in the year 1933, and the section after said amendment is set out above.

In section 218 of the Practice Act, it was provided that when the property was claimed by a third party the sheriff should summon six persons qualified as jurors to try the validity of the claim. This same provision continued as a part of section 689 when it was incorporated in the Code of Civil Procedure in the year 1872. This verdict of the jury, however, did not protect the sheriff, and the proceedings before the jury were not admissible upon the trial of the action to determine title to the property in dispute. Perkins v. Thornburgh, 10 Cal. 189, 191, and Sheldon v. Loomis, 28 Cal. 122. In 1891 (Stats.1891, p. 20) the section was amended so as to do away with the trial by sheriff's jury. In the place of said trial, the amended section provided that the sheriff was not bound to keep the property when claimed by a third party by a written verified claim unless a bond was given the sheriff to protect him against such claim. Section 689 as enacted in 1891 continued without any material change therein until 1929 (Stats.1929, p. 661). In that year radical changes were made in the section, among which was the enactment of the provision providing for a summary trial of the title to the property levied upon and claimed by a third party before the court "having jurisdiction of the action." As so amended, the section was not materially different from the amended section which the Legislature enacted in 1933, and which we have hereinbefore set out in full.

Respondent in support of its contention that section 689 of the Code of Civil Procedure is applicable to real property as well as personal property relies upon the first sentence of said section where the word "property" is used, without any limitation as to the type of property whether real or personal to which it refers, and section 17 of the Code of Civil Procedure, which provides that the word "property" includes both real and personal property. It may be conceded that this argument has some merit, and if there were no other reasons for giving this section a different construction, it might control the meaning to be given to the whole section. But there are other provisions to be found in the section which must be given their proper place in arriving at the meaning of the section. In reading the first few lines of the section, we find that it provides that the claimant must set forth in his verified claim to the officer his "right to the possession thereof." (The property held under execution.) This is the only requirement as to what the third party's claim shall contain. The right to the possession of the property levied upon at the time of the levy is, therefore, the only question put in issue by the filing of the third party's claim. In levying an execution upon real property, the question as to who is legally entitled to the possession thereof does not arise. In fact, the possession of an occupant of real property levied upon under execution is not disturbed or in any way affected by the mere levy of execution. The question as to who is entitled to the possession of real property levied upon does not arise until a year after the sale of the property under execution. It is only when the officer levies upon personal property that the right to the possession arises. In most instances, when personal property capable of manual delivery is levied upon under execution, it is the duty of the officer to take physical possession of the property levied upon. It is then that a third person claiming said property must assert his claim, and unless he does so, according to a subsequent provision of said section, the officer is not liable to him in damages. Only when personal property is levied upon can the serving of a third party claim have any force or effect, or result in any advantage to the person serving the same.

[1, 2] There is other language of said section which indicates that the proceedings under a third party claim only refers to personal property when levied upon under execution. In the fourth paragraph of said section we find the expressions "taking or keeping of such property" and "holding * * * such property." These expressions are not pertinent to any acts of an officer levying execution upon real property. He neither takes, keeps, nor holds real property after a levy thereon. By virtue of an execution against real property the officer simply gives the notice of sale required by subdivision 3 of section 692, Code of Civil Procedure, and at the date mentioned in the notice, sells the property at public auction, giving to the purchaser thereof a certificate of sale, which entitles the latter to a sheriff's deed one year thereafter. On the other hand, in most cases when personal property is levied upon, as we have stated before, the officer takes possession thereof, and keeps and holds the same until sold by him, or other disposition is made thereof. Other provisions of the section might be mentioned which lead to the inference that said section is only applicable to personal property when claimed by a third person after an execution is levied thereon. We think, however, that the only reasonable inference to be drawn from those discussed above is that this section of the Code applies only to personal property and has no application to real property levied upon under execution when claimed by a third person. The remedy of a person claiming to be the owner of real property sold under execution for the debt of another, if he wishes to put in issue the legality of the sale, is an action to quiet title to the real property sold against the purchaser. He loses no right by the sale of his property under a judgment against another, for it is so well settled as not to require citation of authorities that the purchaser of real property at execution sale acquires only the judgment debtor's interest therein. Therefore, if a third person is the owner of the real property sold, the purchaser thereof acquires no interest therein adverse to that of the owner.

At the time section 689 of the Code of Civil Procedure was amended in 1933 (St. 1933, p. 1887), sections 549, 519, and 89 of the same Code were also amended (St.1933, pp. 1865, 1857, 1811). Section 549 provides that where a third person claims as his property any personal property attached, the rules and proceedings applicable in cases of third party claims after levy under execution shall apply. In other words, section 549, Code of Civil Procedure, makes section 689 applicable in cases where a third person claims as his own personal property attached. The same provision is found in section 519, Code of Civil Procedure, in an action in claim and delivery when the property is claimed by a third person. It is reasonable to infer from these sections of the Code, amended to read in their present form at the same time that section 689, Code of Civil Procedure, was amended, that the Legislature intended to make the procedure provided in section 689 applicable in all cases when personal property is seized by an officer and at the same time is claimed by a third person. When we consider the amendment to section 89, Code of Civil Procedure, this inference is much stronger, if not conclusive. This section defines the jurisdiction of municipal courts, and in subdivision (g) of said section, we find that municipal courts are given jurisdiction "in proceedings under section 689 of this code, or any amendment thereof, to determine title to personal property, seized in an action pending in, or upon execution issued by, such court." The only reasonable construction to give this provision of said section is that proceedings under section 689 of the Code of Civil Procedure are intended exclusively to determine title to personal property seized under execution.

[3] A further observance which we think might add weight to the conclusion that said section 689 is only applicable to personal property seized under execution and claimed by third persons, is that the word "property," found in the first sentence of said section, is to be found in the text of the old Practice Act, from which said section was taken, and in section 689 as originally enacted, and in every amendment thereof, up to the present time, in

the same relative position as it now occupies in said section. During this time, which covers almost the whole history of our state, this section of the Code, or its predecessor in the Practice Act, has been before the appellate courts of this state in various phases of litigation on scores of occasions, and an examination of these cases involving said litigation shows that in not a single instance before the present action, so far as we have been able to discover, has any attempt been made to apply said section to real property. From these circumstances, we must draw the irresistible conclusion that the profession during these many years has regarded the section as only applicable to personal property. This contemporaneous construction of the section by the legal profession of the state must be taken as strongly indicating that the only reasonable construction to be given to said section is in line with that accorded to it during the years past as only applying to personal property.

The other questions raised by the briefs of the parties are not of any importance on this appeal in view of our conclusion that said section is not applicable to real property. It is not proper, therefore, that we should pass upon them.

The judgment is reversed with directions to the trial court to dismiss the proceedings.

We concur: WASTE, C. J.; LANGDON, J.; EDMONDS, J.; THOMPSON, J.; SHENK, J.; SEAWELL, J.

---

8 Cal.2d 367

THOMPSON et al. v. MOORE et al.

Sac. 5056.

Supreme Court of California.

Feb. 26, 1937.

1. Quieting title 🔑50

Party to exchange of realty who gave note and trust deed to cover alleged difference in value between properties *held* entitled, in action to quiet title, to have trust deed canceled for other party's fraudulent representations as to difference in value, without offering to return property which he received in exchange, where neither cancellation of note, rescission of exchange, nor damages were sought, and cancellation of trust deed was relief merely incidental to quieting title.

2. Exchange of property 🔑5

Action for rescission of exchange of realty will not lie unless plaintiffs restore, or offer to restore, that which they received in exchange from defendants (Civ.Code, § 1691).

3. Quieting title 🔑6

Action to quiet title may be maintained by owner to determine any adverse claim of third parties.

4. Quieting title 🔑34(5)

Petition in action to quiet title need not ordinarily set forth nature of defendant's claim, nor specific facts showing invalidity of instrument on which defendant's claim is founded.

5. Quieting title 🔑34(1)

Where title is sought to be quieted against an instrument on ground of fraud, defrauded party must, as in all other actions involving fraud, plead pertinent facts constituting fraud.

In Bank.

Appeal from Superior Court, Yolo County; J. O. Moncur, Judge.

Action to quiet title by Robert Thompson and Ellen E. Thompson against W. G. Moore and others. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for appellants.

A. G. Bailey, of Woodland, for respondents.

CURTIS, Justice.

Plaintiffs were the owners of a house and lot in San Francisco. The defendants owned a tract of land containing 41.5 acres situated in the county of Yolo. They exchanged their respective properties upon a basis of a valuation of $4,500, assuming each piece of property to be clear of encumbrances. Plaintiffs' property in San Francisco was subject to a mortgage given to secure a promissory note for $1,697.43. Defendants paid plaintiffs the sum of $102.57. These two items amounted to $1,800, and, to offset them, the plaintiffs executed and delivered to the defendants their promissory note for $1,800, secured the same by a trust deed on the Yolo county property. After the completion of this exchange, the plaintiffs instituted this action, claiming that by reason of certain false and fraudulent representations made by defendants in respect to the Yolo county property they had been materially damaged. The original complaint was simply an action to quiet title to real property. Thereafter, plaintiffs filed an amended complaint consisting of two counts. The first count was like that contained in the original complaint, an action to quiet title to real property (the Yolo county property). In the second count it was alleged that the defendants were the owners of the Yolo county property and that it was reasonably worth the sum of $1,452.50 and no more, but that had it been of the kind and character represented by the defendants it would have been worth the sum of $4,500; that plaintiffs were the owners of the San Francisco property and it was reasonably worth the sum of $4,500 with a mortgage thereon in the sum of $1,697.43; that the Yolo county property as represented by defendants exceeded in value plaintiffs' San Francisco property in at least the sum of $1,800; that in order to make up the difference in value between the Yolo county property as represented by the defendants and the true value of plaintiffs' San Francisco property, the plaintiffs executed and delivered to the defendants their promissory note for $1,800 and a trust deed upon the Yolo county property to secure the payment of said promissory note. Then follows a statement of the representations, which the plaintiffs allege were made to them by the defendants; that they were false and fraudulently made, and that the defendants knew of their falsity at the time they were made; that plaintiffs did not, but believed they were true, and would not have made said exchange had they not believed that they were true; and that, by reason of said false and fraudulent representations, the consideration for said trust deed wholly failed. Plaintiffs prayed for a decree quieting their title to said real property and that the deed of trust given to secure said promissory note for $1,800 "is not a lien or encumbrance on said land, or any part thereof, and that the record thereof be canceled and annulled." Upon the service and filing of this amended complaint, the defendants appeared and filed a demurrer thereto and at the same time filed a demand and notice of motion for a transfer of said action to the superior court of San Francisco, the place of residence of the defendants. This demand and notice of motion was accompanied by a sufficient affidavit of merits. Upon the hearing of said matters, the motion for change of venue was denied, and the demurrer was overruled on the ground that the action was one simply to quiet title to real property, and was, therefore, a local action triable in the county where the real property was situated. No appeal was taken from the order denying the motion for change of venue, and the same has become final. Thereafter, the defendants answered said amended complaint, and moved the trial court for an order compelling the plaintiffs to elect whether they would try said action on the theory that the second cause of action was a cause of action in equity for the cancellation and rescission, or a cause at law for damages, or whether they would proceed to the trial of said action on the theory that said action was a suit to quiet title. This motion the court denied upon the same ground stated in its order denying the motion for change of trial and overruling defendants' demurrer. The case then went to trial upon the pleadings as framed by the parties. The defendants denied all averments of the amended complaint charging them with making false and fraudulent representations. The trial court made findings, and rendered judgment thereon in favor of the plaintiffs quieting their title to said real property; that the trust deed securing said promissory note was not a lien upon said property and that defendants be enjoined from asserting any claim to said land and premises. The court found that the Yolo county land at the time of said exchange was actually worth only the sum of $1,452.50, and that had said property been of the kind and character as represented by the defendants it would have been worth the sum of $4,500; and, as conclusions of law, the court found that plaintiffs were entitled to have their title to said property quieted as against the defendants, and in all other respects the conclusions of law support the judgment indicated above. From this judgment the defendants have appealed.

[1, 2] On this appeal the defendants contend that the plaintiffs may not, in the guise of a suit to quiet title, obtain a rescission in part of a transaction without offering to return the consideration received by them. Upon this statement the

defendants base their appeal from the judgment in this action. It will be noted that the plaintiffs have not asked for the cancellation of the $1,800 promissory note, but only that the title to their property be quieted as against the trust deed given to secure said note. That a distinction between two such causes of action may be made is indicated by the opinion of this court in the case of Howe v. Tucker, 219 Cal. 193, 194, 25 P.(2d) 832, 833. The trial court, upon the hearing of defendants' motion for change of place of trial, denied the same upon the authority of Howe v. Tucker, supra. That is the trial court held that the cause of action set forth in the second count of plaintiffs' amended complaint was an action to cancel and annul a trust deed upon the ground that it had been procured by fraud, and for that reason the consideration had failed and the deed was no longer an encumbrance against plaintiffs' property. In other words, the court held that the action was a local action and the trial thereof should not be changed to the county of the defendants' residence. We quote from the opinion in the case of Howe v. Tucker, as follows: "It may be conceded also that a complaint having for its sole and exclusive object the cancellation of a deed or a deed of trust for fraud is a local action. Eckstrand v. Wilshusen [217 Cal. 380] 18 P.(2d) 931; State v. Royal Consolidated Min. Co., 187 Cal. 343, 351, 202 P. 133; Booker v. Aitken, 140 Cal. 471, 74 P. 11."

Moreover, it has been repeatedly held that a complaint consisting of two counts, one stating a cause of action to quiet title to real property, and the other for the cancellation of a judgment or other encumbrance against said real property states but a single cause of action. In the case of Parsons v. Weis, 144 Cal. 410, 77 P. 1007, 1009, the plaintiff sued to quiet his title to real property and for the cancellation of a judgment on the ground that the same was procured through fraud. It was claimed that there was a misjoinder of causes of action in the complaint in that action. This court, however, held to the contrary, and in its opinion (at page 414 of 144 Cal., 77 P. 1007, 1009) used the following language: "The complaint states only a single cause of action, viz., to quiet the plaintiff's title, as against the defendant, to the land therein described, and, as incidental thereto, for the purpose of making the judgment more effective, to have the instrument under which the defendant asserts title declared void." To the same effect is Beronio v. Ventura County Lumber Co., 129 Cal. 232, 61 P. 958, 79 Am.St.Rep. 118, where the action was brought to quiet title and the annulment of a sheriff's deed. In that case the court said (at page 235 of 129 Cal., 61 P. 958, 959, 79 Am.St.Rep. 118): "The complaint presents only a single cause of action, viz. the enforcement of the plaintiffs' right to the premises in question against the unlawful claim of the defendant thereto. As a portion of the remedy for the enforcement of that right, it seeks the annulment of the sheriff's deed, but a plaintiff may frequently be entitled to several species of remedy for the enforcement of a single right." To the same effect are the following cases: Muir v. Hamilton, 152 Cal. 634, 636, 93 P. 857, 858; California Trust Company v. Cohn, 214 Cal. 619, 629, 7 P.(2d) 297; Wood v. Roach, 125 Cal.App. 631, 640, 14 P.(2d) 170. In the case of Muir v. Hamilton, supra, the plaintiff sought to quiet his title to real property and to have a deed which was given to secure two promissory notes canceled on the ground of fraud. In the final paragraph of the opinion it was stated: "The deed which plaintiff gave was, in effect, a mortgage, and was given as security for the payment of the promissory notes. The consideration for the notes having failed totally, it was plaintiff's right, as the court decreed, that the deed itself should be canceled and annulled."

In those cases, however, there was either a total failure of consideration or some other factor present which made it unnecessary for the defrauded party to restore the consideration received by him before seeking for a cancellation of the encumbrance against his own property. In the present case there was not a total failure of consideration. The plaintiffs still have the land which they received from defendants and they have not offered to restore it to the defendants. No action for the rescission of their contract of exchange would lie unless the plaintiffs restored or offered to restore that which they received in the exchange from the defendants. Toby v. Oregon Pac. R. R. Co., 98 Cal. 490, 498, 33 P. 550; Civ.Code, § 1691. Plaintiffs' action, however, is not one in rescission, but, according to the authorities above cited, is an action to quiet title to real property, and the fact that they also ask for a cancellation of the trust deed is only incidental to their quiet title action. Parsons v. Weis, supra. The court found that the property they received from the defendants due to the latters' false and fraudulent representations was worth some three thousand dollars less than it would have been worth had defendants' representations been true. This difference in the true value and the value as represented by the defendants far exceeded the amount of the trust deed. The trust deed was given for the purpose of equalizing the valuation of the two pieces of property exchanged, that is to compensate the defendants for the supposed excess in valuation of their property over the property of the plaintiffs. The court found, however, that the valuation of the Yolo county property did not exceed, but was far less than that of the San Francisco property, and, as a conclusion from this finding, held that there was no consideration for the trust deed, and, by its decree, based upon this finding and conclusion of law, quieted plaintiffs' title.

[3-5] An action to quiet title may be maintained by the owner to determine any adverse claim of the defendant, and the plaintiff in such action is not required to set forth the nature of the defendant's claim. Castro v. Barry, 79 Cal. 443, 447, 21 P. 946. To the same effect is the case of Hyatt v. Colkins, 174 Cal. 580, 581, 163 P. 1007, where the court stated the rule as follows: "As to the point that nothing specific is alleged in the complaint concerning the invalidity or a recital of any facts showing the invalidity of the instrument asserted to be a cloud against the title of plaintiff: It is well settled that there is no merit in such a claim." There is one exception to this rule, and such exception governs in the present action. That exception is that where the plaintiff seeks to have his title to property quieted as to an instrument which is attacked on the ground of fraud, then, as in all other cases when fraud is the basis for relief, the defrauded party must plead the pertinent facts relied upon as grounds for setting aside said instrument. Burris v. Adams, 96 Cal. 664, 667, 31 P. 565; Maison v. Puntenny, 212 Cal. 134, 137, 298 P. 33; Carpenter v. Smallpage, 220 Cal. 129, 133, 29 P.(2d) 841. This exception which we are now considering was clearly stated in the case of Burris v. Adams, supra, 96 Cal. 664, at page 667, 31 P. 565, 566, as follows: "The complaint contains only the averments usually employed in an ordinary action to quiet title. Where the cause of action depends upon the proof of fraud, the facts constituting the fraud must be averred." By reason of this exception to the general rule it was necessary for the plaintiffs' complaint in this action to contain the averments usually employed in an ordinary quiet title action, and, as their right to have their title quieted as against said trust deed was based upon fraud, it was also necessary for them to allege the facts constituting such fraud. The action, however, as is seen from the authorities cited and quoted from above, was still one action, and that an action to quiet title to real property. It is neither an action for rescission nor one sounding in damages.

For the reasons stated herein we are of the view that the judgment should be affirmed, and it is so ordered.

We concur: WASTE, C. J.; LANGDON, J.; THOMPSON, J.; EDMONDS, J.; SEAWELL, J.; SHENK, J.

8 Cal.2d 373

DIETZEL et al. v. ANGER et al.

L. A. 15987.

Supreme Court of California.

Feb. 26, 1937.

Rehearing Denied March 25, 1937.

1. Action 🔑13

Bare right to sue cannot by contract be exclusively given to one without interest in claim and thus denied to owner of claim (Code Civ.Proc. § 367).

2. Corporations 🔑473

Generally, "no-action" clause in corporate bonds, prohibiting action by bondholder unless trustee refuses to sue, is valid, and is intended to protect corporate debtor against multiplicity of suits and to protect bondholders as a class by requiring one suit to be brought by single representative for benefit of all.

3. Corporations 🔑240(1)

Clause prohibiting action by bondholders "on or because of" corporate bonds unless trustee, which was empowered as agent and attorney to enforce liability of corporation

or stockholders, refused to sue, *held* valid and barred action by bondholders to enforce stockholders' liability, where bondholders did not show that trustee had refused to bring action.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Ferd H. Dietzel and others against Lou Anger and others. From a judgment for plaintiffs, defendants appeal.

Reversed.

Prior opinion, 58 P.(2d) 217.

Loeb, Walker & Loeb and Herman F. Selvin, all of Los Angeles, for appellant Edwin J. Loeb.

Guy Richards Crump, of Los Angeles, Mark S. Feiler, of Beverly Hills, and Roy W. Colegate, of Los Angeles, for appellants Lou Anger et al.

Frank P. Doherty and William R. Gallagher, both of Los Angeles, for appellant I. C. Freud.

Guy Richards Crump and Harry G. Sadicoff, both of Los Angeles (Guy Richards Crump and Roy W. Colegate, both of Los Angeles, of counsel), for appellant William Hasberg.

Zagon & Aaron, of Los Angeles, for appellant Harry Brand.

G. C. O'Connell, of Los Angeles, for respondents.

LANGDON, Justice.

This is an appeal by defendants from a judgment rendered against them in an action brought by plaintiffs to enforce stockholders' liability. The facts were stipulated, and the only question is one of law.

Southern California Realty Corporation issued bonds in 1930, in the principal sum of $85,000, secured by a trust indenture to a corporate trustee, Union Trust Company of San Diego. In 1932, the issuing corporation made default in payments, and under the provisions of the instrument accelerating maturity, the trustee declared the entire unpaid balance, amounting to $78,000 plus interest, immediately due. Plaintiffs are the members of a bondholders' committee, and in this capacity have become the holders of all of the outstanding bonds of this particular issue. They brought this action against defendants, stockholders of the issuing corporation, to recover on the former constitutional and statutory proportional stockholders' liability for corporate debts. In the trial court the defendants objected that the suit was not maintainable because by the express provisions of the trust indenture and the bonds all rights of action arising therefrom were vested in the trustee, and bondholders were prohibited from suing except after prior demand upon the trustee, and its refusal to proceed. No such demand had been made by any of the plaintiffs. The court held that plaintiffs were nevertheless entitled to sue, and on this appeal by defendants the only issue is whether the instruments have validly denied such power.

The trust indenture provides: "All rights of action on or because of the bonds issued hereunder * * * and all rights of action under this indenture are hereby expressly declared to be vested exclusively in the Trustee, except only as hereinafter provided; and such rights may be enforced by the Trustee without the possession of any of the bonds issued hereunder. * * * Any suit or proceeding instituted by the Trustee shall be brought in its name as Trustee, and any recovery or judgment shall be for the pro rata benefit of the holders of the bonds issued hereunder. * * *" It further declares that no bondholder shall have the right to institute "any suit, action or proceeding at law or in equity, upon or in respect of this indenture" unless prior written notice is given to the trustee of default, and unless the holders of 25 per cent. of the bonds make written request to the trustee and give it a reasonable opportunity to act. The trustee is appointed "the agent and attorney of the holders of the bonds and coupons * * * to preserve or enforce the liability of the Company and/or any or all of its stockholders in respect of this indenture and/or of the bonds issued hereunder. * * *" The following exception is made: "Provided, however, that nothing contained herein shall defeat the right of an individual bondholder to pursue his legal or equitable remedy where his right of action arises out of collusion, fraud, gross negligence or wilful misconduct."

The bonds refer to the trust indenture and provide that a bondholder, upon acceptance of the bond, assents to the terms and conditions of the trust indenture.

In so far as these provisions relate to the trust indenture and deal with actions involving the security, there is no doubt either as to their applicability or their validity. Actions to foreclose, or other suits concerning the security, must be brought by the trustee, who not only is given the exclusive right to sue, but also has the legal title to the property. This point is well settled and is not questioned.

But the present suit does not relate to the security, and it is not against the issuing corporation. It is a personal action against the stockholders to recover a liability imposed by statute in favor of any creditor, whether or not the creditor had any security for his obligation. And in this connection plaintiffs point to the fact that, though the trustee has legal title to the security, the bondholders are the payees and therefore the legal owners of the chose in action evidenced by the bonds. They accordingly contend that the bondholders are the real parties in interest, and the sole persons permitted to sue. See Code Civ.Proc. § 367. The authorities support the general proposition that the mere right to sue cannot be vested in one who has no legal or equitable interest in the claim sued upon, and a provision in a contract purporting to give such a right may under some circumstances be deemed invalid, because the law and not the agreement determines who has the right to sue. Following this view, a few cases have held restrictive provisions void as an attempt to "oust the jurisdiction of the courts." See In re A. J. Ellis, Inc. (D.C.) 242 F. 156; Mackay v. Randolph Macon Coal Co. (C.C. A.) 178 F. 881.

[1, 2] While the foregoing proposition, namely, that the bare right to sue cannot by contract be exclusively given to one without an interest in the claim and thus denied to the owner of the claim, is in general correct, only a small minority of the decisions have held it controlling in determining the validity of the "no-action" clause in corporate bonds. Such clauses, prohibiting action by a bondholder unless the trustee refuses to sue, are quite common, and have been before the courts on numerous occasions. The great majority of the cases hold the restrictive provision valid on the theory that the bondholders have, by agreement among themselves, imposed a condition precedent to the exercise of the right of any one of them to sue individually. The decisions are doubtless influenced by the salutary purposes of the provision, which are, first, to protect the corporate debtor against a multiplicity of suits by individual bondholders, and, second, to protect the bondholders as a class by requiring one suit to be brought by a single representative for the benefit of all. The provision is, in view of these purposes, of benefit to both the corporation and the bondholders, and the policy of the courts has therefore been to sustain it against such a technical objection as discussed above. It would seem that the restriction on the rights of the bondholders, and the vesting of broad rights of action in the trustee, has the effect of making the latter a trustee of the chose in action represented by the bonds in the instances in which he is authorized to sue. But whether or not this be the correct theory upon which the restrictive provision may be explained, its validity must now be considered as established by the great weight of authority. See Carson v. Long-Bell Lumber Company (C. C.A.) 73 F.(2d) 397; Lidgerwood v. Hale & Kilburn Corp. (D.C.) 47 F.(2d) 318; Craig v. Consolidated Cement Corp. (C.C. A.) 69 F.(2d) 613; Allan v. Moline Plow Company (C.C.A.) 14 F.(2d) 912; In re International Match Corp. (D.C.) 3 F.Supp. 445; Jones v. Atlantic & W. R. Co., 193 N. C. 590, 137 S.E. 706; Schoeler v. Chancery Lane Corp., 161 A. 644, 10 N.J.Misc. 932; Moody v. Pacific S. S. Co., 174 Wash. 256, 24 P.(2d) 609; 2 Jones, Bonds and Bond Securities (4th Ed.1935) § 811; notes, 27 Columb.L.Rev. 579; 41 Yale L.J. 312; 46 Harv.L.Rev. 313, note 28.

[3] Approving, as we do, this general rule, the next question is whether the action to enforce stockholders' liability comes within the terms of the restrictive provision. Such an action differs in one important respect from the usual suit to which the restriction is applied, for it is not against the issuing corporation. But the same reasons of policy are present, for numerous suits by individual bondholders against stockholders would be an unreasonable burden on the stockholders, and would operate to the injury of those bondholders not represented in the action. The restrictive clause in the instrument before us applies not only to a suit on the bonds, but to any action "because of the bonds," and the trustee is expressly authorized, as the agent and attorney of the bondholders, to take necessary or proper steps to enforce the liability of the issuing corporation or its stockholders. The provision seems clearly intended to cover actions based upon stockholders' liability. Such liability did not arise from the statute alone, and could not exist were it not for the bonds. It is, therefore, based upon the

bonds, and exists "because of the bonds." See Babbitt v. Read (C.C.A.) 236 F. 42; Continental Corp v. Gowdy, 283 Mass. 204, 186 N.E. 244, 87 A.L.R. 1039.

It is true that courts have occasionally refused to enforce the restrictions where the circumstances made it inequitable to do so, for example, where the debtor corporation gained control of such a substantial portion of the bonds that it was in a position to hinder or defeat the efforts of other bondholders to demand action by the trustee. Brown v. Denver Omnibus & Cab Co. (C.C.A.) 254 F. 560, 569; see, also, 41 Yale L.J. 774; 27 Columb.L.Rev. 579; 2 Jones, Bonds & Bond Securities, § 1153, p. 561. But no such circumstances are presented here. The record discloses no reason for the failure to call upon the trustee to sue, and there is no attempt to show that he would have been unwilling or unable to assert all of plaintiffs' rights. We have found one case holding that a suit may be brought by the owner of all the outstanding bonds, disregarding the trustee. [Southern Nat. Bank v. Germania Mfg. Co., 176 N.C. 318, 97 S.E. 1]; but a recent federal decision holds directly to the contrary [Central States Life Ins. Co. v. Koplar Co. (C.C.A.) 80 F.(2d) 754], and we believe that the reasoning of this latter decision is conclusive.

The judgment is reversed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.; CURTIS, J.; EDMONDS, J.

---

8 Cal.2d 770

MARBLE et al. v. HASBERG.

SAME v. ANGER et al.

L. A. 15988.

Supreme Court of California.

Feb. 26, 1937.

Rehearing Denied March 25, 1937.

Corporations 🔑240(1)

Bondholders of corporation in default *held* not entitled to sue stockholders of issuing corporation, where rights of action under or because of bonds were vested in a trustee which had not been asked to sue.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Two actions by John M. Marble and others against William Hasberg and against Lou Anger and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Prior opinion, 58 P.(2d) 221.

Overton, Lyman & Plumb, Irving H. Prince, Chalmers L. McGaughey, and Roscoe R. Hess, all of Los Angeles, for appellants.

Loeb, Walker & Loeb and Herman F. Selvin, all of Los Angeles, for respondents Hasberg, Anger, Grauman, Rapf, Thalberg, Mayer, J. P. Loeb, E. J. Loeb, Lichty, Evans, as administrator, etc., and Keaton.

Guy Richards Crump, of Los Angeles, Mark S. Feiler, of Beverly Hills, and Roy W. Colegate, of Los Angeles, for respondent Schenck.

Frank P. Doherty and William R. Gallagher, both of Los Angeles, for respondent Freud.

PER CURIAM.

The questions involved in the appeal in these consolidated cases are the same as those raised in Dietzel v. Anger (Cal.Sup.) 65 P.(2d) 803, this day decided. The trial court in the instant case reached the conclusion that the plaintiffs, representing the holders of bonds of a corporation in default, had no right to sue defendants, stockholders of the issuing corporation, where rights of action under or because of the bonds were vested in a trustee which had not been asked to sue. For the reasons stated in Dietzel v. Anger, supra, the lower court's decision was correct.

The judgment is affirmed.

19 Cal.App.2d 335

PEOPLE v. KOVACEVICH.

Cr. No. 198.

District Court of Appeal, Fourth District, California.

Feb. 25, 1937.

1. Criminal law ⚿561(1)

Every element of crime must be proved beyond a reasonable doubt.

2. Evidence ⚿596(1)

Affirmative allegations requisite to cause of civil action stated by plaintiff's complaint must be established by preponderance of evidence (Code Civ.Proc. § 2061, subd. 5).

3. Bastards ⚿64

Paternity is essential element of offense of willfully failing to support minor child, which must be established by prosecution beyond a reasonable doubt and not by mere preponderance of evidence.

4. Bastards ⚿17½

In civil action against father for support of illegitimate child, father's paternity of child can be established by mere preponderance of evidence (Civ.Code, § 196a).

5. Estoppel ⚿52

Estoppel must be mutual and binding upon both parties.

6. Bastards ⚿25

Judgment in favor of father against whom civil action was brought for support of minor illegitimate child would not estop state from maintaining criminal prosecution for willfully failing to support minor child, since state was not party to civil suit (Civ. Code, § 196a).

7. Bastards ⚿25

Civil action against father for support of illegitimate child was not proceeding in rem, and judgment rendered therein did not conclusively establish status of paternity of child, since purpose of action was to compel father to support child and not to establish paternity of child, notwithstanding that paternity was important and necessary issue (Civ.Code, § 196a).

8. Bastards ⚿25

Judgment against father in civil action for support of minor illegitimate child did not estop father from disputing paternity of child in criminal prosecution for willfully failing to support minor child, since state was not party to civil action (Pen.Code, § 1102; Civ. Code, § 196a; Code Civ.Proc. § 1908, subd. 1; § 1962, subd. 6; § 2061, subd. 5).

9. Bastards ⚿92

Refusal to permit defendant accused of willfully failing to support minor child to show that he was not minor child's father, on ground that question of paternity had been conclusively determined by judgment against defendant in civil action for support of such minor child as defendant's illegitimate child, *held* prejudicial error (Pen.Code, § 1102; Civ. Code, § 196a; Code Civ.Proc. § 1908, subd. 1; § 1962, subd. 6; § 2061, subd. 5).

10. Bastards ⚿92

Instruction that question of paternity of minor child whom defendant was accused of willfully failing to support was conclusively determined by judgment against defendant in civil action against him for support of such minor child as his illegitimate child *held* prejudicial error (Pen.Code, § 1102; Civ.Code, § 196a; Code Civ.Proc. § 1908, subd. 1; § 1962, subd. 6; § 2061, subd. 5).

◆

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

George Kovacevich was convicted for willfully failing to provide necessary food, clothing, shelter, medical attention, and other remedial care for a certain minor child of whom he was alleged to be the father, and he appeals.

Reversed and remanded for new trial.

Julius Hansen, of Fresno, for appellant.

U. S. Webb, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and Dan F. Conway, Dist. Atty., and George DeWolf, Deputy Dist. Atty., both of Fresno, for the People.

JENNINGS, Justice.

The defendant was accused by information of the offense of having wilfully failed to provide necessary food, clothing, shelter, medical attention, and other remedial care for a certain minor child of whom it was alleged he was the father. Upon arraignment defendant entered a plea of not guilty to the accusation. He was thereafter tried before a jury which returned a verdict of conviction. Judgment was thereupon pronounced whereby it was ordered that defendant be confined in the county jail of Fresno county for a period of one year. The judgment provided that pending defendant's good behavior and on the further condition that defendant pay a stated monthly sum for the child's support execution of the sentence of imprisonment should be suspended. From the judgment thus rendered defendant appeals.

The principal contention advanced by appellant is that the trial court erroneously refused to permit him to cross-examine the complaining witness relative to the paternity of the minor child named in the information. It is insisted that thereby appellant was deprived of his right to a fair trial and that consequently the judgment pronounced against him must be reversed.

Examination of the record discloses that, during the presentation of respondent's case, there was admitted in evidence, without objection by appellant, the judgment roll in a certain civil action wherein appellant was named as the defendant and the minor child named in the information was the plaintiff. The judgment which formed a part of said judgment roll decreed that the plaintiff in said action is an illegitimate minor child whose mother is the complaining witness in the criminal proceeding and that appellant is the father of said child. It was accordingly thereby adjudged and decreed that appellant should pay monthly to the plaintiff a specified sum for plaintiff's support.

The complaining witness, Ellen Colombero, testified on direct examination that she was the mother of the minor child mentioned in the information and that appellant was the child's father. She further testified that from the time the child was born until the date of trial, a period of approximately 20 months, appellant had contributed not more than the sum of $5 to the child's support. On cross-examination appellant's counsel asked the following question: "At the General Hospital, didn't you tell the doctor and the parties in charge that you did not know who the father of the child was?" Objection to this inquiry on the ground that the question of paternity had been conclusively adjudicated by the judgment rendered in the civil action brought by the child against appellant was sustained, and the trial court, after argument, ruled that the judgment in the civil action was conclusive on the issue of paternity. The court also instructed the jury that in the present proceeding the question of paternity had been determined in another action wherein it had been adjudged that appellant was the father of the minor child and that the judgment in said action was conclusive as to the relationship which existed between appellant and the child and that consequently the only question submitted for the jury's determination was whether or not appellant had unlawfully failed to support the child.

Respondent maintains that the trial court's refusal to permit any inquiry as to the child's paternity and its instruction that the issue of paternity had been conclusively determined by the judgment in the civil action was correct. In this connection, it is first observed that subdivision 1 of section 1908 of the Code of Civil Procedure provides that: "In case of a judgment or order against a specific thing, or in respect * * * to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon * * * the condition or relation of the person." Attention is next called to subdivision 6 of section 1962 of the Code of Civil Procedure, which provides that, "The judgment or order of a court, when declared by this code to be conclusive," shall be deemed to be a conclusive presumption. It is finally observed that section 1102 of the Penal Code declares that: "The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code." It is urged that the effect of the above-mentioned sections of the Codes is that the judgment in the civil action which expressly adjudged that appellant is the father of the minor child mentioned in the information raised a conclusive presumption as to the relationship which exists between appellant and the child and effectively concluded the issue of paternity.

[1-4] With this contention of respondent we are impelled to disagree. It is a fundamental rule of criminal procedure that in the trial of an action wherein a defendant is charged with the commission of a crime, the prosecution is required to prove every element of the offense beyond a reasonable doubt. In this respect there is a marked difference between the degree of proof which is thus required and that which is imposed upon a plaintiff in a civil action. Code Civ.Proc. § 2061, subd. 5. In the latter all that is required is that the affirmative allegations requisite to the cause of action stated by the plaintiff's complaint shall be established by a preponderance of the evidence. In the instant action it must be conceded that the issue of paternity was an essential element of the offense of

which appellant was accused. People v. Swiggy, 69 Cal.App. 574, 585, 232 P. 174; People v. Morrison, 54 Cal.App. 469, 472, 202 P. 348. This element the prosecution was required to establish beyond a reasonable doubt, and not by a mere preponderance of the evidence, which was all that was required of the plaintiff in the civil suit brought in conformity with section 196a of the Civil Code, which provides that the father of an illegitimate child must furnish suitable support to such child and that a civil action for the enforcement of the duty is maintainable in behalf of the child by the mother or guardian.

In 15 California Jurisprudence, at page 114, it is said that: "Judgments in criminal proceedings are generally not competent or conclusive in civil proceedings, and vice versa, not only because ordinarily there is not the necessary identity of parties, but also because the same rules of evidence and degree of proof do not prevail in the two classes of proceedings." To the same effect is the text of 15 Ruling Case Law, p. 1004, which declares that: "It would not be just to convict a defendant by reason of a judgment obtained against him civilly by a mere preponderance of evidence."

[5, 6] It is apparent that the foundation for respondent's argument in support of the contention that the trial court properly denied to appellant any opportunity to make a showing regarding the paternity of the child and correctly instructed the jury that the question of paternity had been concluded by the judgment rendered in the civil action is the principle of estoppel. The basis for the contention that appellant is estopped from disputing paternity by the judgment rendered against him in a civil action wherein he was the defendant and which it appears he unsuccessfully litigated rests in subdivision 1 of section 1908 of the Code of Civil Procedure which, as above noted, declares that a judgment in respect to the legal condition or relation of a particular person is conclusive upon the condition or relation of the person. It is urged that the judgment in the civil action established that the relation which exists between appellant and the child mentioned in the information is that of father and child and constituted a final adjudication of such relationship. One difficulty which immediately suggests itself with respect to the applicability of the doctrine of estoppel to the situation here presented relates to the mutuality of the estoppel. It is a recognized principle of the law of estoppel that it must be mutual and binding upon both parties. 10 Cal.Jur., p. 627; People ex rel. Drew v. Rodgers, 118 Cal. 393, 397, 46 P. 740, 50 P. 668; People ex rel. Leavitt v. Bass, 15 Cal.App. 62, 113 P. 695; People v. Smith, 58 Cal.App. 607, 609, 209 P. 248. It is apparent that if appellant had succeeded in the civil action and a judgment had been rendered in his favor, respondent would not have been estopped in this proceeding by such judgment from showing that appellant is the father of the child named in the information. People ex rel. Drew v. Rodgers, supra. This must be true since the state which instituted the present action was not a party to the civil suit.

[7, 8] Furthermore, it must, we think, be conceded that the civil action in which appellant was named as the defendant was not brought for the sole purpose of determining the paternity of the child. The issue of paternity was, to be sure, an important and necessary issue in the case. It was not, however, the sole issue, and it may not be declared that the single object sought to be attained thereby was a determination of paternity. On the contrary, the suit was brought for the purpose of compelling appellant to furnish support. It may not, therefore, be successfully maintained that the civil action, whose object was to compel appellant to furnish support to the child, was a proceeding in rem and that the judgment in such action was one which conclusively established the status of paternity. Although the paternity of the child was a fact whose determination was essential to the adjudication of the principal subject-matter of the civil action, which was appellant's obligation to furnish support, the resulting judgment in that action could not be conclusive upon respondent which was not a party thereto. The lack of mutuality in the application of the doctrine of estoppel is therefore apparent. Freeman on Judgments (5th Ed.) vol. 2, p. 1895; vol. 3, § 1534, p. 3145; Gridley v. Boggs, 62 Cal. 190, 202.

[9, 10] Respondent relies upon the case of In re Madalina, 174 Cal. 693, 164 P. 348, 1 A.L.R. 1629, as decisive of the proposition that the judgment in the civil action constituted a conclusive adjudication of the issue of paternity which was binding upon appellant and could not thereafter be questioned by him. The cited case is not in

point on the question which is here involved and did not authorize the trial court to refuse to allow appellant an opportunity to show that he was not the father of the child mentioned in the information and to instruct the jury that the question of paternity had been conclusively determined by the judgment in the prior civil action. For the reasons herein stated it is our conclusion that the trial court committed error prejudicial to appellant with respect to these matters.

The judgment from which this appeal has been taken is therefore reversed, and the cause is remanded for a new trial.

We concur: BARNARD, P. J.; MARKS, J.

---

19 Cal.App.2d 327

McKENNA et al. v. EDWARDS et ux.

Civ. 10094.

District Court of Appeal, First District,
Division 1, California.
Feb. 24, 1937.

1. Brokers ⚷42

Plaintiff *held* entitled to recover for services leading to sale of defendant's corporate stock, notwithstanding plaintiff was not licensed as stockbroker, where defendant promised to pay plaintiff if she would negotiate loan for defendant, parties approached by plaintiff suggested sale of stock instead, plaintiff arranged conference between such parties and defendant, at which plaintiff was not present, and agreement for sale of stock embodying new plan of corporate operation was reached at conference, since plaintiff was not "broker" as regards sale of stock (St. 1933, p. 2310, § 2(a)(10).

[Ed. Note.—For other definitions of "Broker," see Words & Phrases.]

2. Brokers ⚷42

Plaintiff unlicensed as stockbroker *held* entitled to recover for services leading to sale of defendant's corporate stock, notwithstanding plaintiff's bill of particulars stated that claim sued on was for services rendered in "effecting" sale of stock, where evidence showed that plaintiff had not acted as broker, but had arranged conference between prospective buyer and defendant which resulted in agreement, based entirely upon their own negotiations, providing for sale of stock and future management of corporation (St.1933, p. 2310, § 2(a)(10).

◆

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by Mary L. McKenna and another against L. P. Edwards and wife. From an adverse judgment, defendants appeal.

Affirmed.

Owen D. Richardson, of San Jose, for appellants.

Louis Oneal and C. E. Luckhardt, both of San Jose, for respondents.

KNIGHT, Justice.

Defendants appeal from an adverse judgment entered pursuant to a verdict by a jury in an action to recover a balance due for services rendered by the plaintiff Mrs. Mary L. McKenna. The cause of action was pleaded in a common count, the allegations thereof being that defendants became indebted to plaintiffs in the sum of $2,634, that $1,063.45 thereof had been paid, and that there was a balance due of $1,591.36. The answer consisted of a general denial. Defendants contend as sole ground for reversal that the earnings sued for constituted broker's commissions for the sale of defendants' corporate stock, and that therefore Mrs. McKenna was entitled to recover nothing for her services because admittedly she was not licensed as a stock broker by the commissioner of corporations. In our opinion the earnings cannot be so classified.

[1] The evidence, although conflicting on some points, establishes the following facts: At the time these transactions took place, the defendants L. P. Edwards and his wife, Clara P. Edwards, were the owners of practically all the corporate stock of the San Jose Title & Abstract Company. The business was operated under Edwards' management; and Mrs. McKenna was the company's secretary and bookkeeper. She had been so for twenty-three years, and during the last fifteen years of her employment she officiated also as Edwards' private secretary. Edwards was indebted to a third party on a secured promissory note for $120,000, which matured at the end of

the year 1934. In May of that year he informed Mrs. McKenna that he was fearful the holder of the note would demand payment at maturity and foreclose unless the indebtedness was liquidated; and in view of that situation he promised Mrs. McKenna that if she would negotiate a loan for him for $100,000, to be secured by the corporate stock in the abstract company belonging to himself and his wife, he would pay her $5,000 for her services. Relying on said promise, Mrs. McKenna immediately contacted several people financially able to make the loan, the last of whom was Martin E. Ray, who was associated with a Mr. Kamb in the management of several investment companies. Ray informed her that a loan was not feasible, but suggested that Edwards sell a block of his stock sufficient to liquidate the indebtedness; that he would still own the controlling interest in the abstract company; and that if he decided to do so the investment companies represented by Kamb and himself would be interested in purchasing the stock. Mrs. McKenna laid Ray's suggestion before Edwards, who stated that he would discuss the matter with his wife. After having done so he told Mrs. McKenna they had concluded to act upon Ray's suggestion; whereupon Mrs. McKenna arranged for a conference between Edwards, Ray, and Kamb, which took place in the Masonic Temple in San Jose. Mrs. McKenna was not present at any time during the conference, nor did she participate directly or indirectly in any of the negotiations which took place between the parties. As the result of these negotiations between the parties, and on July 25, 1934, Edwards and his wife entered into a written agreement with Ray and Kamb, in the preparation of which Mrs. McKenna had no part, whereby Edwards and his wife agreed, among other things, to sell to Ray and Kamb 375 shares of their stock for the sum of $112,500. As part performance of the agreement thirty-three and a third shares of the stock and $10,000 in cash were at once deposited in escrow; and as provided by the terms of the agreement Ray and Kamb agreed to pay the balance of the purchase price, amounting to $102,500, on or before December 31, 1934, at which time the remainder of the stock was to be delivered. The agreement went much further, however, than providing merely for a sale of the stock. It embodied a new setup for the future operation of the abstract company. In this regard it provided for a stock "voting trust agreement," the insuring of the life of Edwards, who was to continue as the executive of the company, a limitation upon the amount of dividends to be paid on stock, the fixing of salaries of its officers, the designation of certain members of the board of directors, and restrictions as to the increase in the amount of capital stock. Immediately following the execution of the agreement Edwards informed Mrs. McKenna that inasmuch as the money was not obtained through the medium of a loan, he could not pay her the $5,000, but that as compensation for the services she had rendered in bringing about the arrangement whereby he was able to secure sufficient money to liquidate the indebtedness on the promissory note, he would pay off the balance of an outstanding loan on her home, which then amounted to $2,634, and which was being paid off by Mrs. McKenna in instalments of approximately $72 a month. And in part performance of such promise Edwards caused to be paid on said loan the sum of $921.01, and later two monthly instalments, thus reducing the amount of the loan to $1,591.36. At the end of December, 1934, Ray and Kamb consummated the purchase of the balance of the corporate stock; and on February 5, 1935, Mrs. McKenna resigned her position with the abstract company; whereupon Edwards refused to make any further payments on the outstanding loan on her property, or otherwise to pay her the balance due for her services. The present action was filed on May 25th of the same year.

Subdivision 10 of section 2 (a) of the Corporate Securities Act (St.1917, p. 673), as amended in 1933 (Stats.1933, pp. 2308, 2310), defines a "broker" to be any "person or company, other than an agent, who shall, in this State, engage either wholly or in part in the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in any security issued by others * * * or of underwriting any issue of such securities, or of purchasing such securities with the purpose of reselling them, or of offering them for sale to the public." And in this connection it has been held that even though there be but a single sale the transaction is not taken out of the operation of the provisions of the foregoing section. Van Wyke v. Burrows, 98 Cal.App. 415, 277 P. 190. Here, however, the evidence shows without conflict that Mrs. McKenna at no time engaged in or purported to carry on the business of dealing in stocks; likewise it shows that at no time did she offer for sale or negotiate for the sale of, or sell, any of the Edwards stock. As will be seen, her activities consisted only of soliciting a loan on the stock and afterwards conveying to Edwards the suggestion made by Ray for a sale of the stock, and arranging a conference between the parties which resulted in the execution of the written agreement above mentioned. As stated, the parties themselves, in the absence of Mrs. McKenna, did their own negotiating, and finally reached an agreement on their own terms which they reduced to writing and subsequently signed, providing not only for the sale of the stock but for the future operation of the company under the conditions therein set forth.

The situation here presented is no different in principle, therefore, from the one dealt with in Shaffer v. Beinhorn, 190 Cal. 569, 213 P. 960, which arose under the Real Estate Brokers' Act (St.1919, p. 1252). In that act, as in the Corporate Securities Act, it is in substance provided that in order to come within the definition of a broker a party must "sell or offer to sell, buy or offer to buy, or negotiate the purchase or sale or exchange of real estate * * *" (section 2); and in that case, as here, the services rendered consisted only of finding and introducing to the seller a person interested in making the purchase. In holding that the plaintiff therein was not a broker, the court went on to say that the employment of a person to perform an act preceding the negotiations of a sale does not, in the absence of subsequent assistance rendered in the ultimate negotiations of the sale, bring such person within the scope of the definition of a broker.

[2] Defendants call attention to the wording of the bill of particulars furnished by plaintiffs, wherein it is stated that the claim sued on is for services rendered in "effecting" a sale of the stock. It is evident, however, that the use of the word "effecting" in said bill amounted to nothing more than a statement of the pleader's conclusion, which fairly construed in the light of the uncontradicted facts meant only the finding of a prospective purchaser, and arranging a conference between the parties themselves, which eventually resulted in the execution by them of an agreement based entirely upon their own negotiations, providing not only for a sale of the stock but also for the future management of the corporation. And as will be noted, the statutory definition of a broker set forth in the Corporate Securities Act contains no terms comprehensive enough to bring within the meaning of said definition a person performing the character of services above mentioned.

Nor do we find any ground for reversal in the giving or refusal to give any of the instructions to the jury. Defendants' proposed instruction set out on page 109 of the reporter's transcript, which the court refused to give, was based upon the hypothesis that Mrs. McKenna negotiated the sale of the stock; and as shown there was no evidence whatever to justify such hypothesis. And plaintiffs' instruction No. 3, which the court gave, to the effect that under the evidence presented it was not essential for plaintiffs to prove that Mrs. McKenna was a licensed broker in order that plaintiffs might recover, cannot be said to have been prejudicial because it was doubtless correct in the abstract, even though it be assumed, as defendants contend, that it was based on an unsound legal premise.

The conclusions we have reached upon the questions above discussed make it unnecessary to inquire into the remaining points raised by the appeal, including those relating to the interpretation of section 2 (b) (3) of the Corporate Securities Act (St. 1917, p. 673, as amended by St.1933, p. 2311), and the effect of the failure of defendants to plead as a special defense the alleged violation of the provisions of the Corporate Securities Act.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

FIRST CONGREGATIONAL CHURCH OF GLENDALE v. LOS ANGELES COUNTY et al.*

Civ. S. C. 26.

District Court of Appeal, Second District, Division 1, California.

Feb. 26, 1937.

Hearing Granted by Supreme Court April 26, 1937.

1. Constitutional law ⟹34

Constitutional provision exempting church property from taxation is self-executing, and hence no legislation is necessary to achieve its purpose, nor may any legislation impair, limit, or destroy the rights granted thereunder (Const. art. 13, § 1½).

2. Constitutional law ⟹29

Legislation in regard to subject-matter of self-executing constitutional provision, if permissible at all, must be in furtherance of its purposes, and not in derogation, impairment, or destruction thereof.

3. Pleading ⟹214(1)

Facts alleged in complaint must be assumed to be true in consideration of demurrer.

4. Taxation ⟹244

Status of church property for taxing purposes is determined by facts in connection with use to which property is put, and not by anything that may or may not be done by owner or by assessor (Const. art. 13, § 1½).

5. Taxation ⟹537

Legislature may not restrict efforts of a religious corporation to obtain return of money paid under an assessment levied in defiance of self-executing constitutional provision exempting church property from taxation (Const. art. 13, § 1½).

6. Taxation ⟹537

Religious corporation which had paid taxes assessed on church property which was exempt from taxation under Constitution *held* entitled to recover taxes paid thereon, notwithstanding failure of corporation to comply with statute prescribing procedure for recovery of void taxes in respect to time within which corporation should have made demand on tax collector, since constitutional provision was self-executing and Legislature could not impair rights conferred thereby (Pol.Code, § 3819; Const. art. 13, § 1½).

7. Appeal and error ⟹102

Attempted appeal from order sustaining demurrer to plaintiff's first of two causes of action was dismissed, since no appeal would lie from such an order.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the First Congregational Church of Glendale, a religious corporation, organized under the laws of California, against the County of Los Angeles and another. From a judgment in favor of the defendants, entered after demurrer to plaintiff's first cause of action was sustained without leave to amend and from an order sustaining the demurrer, the plaintiff appeals.

Attempted appeal from order sustaining demurrer dismissed, and judgment reversed, with directions.

James P. Mackel, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, Gordon Boller, Deputy Co. Counsel, and D. DeCoster, Chief Deputy Co. Counsel, all of Los Angeles, for respondents.

WHITE, Justice pro tem.

This is an appeal by a religious corporation from a judgment in favor of defendants entered after sustaining defendants' demurrer to the first cause of action in plaintiff's complaint without leave to amend. While the complaint contained two causes of action, this appeal concerns only the first, for the reason that a stipulated judgment was entered in plaintiff's favor as to the second cause of action. The first cause of action in the complaint alleged that the plaintiff religious corporation is the owner of certain real property, which, with its improvements, is used solely and exclusively for purposes of religious worship, all being required therefor, and the same never having been rented or any rent received; that taxes were assessed against this church property in the year 1930; that plaintiff failed to pay the taxes so assessed, and thereafter, on June 30, 1931, the property was sold to the State of California by respondent County of Los Angeles under the claim that said taxes had become delinquent; that on November 9, 1931, plaintiff religious corporation, claiming that said sale was wholly void on the ground that the property so sold was exempt from taxes under the provisions of section 1½ of article 13 of the Constitution of California (except as to $27.50 levied on account of Los Angeles County Flood Control), tendered said taxes, with interest, costs, and penalties, amounting in all to $1,462.03, to the county tax collector of respondent Los Angeles County; that this tender was accompanied by a written protest, but that the tax collector refused to accept the proffered tax money; whereupon such taxes were tendered by plaintiff, paid to, and accepted by the county treasurer of respondent county, thereby redeeming the property from the sale thereof to the State of California by making to the county treasurer the statutory and regularly computed redemption payment of the taxes, penalties, percentages, and costs. The complaint further alleged that plaintiff also filed a written demand with the council of the City of Glendale for the repayment of the portion of said taxes collected by the county on behalf of said respondent city and paid under protest, as aforesaid, which demand was rejected by the City of Glendale. The first cause of action in the complaint also alleged that at all times mentioned the county assessor and tax collector of respondent county had knowledge of the ownership and use of the property in question as therein stated, and that the same was exempt from taxation. This action is prosecuted by appellant religious corporation to recover from respondents the moneys so paid.

---

*For subsequent opinion see 71 P.2d 1106.

It is the contention of respondents that freely admitting that the 1930 tax in question was void, nevertheless appellant cannot recover the money paid thereunder, for the reason that the latter has not brought itself within the provisions of section 3819 of the Political Code, which attempts to prescribe a procedure for recovery of void taxes paid under certain circumstances. The pertinent section provides as follows: "At any time after the assessment-book has been received by the tax collector, and the taxes have become payable, the owner of any property assessed therein, who may claim that the assessment is void in whole or in part, may pay the same to the tax collector under protest, which protest shall be in writing, and shall specify whether the whole assessment is claimed to be void, or if a part only, what portion, and in either case the grounds upon which such claim is founded and when so paid under protest, the payment shall in no case be regarded as voluntary payment. And such owner may at any time within six months after such payment bring an action against the county, in the superior court, to recover back the tax so paid under protest."

The sole question presented to us is whether the limitations prescribed in section 3819 of the Political Code apply to the right of a religious corporation to recover a tax paid on church property which by the fundamental law of the land (section 1½, art. 13, Calif.Const.) is freed from such taxation.

[1-4] The section of the Constitution last referred to is self-executing [St. John's Church v. County of Los Angeles, 5 Cal.App.(2d) 235, 42 P.(2d) 1093], and therefore no legislation is necessary to achieve its purpose; nor is any legislation permissible that will impair, limit or destroy the rights granted thereunder. In Winchester v. Howard, 136 Cal. 432, 64 P. 692, 69 P. 77, 79, 89 Am.St.Rep. 153, it was said: "We must submit to this policy established in the fundamental law, and therefore every constitutional mandate which can be put in force without legislation must be held to be self-executing, unless a contrary intent is shown." In Cooley on Taxation, 4th Edition, it is said: "On the other hand, constitutional provisions declaring that certain property shall be exempt are self-executing and need no legislation to make the exemptions effectual." Section 650, p. 1369. "In many, if not most, of the state constitutions, there are provisions expressly relating to the exemption of property from taxation. Some of these provisions, naming particular property as exempt, are self-executing so as to grant exemption without any action of the legislature." Section 661, p. 1382.

Assuming that even though a constitutional provision is self-executing, the Legislature may, and in some instances must, enact legislation to facilitate its operation, and to provide convenient remedies for the protection of the right established, and for the determination thereof and the regulation of claims thereto; nevertheless, such legislation must be in furtherance of the purpose of the constitutional amendment and not in derogation, impairment, or destruction thereof. First M. E. Church v. Los Angeles County, 204 Cal. 201, 204, 267 P. 703. The Constitution enjoins upon the assessor the duty not to assess this property, which the complaint alleges is exempt by reason of its use, and in the consideration of a demurrer the truth of the facts alleged must be assumed. In our opinion, in the face of the constitutional exemption, the owner had a right to assume that the tax would not be levied, in view of the admitted exemption therefrom; and in fact the assessment never should have been made. The only right vested in the respondents is to have a determination of the fact as to whether the property comes within the provisions of the constitutional section. If in fact, as alleged in the complaint, it does come within the provisions of the section, its status is fixed and it is not taxable. The status is determined by the facts in connection with the use to which the property is put, and not by anything that may or may not be done by the owner or the assessor.

[5] Our system of government is founded on the principle that all just powers are derived from the consent of the governed. When, therefore, the people have spoken, through their Constitution, directing that church property shall be exempt from taxation, it does not lie within the province of an assessor to levy a tax, nor is a tax collector or treasurer within his rights in accepting or attempting to keep money paid pursuant to an assessment which the Constitution outlaws. The legislature has no right, by either general or special legislation, to place any restriction upon a religious corporation in its efforts to obtain the return of money paid under an assessment levied in defiance of this self-executing constitutional amendment, which forbade the assessor to levy or the tax collector to demand or receive the tax.

[6] In the face of the self-executing constitutional amendment here in question, we hold that the Legislature is without power, by statute, to prescribe that the owner of such property cannot appeal to the courts to recover money paid upon an assessment levied notwithstanding such constitutional amendment unless such owner makes demand upon the tax collector during a certain prescribed time, as required by the provisions of section 3819 of the Political Code. The constitutional mandate prohibited the assessor from making an assessment upon this property and restrained the assessor, treasurer, or any other tax-collecting agency, from collecting taxes thereon. Therefore, under the allegations of the first cause of action in plaintiff's complaint, any moneys collected by reason of such assessment are illegally and unlawfully held; and appellant is entitled to recover the same, because the allegations of the complaint affix to the property the status which brings it within the constitutional exemption. The general demurrer to plaintiff's first cause of action should not have been sustained.

[7] The attempted appeal from the order sustaining the demurrer is dismissed, as no appeal lies from such order. The judgment is reversed, with directions to the court below to overrule respondents' demurrer, allowing the latter appropriate time within which to answer the first cause of action in plaintiff's complaint if respondents be advised to file such answer.

We concur: YORK, Acting P. J.; DORAN, J.

LOS ANGELES COUNTY v. RANSOHOFF et al.*

Civ. 9950.

District Court of Appeal, First District, Division 1, California.

Feb. 27, 1937.

Rehearing Granted March 29, 1937.

1. Taxation 🔑543(2), 587

Property owner cannot defeat collection of tax, or recover its amount if paid under protest, upon the claim that the assessment was excessive and discriminatory, unless he has applied for a reduction under the statute (Pol.Code, § 3674).

2. Taxation 🔑470

County board of equalization has no jurisdiction or power to reduce assessment for taxation except upon an application under the statute (Pol.Code, § 3674).

3. Taxation 🔑483

Application to county board of equalization for reduction of assessment, stating that ground upon which the change was asked was "unequal value," did not show the facts on which it was claimed the reduction should be made as required by statute, and was insufficient to give jurisdiction to the board (Pol.Code, § 3674).

---

*For subsequent opinion see 74 P.2d 828.

4. Taxation ⚷483

Where application to county board of equalization for reduction of assessment was insufficient to confer jurisdiction on the board, the lack of jurisdiction was not cured by the action of the board in hearing and determining the application (Pol.Code, § 3674).

5. Taxation ⚷597

In action to collect personal property taxes, defended on ground that assessment was unequal and excessive, it was essential that answer allege either payment or offer to pay what was due upon a fair valuation as conceded or fixed by the court, and where it did not do so, and was not cured by any evidence or finding, judgment denying any recovery would be reversed.

◆

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by the County of Los Angeles against Robert Ransohoff and others, doing business as Ransohoff's, and another. From a judgment for defendant, plaintiff appeals.

Reversed.

Everett W. Mattoon, Co. Counsel, and Beach Vasey, Deputy Co. Counsel, both of Los Angeles, for appellant.

Livingston & Livingston and Richard Wagner, all of San Francisco, for respondents.

GRAY, Justice pro tem.

By this action appellant, County of Los Angeles, attempted to collect from respondents, a copartnership and its members, unsecured personal property taxes. The following facts as found by the court sufficiently depict the controversy: Respondents owned money, merchandise, store fixtures, and equipment, which were subject to taxation. The assessor, in accordance with a method deliberately adopted, systematically assessed the several kinds of personal property owned by merchants at percentages of their book value, which varied as to each kind. In disregard of this method and for the purpose of subjecting respondents to an excessive tax, the assessor willfully and intentionally assessed the several kinds of respondents' property at higher percentages of their book values than he used in such method. This unequal assessment was made by the assessor with the intent and purpose that respondents' property should be assessed upon a different basis and at different valuations than assessments made upon similar property of all other merchants similarly situated in the county. His acts disclosed such discrimination between respondents' property and similar properties of other merchants as to evidence willful disregard of law and to amount to fraud. Subsequently respondents filed with the county board of equalization a verified protest, stating the true value of their property, its assessed value, and requesting that it be assessed at its true value, upon the ground that there had been an unequal valuation of such property. After a hearing, at which respondents presented evidence showing that the assessment was arbitrary although they had given the assessor a statement and other information as required by law, the board, in disregard of such evidence and for the purpose of compelling them to pay an excessive tax, denied the protest, with full knowledge of the discriminatory manner, above outlined, in which their property had been assessed. The tax subsequently levied was illegal and not due or owing. The judgment decreed that appellant take nothing and that respondents recover their costs.

[1, 2] Section 3674 of the Political Code reads as follows: "No reduction must be made in the valuation of property, unless the party affected thereby or his agent makes and files with the board a written application therefor, verified by his oath *showing the facts upon which it is claimed such reduction should be made.*" (Italics ours.) A property owner cannot defeat the collection of a tax, or recover its amount if paid under protest, upon the claim that the assessment was excessive and discriminatory, unless he has applied for its reduction under this section. Luce v. City of San Diego, 198 Cal. 405, 245 P. 196; Southern California H., etc., Co. v. Los. Angeles County, 49 Cal.App. 712, 194 P. 62; City of Los Angeles v. Glassell, 4 Cal.App. 43, 87 P. 241. A county board of equalization has no jurisdiction or power to reduce any assessment except upon an application under this section. Garretson v. Board of Sup'rs of County of Santa Barbara, 61 Cal. 54. Power, analogous to that conferred by the above section, was formerly granted by section 23 of the revenue law of 1861 (Stats. 1861, p. 427), reading as follows: "The Board of Equalization shall have power to determine all complaints made in regard to the assessed value of any property; and

may change and correct any valuation, either by adding thereto, or deducting therefrom * * *." Under this section it has been consistently held that a board did not have jurisdiction to increase an assessment unless a complaint had been filed. People v. Reynolds, 28 Cal. 107; People v. Flint, 39 Cal. 670; People v. Goldtree, 44 Cal. 323. Where a municipal ordinance required the filing of a complaint before the board could raise an assessment, such filing is a jurisdictional prerequisite to any increase. Mayor, etc., of Los Angeles v. Los Angeles W. W. Co., 49 Cal. 638; Rickard v. Council of Santa Barbara, 49 Cal.App. 58, 192 P. 726.

[3] In order for the application to confer jurisdiction on the board it must contain the matters required by statute. An application lacking the required verification is insufficient to authorize the board to reduce an assessment. Garretson v. Board of Sup'rs of County of Santa Barbara, supra. A complaint which fails to state facts is entirely nugatory for any purpose. People v. Flint, supra. The italicized portion of said section 3674 requires that the application shall show "the facts upon which it is claimed such reduction should be made." The present application (erroneously called a protest in the answer and findings) merely states "that the grounds upon which such change is asked and should be made are as follows, to-wit: unequal value." In considering a similar application upon indentically worded grounds, as shown by the record, the Supreme Court in Rittersbacher v. Board of Supervisors, 220 Cal. 535, 540, 32 P.(2d) 135, 137, said: "The petitions filed with the board alleged an overvaluation of the described real estate and improvements and nothing more and the prayer was for an equalization of the value. 'To equalize is to make equal, to cause to correspond, or be like in amount or degree, as compared with something.' Wells, Fargo & Co. v. State Board of Equalization, 56 Cal. 194, 196. What the petitioners before the board were entitled to was that their property be placed 'on the same basis of valuation as that applied to other property of like character and similarly situated.' Birch v. County of Orange, 186 Cal. 736, 200 P. 647, 649; Los Angeles, etc., Co. v. County of Los Angeles, 162 Cal. 164, 166, 121 P. 384, 9 A.L.R. 1277."

"As above indicated the petitions for equalization filed with the board made no reference whatever to the claim of the petitioners that their properties were assessed on an unlawfully discriminatory basis. The petitioners failed then to advise the board of 'the facts upon which it is claimed such reduction should be made,' as required by section 3674 of the Political Code." Rittersbacher v. Board of Supervisors, supra, 220 Cal. 535, at page 540, 32 P.(2d) 135, 137. The deficiency of the present application is readily apparent when it is compared with the following one, conceded to be sufficient in Birch v. County of Orange, 59 Cal.App. 133, 135, 210 P. 57, 58: "It set forth as the particular grounds that the 'assessed value of said property is unfair, unjust, and excessive as compared with other property of substantially the same character and value and similarly situated in said county, and imposes an unequal burden upon the applicant,' and that the assessment was 'arbitrary, discriminatory, oppressive, erroneous and illegal.'"

[4] The lack of jurisdiction arising from the insufficiency of the application was not cured by the action of the board in hearing and determining it. People v. Reynolds, supra; People v. Goldtree, supra. The power of the board to reduce an assessment comes solely from section 3674 of the Political Code, and this section permits the exercise of the power granted only upon the filing of an application containing the specified matters. If the board could acquire jurisdiction by hearing an application, insufficient in its statement of facts, its jurisdiction would then arise from its own acts rather than from the section. If it could waive part of the statutory requirements, it could waive all and thus nullify the entire section. The judgment must be reversed because of the lack of a valid application for reduction. Arapahoe County Board of Commissioners v. Denver Union Water Co., 32 Colo. 382, 76 P. 1060; Northern Pac. Ry. Co. v. Clatsop County, 74 Or. 250, 145 P. 271.

[5] Since their property was admittedly assessable, respondents owed taxes in an amount which could be computed by applying the rate to a fair and equal assessment. Mayor, etc., of Los Angeles v. Los Angeles W. W. Co., supra. In order to constitute a good defense to this action, it was essential that the answer allege either payment or an offer to pay what was due upon a fair valuation of their property as conceded or fixed by the court. County of Los Angeles

v. Ballerino, 99 Cal. 593, 32 P. 581, 34 P. 329; Mackay v. San Francisco, 113 Cal. 392, 45 P. 696. The answer in a defective manner attempts to allege a tender and refusal of the correct amount of the tax. The defect, however, is of the kind that could be cured by the findings (San Francisco v. Pennie, 93 Cal. 465, 29 P. 66), but no evidence was presented on this issue nor did the court find thereon. Instead the findings and the judgment exonerated respondents from the payment of any tax. Obviously this unjust result cannot stand.

The judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

19 Cal.App.2d 420

SECURITY TRUST & SAVINGS BANK v. SOUTHERN PAC. R. CO. et al.

Civ. S. C. 35.

District Court of Appeal, Second District, Division 1, California.

March 4, 1937.

Hearing Denied by Supreme Court May 3, 1937.

1. Judgment 🔑313

Trial court had jurisdiction, after its original decree in purchaser's favor for specific performance of land contract became final, to order purchaser to tender purchase price within specified time on penalty of having decree vacated.

2. Appeal and error 🔑1099(2)

Adjudication on former appeal directing court which had decreed specific performance of land contract to fix reasonable time within which plaintiff must tender purchase price *held* "law of the case" on question whether trial court had jurisdiction to make such order after original judgment became final.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

3. Appeal and error 🔑1200

Order of trial court, made in response to direction of District Court of Appeal, could not be attacked on ground that judgment of District Court of Appeal was erroneous because based on misinterpretation of record, since correction thereof could be secured only through petition for rehearing or request for hearing by Supreme Court and, being uncorrected, judgment became final and binding on trial court.

4. Judgment 🔑313

Trial court *held* not to have abused its discretion in fixing 60 days from service of order upon purchaser as time within which purchaser must tender purchase price on penalty of having decree granting purchaser specific performance of land contract vacated.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the Security Trust & Savings Bank against the Southern Pacific Railroad Company and another. From an order, plaintiff appeals.

Affirmed.

Walter M. Campbell, Jr., and Walter M. Campbell, both of Los Angeles, for appellant.

Frank Thunen, of San Francisco, for respondents.

BISHOP, Justice pro tem.

The specific performance of a contract executed in 1885 was decreed in a judgment entered in this action in 1928. By the terms of the judgment the real property involved was to be conveyed by the defendant Southern Pacific Land Company to the plaintiff upon the payment of $31,895.23. It was also provided that if the conveyance was not made within thirty days after the same became final, upon deposit of the sum mentioned the county clerk, as commissioner of the court, should execute a deed. No time was fixed within which the plaintiff was to offer to make payment of the sum of $31,895.23. On an appeal, taken by the defendants, this judgment was affirmed, the opinion making no mention either of the provisions or lack of provision to which we have referred. Security Trust & Savings Bank v. Southern Pacific R. R. Co. (1931) 214 Cal. 81, 3 P.(2d) 1015.

After the Supreme Court's decision the defendant sought an order fixing a definite time within which the plaintiff would either have to pay the money specified by the decree, or lose its benefits, and when their motion was denied, they appealed. The question on appeal, as framed by the court itself in Security Trust & Savings Bank v. Southern Pacific R. R. Co. (1935) 6 Cal. App.(2d) 585, 45 P.(2d) 268, 269, was "should the trial court have rendered its decree more certain by specifying a reasonable time within which the plaintiff would be required to tender the money specified in the judgment so as to entitle it to specific performance of the contract"? The question was answered in the affirmative, the judgment being [at page 590 of 6 Cal.App.(2d), 45 P.(2d) 268, 270]: "The order is reversed, and the court is directed to fix a reasonable time within which the purchase price of the land shall be tendered by the plaintiff, on penalty of vacating the decree for failure to comply therewith."

The present appeal by the plaintiff is from the order which the District Court of Appeal had directed, and which the trial court entered in these words:

"Now, therefore, it is hereby ordered that Security First National Bank of Los Angeles, as successor to plaintiff above named, pay unto the defendant Southern Pacific Land Company, or deposit in court for said defendant within 60 days after service of a copy of this order, the sum of $31,895.23, upon the terms provided in the decree herein; and it is hereby further ordered that upon failure of said Security First National Bank of Los Angeles to make said payment or said deposit with the clerk of this court within the time aforesaid, the said decree made herein on the 4th day of June, 1928, will be vacated and set aside.

"Done in open court this 29th day of July, 1935."

[1, 2] We do not look with favor upon any of the arguments appellant advances in support of its desire to have this order reversed. It contends, first, that the trial court had no jurisdiction, after the original judgment became final, to make such an order as that under review. Upon the authority of Security Trust & Savings Bank v. Southern Pacific R. R. Co., supra, 6 Cal.App.(2d) 585, 45 P.(2d) 268, we hold that it did have jurisdiction. We are of the opinion, furthermore, that the former adjudication establishes the law of the case, although the question involved is one of jurisdiction. Clary v. Hoagland (1856) 6 Cal. 685. Every reason which dictates the principle which we have known by the term "the law of the case" applies to such a situation as this, where upon appeal it has been determined that a trial court has the jurisdiction, in the sense of having the power, to make such an order as we are considering. No change in facts has occurred, since the adjudication in 1931, to make inapplicable as the law of the case the former decision on this question of the inherent right of a court in equity.

[3] Appellant contends that on the question of laches the former ruling on appeal is not the law of the case, because it was based on the erroneous supposition that the motion there involved had been made in 1931, whereas it had been made in 1933. As we view the situation, the question of defendants' laches was not before the trial court upon the last motion, and "the law of the case" is not the question involved. The order appealed from must be understood as having been made in response to the direction of the District Court of Appeal, not as an exercise of the discretion of the trial court. If the judgment of the District Court of Appeal was erroneous, because based on a misinterpretation of the record before it, a correction should have been secured through a petition for a rehearing or a request for a hearing by the Supreme Court. Its judgment, in error or not, became final, and the trial court had no choice but to follow the directions of that judgment. In re Heydenfeldt's Estate (1897) 117 Cal. 551, 554, 49 P. 713.

This disposes, too, of the contention that the order in providing that the decree shall be vacated if the money is not tendered within sixty days, goes too far, in that it destroys plaintiff's judgment for costs and the provision in the original judgment that defendant land company take nothing by reason of its cross-complaint. The term of the order complained of was included because directed in the judgment of reversal. We might add, however, that the record before us discloses that the original judgment, now final over five years, contains no costs taxed in plaintiff's favor.

[4] By the judgment of the District Court of Appeal, one matter was left to the judicial discretion of the trial judge: The determination of the time within which plaintiff should tender the sum of $31,895.23. We are unable to find in the record any foundation for the contention that the trial court abused its discretion in fixing sixty days from the service of the order upon the plaintiff as that time.

The order appealed from is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

19 Cal.App.2d 434

MORGAN et al. v. SOMERVELL et al.

Civ. 11265.

District Court of Appeal, Second District, Division 2, California.

March 5, 1937.

Courts 🔑121(6)

Superior Court *held* without jurisdiction of action on note secured by trust deed which had become entirely valueless where note was for $4,150, of which but $1,780.68 remained unpaid, since action on note was a "case at law" within statute providing that municipal court shall have original jurisdiction of cases at law in which demand amounts to $2,000 or less (Code Civ.Proc. § 89, as added by St. 1933, p. 1811).

[Ed. Note.—For other definitions of "Case at Law," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by John W. Morgan and another against Bertha K. Somervell, now known as Bertha K. Walker, and others. From an adverse judgment, the named defendant appeals.

Reversed.

Walter Gould Lincoln, of Los Angeles, for appellant.

H. A. Miller, of Los Angeles, for respondents.

WOOD, Justice.

Plaintiffs' complaint is based upon a promissory note executed and delivered by appellant to plaintiffs' assignor. The promissory note was originally secured by a deed of trust on real property which was subject to a first mortgage. The first mortgage was foreclosed, the property sold, and the time for redemption elapsed. The security for the note which is the subject of the present action became entirely valueless before the commencement of the action. The note was for the sum of $4,150, but before the commencement of the action only $1,780.68 remained unpaid. Plaintiffs asked judgment for the last-mentioned sum and interest. Judgment was rendered in accordance with the prayer of the complaint.

Section 89 of the Code of Civil Procedure (as added by St.1933, p. 1811), provides: "Municipal courts shall have original jurisdiction of civil cases and proceedings as follows: (a) In all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to two thousand dollars or less." The present action is a "case at law." The Superior Court was without jurisdiction to enter the judgment from which appeal is taken. Williams Co. v. Superior Court, 97 Cal.App. 422, 275 P. 838.

The judgment is reversed.

We concur: McCOMB, Justice pro tem.; CRAIL, P. J.

---

19 Cal.App.2d 362

HOLMES v. JUSTICE'S COURT OF OAKLAND TP. et al.

Civ. 10223.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1937.

1. Justices of the peace 🔑135(4)

Justice's court could not perpetually stay execution on judgment, notwithstanding that judgment was based on debt discharged in bankruptcy, where judgment debtor allowed judgment to become valid and final without bringing discharge to attention of justice's court, since discharge in bankruptcy was special defense which must be pleaded (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

2. Mandamus 🔑55

Judgment creditor *held* entitled to writ of mandate to require justice's court to issue writ of execution on judgment based on debt dischargeable in bankruptcy, where judgment debtor had allowed judgment to become valid and final without bringing discharge to attention of justice's court (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

3. Justices of the peace 🔑205(1)

Demurrer to judgment creditor's petition which asked for writ to review order of justice's court granting perpetual stay of execution on judgment, and pleaded all proceedings had in justice's court, made petition the return on which the review should have been heard.

4. **Justices of the peace** ⚷208(1)

On judgment creditor's petition for writ to review order of justice's court granting perpetual stay of execution on judgment, no findings as to special defenses pleaded in answer were proper, since sole issue was whether justice's court exceeded its jurisdiction in making such order, and such issue could be determined on examination of record of justice's court as pleaded in petition and admitted by return (Code Civ.Proc. §§ 1074, 1075).

5. **Certiorari** ⚷5(1)

Writ of review is not writ of error and cannot take place of appeal, but is simply a review of proceedings in inferior tribunal to determine whether authority of such tribunal has been regularly pursued (Code Civ. Proc. § 1074).

6. **Justices of the peace** ⚷209(2)

In judgment creditor's suit for writ to review order of justice's court which granted perpetual stay of execution on judgment on ground that judgment was based on debt discharged in bankruptcy, order denying judgment creditor relief, if treated as affirmance of order of justice's court, was reversible error, since such order was beyond jurisdiction of justice's court, where judgment debtor allowed judgment to become valid and final without bringing discharge to attention of justice's court (Code Civ. Proc. § 473, as amended by St.1933, p. 1851).

7. **Justices of the peace** ⚷209(2)

In judgment creditor's suit for writ to review order of justice's court granting perpetual stay of execution on judgment, order denying judgment creditor relief, if treated as denial of relief because of special defenses raised in answer to judgment creditor's petition, was void as beyond court's jurisdiction.

8. **New trial** ⚷7

Where issue tried is one of law alone raised by demurrer, no issue of fact is involved, and hence there is nothing to retry, as respects right to new trial after rendition of judgment rendered on question of law alone.

9. **Justices of the peace** ⚷209(7)

Court rendering judgment granting relief to judgment creditor suing for writ to review order of justice's court granting perpetual stay of execution on creditor's judgment, and for writ of mandamus to require justice's court to issue writ of execution on such judgment, *held* without jurisdiction to grant new trial where "evidence" in petition, on which alone court could base judgment, showed that justice's court in excess of its jurisdiction granted perpetual stay of execution on final and existing judgment (Code Civ.Proc. § 656).

◆

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Proceeding by S. O. Holmes against the Justice's Court of Oakland Township and Harry Pulcifer, justice of the peace, for a writ to review an order of the Justice's Court granting a perpetual stay of execution on a judgment which petitioner had secured against one Mrs. Leese and for writ of mandamus to require the Justice's Court to issue a writ of execution on such judgment. From the judgment, S. O. Holmes appeals.

Reversed.

Nathan G. Gray, of Berkeley, for appellant.

Decoto & St. Sure, of Oakland, for respondents.

NOURSE, Presiding Justice.

Petitioner sued for a writ to review an order of the Justice's Court granting a perpetual stay of execution upon a judgment which petitioner had secured against Mrs. Leese. Petitioner also asked a writ of mandate to require the Justice's Court to issue a writ of execution upon that judgment. The respondents appeared by demurrer and answer. After a hearing, judgment was entered for petitioner upon both counts. Thereafter the respondents moved for a new trial, which was granted, and judgment was then entered for respondents denying any relief to petitioner.

The appeal is taken from this judgment. No question is made that the writ of mandate should not issue if the order of the Justice's Court is annulled, and we will, therefore, confine our discussion to the writ of review.

[1] That the Justice's Court had no jurisdiction to enter the order perpetually staying execution must be obvious. The effect of such order was to cancel or annul the judgment on the debt. When plaintiff's

judgment was entered on June 13, 1934, and the defendant therein allowed it to become a final and valid judgment, "the validity and finality thereof was not affected by the fact that it was based upon a debt discharged in bankruptcy. A discharge in bankruptcy is a special defense and it must be pleaded. Tuttle v. Scott, 119 Cal. 586, 51 P. 849; In re Boardway (D.C.) 248 F. 364; Garner v. Hartsfield Loan & Savings Co., 49 Ga.App. 199, 174 S.E. 647; 4 Cal. Jur. 86." Harrlell v. Hoagland (Cal.App.) 64 P.(2d) 953.

[2] It is conceded that the judgment in the Justice's Court was entered after defendant therein had obtained her discharge in bankruptcy, and that said defendant permitted said judgment to be entered and to become final and allowed the time to elapse within which to obtain relief under section 473 of the Code of Civil Procedure, as amended by St.1933, p. 1851, without bringing to the attention of the Justice's Court at any time either the discharge in bankruptcy or the pendency of the bankruptcy proceedings. Since, through her own fault, she permitted the judgment to become final, it was incumbent upon the justice, on demand of the plaintiff therein, to issue the execution. The right of the petitioner herein to the writ of mandate prayed for is not open to controversy.

[3-5] When the petitioner herein asked for a writ of review and pleaded all the proceedings had in the Justice's Court, the demurrer to that petition made the petition the return upon which the review should have been heard. The respondents' answer, setting up special defenses in the nature of laches and estoppel, pleaded matters which were all de hors the record which the court had up for review. It does not matter what findings the court made herein or that they were based upon "testimony offered in behalf of respondents, and certain arguments of counsel." No findings were proper because no issue of fact was before the court for determination. The sole issue before the court was whether the Justice's Court exceeded its jurisdiction in ordering the perpetual stay of execution, and that issue could be determined upon examination of the record of the Justice's Court as pleaded in the petition and admitted by the return. If that record was incorrect in any respect, the proper procedure was to have filed a supplemental return so that the trial court would have before it the true record upon which to base its "review." A writ of review is not a writ of error, and it cannot take the place of an appeal. It is simply what the Code states it to be—a review of the proceedings in the inferior tribunal to determine whether it "has regularly pursued the authority of such tribunal." Code Civ.Proc. § 1074.

If any of the matters pleaded in the return presented a triable issue, they could be heard only in opposition to the writ of review issued by order of Judge Wood on March 2, 1935. The only judgment or order which could be made upon the hearing on the return was one "either affirming or annulling, or modifying the proceedings below." Section 1075, Code Civ.Proc.

[6, 7] Hence, if the judgment herein appealed from denying petitioner any relief be treated as an affirmance of the order under review, it is error because that order was beyond the jurisdiction of the Justice's Court to make. If this judgment be treated as a denial of relief to petitioner because of the special defenses raised in the answer to the petition, it is not error, but void, because beyond the jurisdiction of the trial court to make. Under either view, the judgment appealed from must be reversed.

[8, 9] The appellant contends that the former judgment having been rendered on a question of law alone, the trial court had no jurisdiction to grant a new trial. Respondents argue that, since the demurrer to the petition accepted the petition as their return to the writ and thereby made the petition the answer "as well as evidence" (Stumpf v. Board of Supervisors, 131 Cal. 364, 63 P. 663, 82 Am.St.Rep. 350), therefore, the order granting a new trial on the ground of insufficient evidence cannot be disturbed in the absence of a reporter's transcript of all the evidence heard. A complete answer to this argument is that the trial court was without jurisdiction to hear any evidence other than that pleaded in the petition and, hence, we have in the petition all the "evidence" upon which the trial court could legally base its judgment. This evidence shows nothing more than that the Justice's Court in excess of its jurisdiction granted a perpetual stay of execution upon a final and existing judgment. "A new trial is a re-examination of an issue of fact in the same court after trial." Section 656 of the Code of Civil Procedure. But, where the issue tried was one of law alone raised by demurrer, no issue of fact is involved, hence, there is nothing to retry. Power v.

Fairbanks, 146 Cal. 611, 614, 80 P. 1075; Abbey Land, etc., Co. v. San Mateo, 167 Cal. 434, 436, 139 P. 1068, 52 L.R.A.(N.S.) 408, Ann.Cas.1915C, 804. For these reasons, the trial court had no jurisdiction to grant a new trial.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

ARONSON et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.*

Civ. 11183.

District Court of Appeal, Second District, Division 2, California.

Feb. 25, 1937.

Rehearing Denied March 16, 1937.

Hearing Granted by Supreme Court April 26, 1937.

1. Pleading 🔑214(1)

Demurrer to complaint admits truth of facts alleged.

2. Limitation of actions 🔑72(2)

That minor distributees had been represented by one or more general guardians who failed to sue within limitation period *held* not to bar distributees' subsequent action against successor of banking corporations which allegedly converted stock certificates belonging to decedent's estate, since cause or right of action vests in ward, not guardian, precluding application of rule that cestui's right is barred when limitation statute bars right of action in trustee holding legal title (Code Civ.Proc. §§ 339, 352).

3. Limitation of actions 🔑72(1)

Minor is presumably unable to impart to guardian sufficient facts to disclose cause of action, and hence, under statute tolling limitation statute during minority, minor is not barred merely by guardian's failure to sue within prescribed period (Code Civ.Proc. § 352).

4. Executors and administrators 🔑513(10)

Statute relating to conclusiveness of order settling final account is available by way of defense to action as between estate or administrator and persons interested in estate (Code Civ.Proc. § 1637, now Probate Code, § 931).

5. Executors and administrators 🔑513(10)

Distributees' causes of action based on charge that, prior to settlement of administrators' final account, banking corporations converted stock certificates belonging to decedent's estate, *held* not barred by statute relating to conclusiveness of order settling final account, where distributees brought action against such corporations' successor which had no interest in estate, and whose liability was not involved in accounting proceedings (Code Civ.Proc. § 1637, now Probate Code, § 931).

6. Limitation of actions 🔑72(2)

When decree of distribution was made, causes of action for antecedent conversions of stock certificates belonging to decedent's estate *held* vested absolutely in distributees who were then minors, and hence action by distributees was not barred, as against contention that causes of action remained in administrators and therefore limitation statute, having run against administrators, also barred distributees (Code Civ.Proc. §§ 339, 352).

7. Banks and banking 🔑40

Banking corporations *held* bound to inquire into administrators' authority to transfer stock certificates standing in name of decedent or of estate, as regards liability to distributees on part of successor of banking corporations which allegedly transferred certificates unlawfully.

8. Evidence 🔑65

Generally, corporation is chargeable with notice of restrictions imposed on powers of executors and administrators by general law, and is bound at its peril to see that provisions of law have been complied with.

9. Corporations 🔑134

Corporation, before canceling stock certificate and issuing new one, has duty to know whether person demanding transfer has authority to make it.

10. Trover and conversion 🔑9(3)

Demand for issuance of certificates representing corporate stock allegedly converted need not be made before bringing action for conversion; bringing of action being sufficient demand.

11. Trover and conversion 🔑4

Unauthorized cancellation of old certificates and issuance of new certificates for banking corporations' stock *held* to constitute "conversion" as against distributees of decedent's estate entitled thereto.

---

*For subsequent opinion see 72 P.2d 548.

[Ed. Note.—For other definitions of "Conversion," see Words & Phrases.]

12. Pleading ⚷243

Plaintiffs bringing action against banking corporations' successor for unlawful transfer of stock certificates by such corporations *held* entitled to opportunity to eliminate by amendment alleged uncertainties and ambiguities in complaint.

13. Pleading ⚷245(1)

Great liberality should be allowed in permitting amendments to complaints before trial, in order that cases may be tried on merits.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Herbert Hellman Aronson and a minor coplaintiff, by Daniel Aronson, the guardian of their estates, and by the named plaintiff individually, against the Bank of America National Trust & Savings Association. From a judgment of dismissal and an order denying permission to amend the complaint after the sustaining of a general demurrer, plaintiffs appeal.

Judgment and order reversed.

Mitchell, Silberberg, Roth & Knupp and Livingston & Livingston, all of Los Angeles, for appellants.

Edmund Nelson, G. L. Berrey, Freston & Files, and James A. McLaughlin, all of Los Angeles (Louis Ferrari, of San Francisco, and Ralph E. Lewis and Sydney Wetzler, both of Los Angeles, of counsel), for respondents.

CRAIL, Presiding Justice.

This appeal is taken from a judgment of dismissal entered after a general demurrer to plaintiffs' complaint was sustained without leave to amend, and from an order denying a motion for permission to amend.

[1] The action is one for damages, based upon alleged unlawful transfers of certificates of stock by certain banking corporations. For the sake of brevity and clearness we set forth the facts informally which are alleged in the complaint and in the proposed amended complaint and which are admitted by the demurrer to be true, rather than in the formal way in which they are set forth in said complaints. These pleadings fill 101 pages of the printed transcript. In 1920 plaintiffs' mother died intestate, leaving as her sole heirs the plaintiffs, who were minors. Two administrators were appointed in 1920 and continued to act until October 5, 1925, at which time their account was settled and approved by the court and the estate distributed to the plaintiffs who were still minors. It was ordered by the decree of distribution that all property of every kind and nature belonging to said estate, whether described in said decree or not, be distributed to the plaintiffs. Although the stock in question was inventoried as an asset of the estate, no accounting of the transfers thereof was ever made to the probate court. Of the original stock certificates which are alleged to have been unlawfully transferred, some stood in the name of the decedent and the remainder in the name of the estate of such decedent. Complaint is made of four separate wrongful transfers, occurring on the following dates: May 25, 1925; March 27, 1925; November 16, 1926; and June 13, 1927. It will be noted that two of these transfers took place prior to the distribution of the mother's estate, and that the other two occurred subsequent thereto.

The certificates in question were for shares of stock in certain banking corporations, of which both administrators were directors and one administrator was the president of one of the corporations. The old certificates were canceled and new certificates issued without any order of court, or other authority for such transfer; in two instances, upon the indorsement of one administrator only, and in the other two instances, upon the indorsement of both. One transfer was made directly to one administrator in his personal capacity, another was made to a company bearing the family name of the administrators, and the other two were made to third persons who were "dummies" for the administrators. Thereafter, by means of various consolidations and mergers, defendant bank succeeded to the assets and liabilities of the banking corporations which are alleged to have unlawfully transferred the stock certificates in question.

Since April 21, 1926, one or more persons have been the duly appointed and acting general guardians of the persons and estates of the plaintiffs. Neither the plaintiffs nor their guardians have demanded of any of the above-mentioned banks that a certificate be issued to them for the shares of stock which are the subject of the alleged conversions. The complaint in this action was filed on January 7, 1936, almost nine years after the last alleged conversion. One of the plaintiffs was a minor at the time the complaint was filed; the other had reached his majority less than two years prior thereto.

The demurrer was sustained, and plaintiffs were denied leave to amend by the trial court apparently upon the ground that the complaint and proposed amended complaint disclosed that the cause of action was barred by the statute of limitations (Code Civ.Proc. § 339) and that the facts, which were disclosed, were such that it would be impossible for the plaintiffs to state a cause of action which would not be barred by the statute of limitations.

[2] In this respect we are asked to decide whether or not the running of the statutory period where there is a general guardian of a minor is a bar to a subsequent action by the minor. The primary contention of the defendant (respondent) is that the answer to the question is yes. We are of the view that the answer is no.

In deciding the question we have before us the decision of the Supreme Court in denying a petition for hearing, after the decision of the Appellate Court, in Maier v. Harbor Center Land Co., 41 Cal.App. 79, 182 P. 345, 346. In that case, an action was brought by a guardian ad litem, on behalf of a minor, seeking to cancel a contract for the purchase of realty and to recover money paid under the contract. Respondent contended that the statute of limitations barred the action because, prior to the appointment of the guardian ad litem, the minor had been represented by a general guardian who was at all times competent to sue in behalf of the minor. In denying the petition for hearing, the Supreme Court made the following statement: "We desire, however, to say, in respect to the claims made under the statute of limitations, that in our opinion a complete answer to all such claims is to be found in section 352 of our Code of Civil Procedure, in view of which the statute of limitations could not commence to run prior to the attainment of his majority by the minor." Said section reads as follows: "If a person entitled to bring an action, mentioned in chapter three of this title, be, at the time the cause of action accrued, * * * within the age of majority * * the time of such disability is not a part of the time limited for the commencement of the action."

Defendant relies upon a sentence contained in Patchett v. Pacific Coast Ry. Co., 100 Cal. 505, 509, 35 P. 73, 75, to the effect that, when a cause of action "vests in an executor, guardian, or trustee" who is under no legal disability, the statute will commence to run, despite the disability of a minor heir, ward, or beneficiary. We cannot accept that language as the law of this case. In that case, the court was considering a trustee-beneficiary relationship solely. As we shall hereafter point out, a guardian-ward relationship is inherently different. The question as to a guardian-ward relationship was not involved in the case. The insertion of the word "guardian" was an inadvertence. In any event, the word, so inserted, was mere obiter dictum.

It will be noted that respondent's contention is conditioned upon the vesting of the cause of action in the guardian. Our Supreme Court has concluded this argument also by holding that such cause of action vests in the ward and not in the guardian. Dixon v. Gries (Cardozo), 106 Cal. 506, 39 P. 857. Since the right of action vests in the ward, it is not affected by the failure of his guardian to sue within the prescribed period, and the rule that when a right of action in a trustee holding legal title becomes barred by limitation the right of the cestui que trust is also barred has no application. Brown v. Midland Nat. Bank (Tex.Civ.App.) 268 S.W. 226.

[3] The underlying reason for the difference in the rule as to the running of the statute, which is applied to guardians, and that which is applied to executors, administrators, and trustees, is clearly shown in the case of O'Shea v. Wilkinson, 95 Cal. 454, 30 P. 588, 589, wherein the court states: "An executor, administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue or be sued without joining with him the persons for whose benefit the action is prosecuted, but a guardian does not belong to any of these classes. The guardian appears in the action simply to manage and take care of the interests of the infant when he [the infant] is a party to the action, and [the guardian] 'is no more a party to the action than the attorney, who appears in an action for one who has attained his majority, is a party to the suit in which he enters his

appearance.' Emeric v. Alvarado, 64 Cal. 529, 2 P. 418; Justice v. Ott, 87 Cal. 530, 25 P. 691." A further distinction lies in the fact that, although the guardian could have commenced the action within time and failed to do so, the ward, because of his incompetency, may have been—indeed is presumed to have been—unable to impart to his guardian sufficient facts to disclose the existence of a cause of action, was under certain difficulties with regard to testifying about them, and by reason of the same disability may have been totally unaware of his rights. The incompetent should not be penalized for his disabilities. To meet this situation, section 352 of the Code of Civil Procedure and other similar statutes, tolling the statute of limitations during the continuance of the period of disability in certain specified cases, were enacted.

The rule which we have adopted as prevailing in this case has been generally adopted in the other jurisdictions of the United States. For a summary of the cases on the subject see 6 A.L.R. 1690, entitled, "II. Appointment of General Guardian for Infant. a. Where Right of Action is in Infant."

[4, 5] The contention is next made by defendant that the causes of action based upon the conversions which took place prior to the settling of the final account of the administrators are barred by former section 1637 of the Code of Civil Procedure, now section 931 of the Probate Code. While it is true that those Code sections dealing with the conclusiveness of an order settling a final account could be set up as a defense to an action as between the estate and persons interested in the estate and also, as between the executor or administrator and those interested in the estate, it is obvious that those sections have no application to a third party, such as respondent bank, which has no interest in the estate. The liability of the respondent was not involved in the proceedings by which the administrators undertook to settle their affairs with the heirs at law.

[6] It is next contended in support of the judgment that the cause of action for the conversions which occurred prior to distribution remained in the administrators thereafter and that, since the statute of limitations has run against the administrators, it constitutes a bar to the present action by the heirs. With this contention we are unable to agree. When the decree of distribution was made, the causes of action for such conversions were vested absolutely in the distributees [Stoner v. Security Trust Co., 47 Cal.App. 216, 190 P. 500, Lindley v. United States (C.C.A.) 59 F.(2d) 336, and MacKay v. Clark Rig Bldg. Co., 5 Cal.App.(2d) 44, 42 P.(2d) 341], who at that time were under the disability of minority.

[7-9] The remaining contentions of defendant deal with the question whether or not a cause of action is stated in the amended complaint, irrespective of the statute of limitations. Defendant argues that no duty is imposed upon a banking corporation to inquire into the authority of an administrator to make such a transfer. Such contention finds no support, however, for the general rule is that a corporation is chargeable with notice of restrictions imposed upon the powers of executors and administrators by the general law and is bound at its peril to see that the provisions of the law have been complied with. Volume 12, Fletcher's Cyclopedia of Corporations (Perm.Ed.1932) § 5549. Before canceling a certificate and issuing a new one, it is the duty of the corporation to know whether there is authority in the person demanding the transfer to make it. Quay v. Presidio, etc., R. Co., 82 Cal. 1, 22 P. 925; Tafft v. Presidio, etc., R. Co., 84 Cal. 131, 24 P. 436, 11 L.R.A. 125, 18 Am.St.Rep. 166.

[10, 11] Defendant further contends that a demand for the issuance of certificates representing the shares of stock must be made prior to the bringing of the action for conversion. Such is not the law. Ham v. Henderson, 50 Cal. 367; Scriber v. Masten, 11 Cal. 303; Mier v. Southern California Ice Co., 56 Cal.App. 512, 206 P. 83. The rule is no different in the case of conversion of shares of stock than in the case of other types of personal property. The bringing of the action is a sufficient demand. That the unauthorized transfer of such certificates constitutes a conversion cannot be doubted. Tafft v. Presidio, etc., R. Co., 84 Cal. 131, 24 P. 436, 11 L.R.A. 125, 18 Am.St.Rep. 166.

[12, 13] The remaining contentions of defendant are concerned with uncertainties and ambiguities in the pleadings. In our view of the pleadings these uncertainties and ambiguities, if any, either have been eliminated by the proposed amended complaint, or are capable of being eliminated by further amendment. At least the

plaintiffs are entitled to try to eliminate them if they desire to do so, and their motion for permission to amend indicates that they do desire to try. We do not deem it necessary to set forth these minor contentions in detail. In order to promote justice, great liberality should be allowed in permitting amendments to complaints before trial, to the end that cases may be tried upon the merits. George v. Simpson, 14 Cal.App.(2d) 571, 58 P.(2d) 666.

Judgment and order reversed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

CARPENTER v. PEOPLES MUT. LIFE INS. CO. et al. *

Civ. S. C. 17.

District Court of Appeal, Second District, Division 1, California.

Feb. 26, 1937.

Rehearing Denied March 25, 1937.

Hearing Granted by Supreme Court April 26, 1937.

1. Taxation 🔑140

Gross premiums tax *held* not property tax, but excise or privilege tax, properly assessed against life insurance company for year in which it received premiums taxed, though it was not doing business in state when tax accrued because of previous court order for its liquidation (Gen.Laws 1931, Act 3739; Const. art. 13, § 14(b), as added in 1910).

2. Insurance 🔑72

Tax delinquency penalty, accruing against insolvent corporation, such as life insurance company failing to pay gross premiums tax accruing after court order for its liquidation, is not proper charge against it (Gen.Laws 1931, Act 3739; Const. art. 13, § 14(b), as added in 1910).

3. Insurance 🔑72

Generally, interest and penalties, arising after insolvent corporation's property passes into receivers' hands, are not allowable on claims against its funds or assets, as in case of life insurance company sought to be subjected to penalty for nonpayment of gross premiums tax accruing after court order for its liquidation (Gen.Laws 1931, Act 3739; Const. art. 13, § 14(b), as added in 1910).

4. Insurance 🔑72

Insurance commissioner, as statutory liquidator of life insurance company, *held* not liable for payment of interest on state's claim against company for delinquent gross premiums tax accruing after liquidation order (Gen.Laws 1931, Act 3739; Const. art. 13, § 14(b), as added in 1910).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Samuel L. Carpenter, Jr., insurance commissioner of the state of California, by substitution, for liquidation of the Peoples Mutual Life Insurance Company, in which Ray L. Riley, state controller, filed a claim for gross premiums, taxes, and penalties for default in payment thereof. From the judgment rendered, the commissioner and controller appeal.

Affirmed.

Frank L. Guerena, of San Francisco, for appellant and respondent Samuel L. Carpenter, Jr., Insurance Commissioner.

U. S. Webb, Atty. Gen., and John O. Palstine, Dep. Atty. Gen., for appellant and respondent Ray L. Riley, State Controller.

WHITE, Justice pro tem.

Two appeals are before us from the same judgment rendered by the trial court. One appeal is by the insurance commissioner of the state of California from that part of the judgment wherein it was decreed that the Peoples Mutual Life Insurance Company, a California corporation, was liable for the state insurance company tax which was assessed by the state board of equalization between the first Monday in March, 1933, and the first Monday in July of that year, notwithstanding the fact that the company was not doing business in this state on the first Monday in March, 1933, and had been prohibited from doing business in this state by order of the Superior Court, dated November 10, 1932, decreeing its insolvency and directing its liquidation. From that holding, the insurance commissioner, as statutory liquidator of the company, takes this appeal.

The second appeal is taken by the state controller from that part of the judgment which decreed that the insurance company,

*For subsequent opinion see 74 P.2d 508.

which was ordered liquidated by the Superior Court of the county of Los Angeles on November 10, 1932, and which thereafter did no business in California, was liable for penalties for default in the payment of taxes accruing prior to November 10, 1932, the date of the order of liquidation, but was not liable for penalties accruing after the date of such liquidation order.

The facts are undisputed, and epitomized, are that Peoples Mutual Life Insurance Company was an insurance company doing business as such in the state of California during that portion of the calendar year 1932 prior to November 10, 1932, on which day the court below, after full hearing upon the petition of the state insurance commissioner, adjudged the company insolvent, terminated its right to do business, and ordered it liquidated pursuant to the provisions of Act 3739 of Deering's General Laws 1931 (Stats. 1919, p. 265, and amendments thereto). By said order the insurance commissioner was appointed liquidator. At no time after November 10, 1932, was the company engaged in the business of insurance or doing business as an insurance company, in the state of California or elsewhere. Between the first Monday in March, 1933, and the first Monday in July, 1933, the state board of equalization purported to assess and levy a state tax against said company in the sum of $2,284.70, representing the statutory percentage of the gross premiums received by the company from business done by it in California during the calendar year 1932, less the deductions provided by law. That tax was not paid. The state controller filed with the liquidator a claim of the state of California for the tax in question. The claim was rejected by the liquidator, whereupon the action of the liquidator was reviewed by trial had in the manner provided by section 8c of the liquidation statute (as added, Stats. 1933, p. 1422 [Gen. Laws Supp.1933, No. 3739]).

[1] On the appeal taken by the state insurance commissioner as liquidator, it is contended that the state insurance company tax imposed by section 14 of article 13 of the Constitution of California, as added in 1910, see St.1910, 2d Ex.Sess., p. 14, is a property tax; that it is imposable only upon a company doing business on the tax accrual date; that the accrual date of said tax for the 1933 levy was the first Monday in March of 1933; and that Peoples Mutual Life Insurance Company was not subject to that tax for the year 1933 because it was not doing business and was prohibited from doing business on the first Monday in March, 1933. Appellant insurance commissioner earnestly asserts that the test of tax liability is the existence of taxable property on the first Monday in March, and that because the insurance company was not engaged in the business of insurance on the first Monday in March, 1933, and had not been so engaged since November 10, 1932, the state board of equalization was without authority to levy what appellant insurance commissioner contends was a property tax as of the first Monday in March, 1933.

Appellant insurance commissioner argues that under subdivision (a) of section 14 of article 13 of the Constitution, there is imposed the so-called state gross receipts tax upon railroad companies, car companies, telegraph and telephone companies, and gas and electric companies; that our Supreme Court has declared that said tax upon each of these utilities was a property tax and not an excise or privilege tax; and that it follows therefrom that subdivision (b) of the same constitutional provision which we have under consideration imposes the same so-called state gross premiums tax upon insurance companies, and that the same constitutes a property tax and not an excise or privilege tax. However, our Supreme Court, in the case of Consolidated Title Securities Co. v. Hopkins, 1 Cal.(2d) 414, 417, 35 P.(2d) 320, 323, certiorari denied 294 U.S. 716, 55 S.Ct. 515, 79 L.Ed. 1249, declared that there are important distinctions between those provisions of section 14, subdivision (a), of article 13, establishing the public utilities gross receipts tax, and the provisions of section 14, subdivision (b), under which insurance companies are required to pay a gross premiums tax, by reason of which the decisions under the public utilities tax provisions are not necessarily controlling as to insurance companies. In the case just referred to, the Supreme Court, 1 Cal.(2d) 414, at page 418, 35 P.(2d) 320, after explaining that the theory of the public utilities tax under section 14, subdivision (a), is that gross receipts from operation furnish a fair measure for estimating the value of operative property and computing the tax upon it, uses this decisive language with reference to the tax on insurance companies, 1 Cal.(2d) 414, at page 419, 35 P.(2d) 320, 323: "The gross premiums tax required to be paid by insurance companies, although in lieu of certain taxes *upon* property, is not, like the public utilities gross receipts tax, by the terms of the constitutional provision itself a tax *upon* property. Rather, [italics added] *it is a franchise tax exacted for the privilege of doing business in this state,* and is recognized as such in the amendment to section 14 which goes into effect on January 1, 1935." We therefore hold that the tax on insurance companies levied pursuant to section 14, subdivision (b), of article 13 of the Constitution is an excise or privilege tax and not, as contended by appellant insurance commissioner, a property tax. The trial court, therefore, was correct in holding that Peoples Mutual Life Insurance Company became liable for the tax here in question during 1932, because it received in the course of doing business the premiums upon which the tax was imposed, and such tax is for the privilege of doing business during the year in which the premiums were received by the insurance company.

[2, 3] We come now to a consideration of the question raised on the appeal by the state controller as to whether a penalty for delinquency in payment of the state insurance company tax is a legal charge against the estate of an insolvent company when the date for the accrual of the penalty succeeded the appointment of the state insurance commissioner as liquidator of the company under an order of the superior court placing the commissioner officially in possession of the company property, terminating the transaction of business by the company, and directing that the company be liquidated and its affairs wound up. In our opinion, a delinquency penalty set by statute to attach on a date succeeding a liquidation or wind-up order, such as the one involved here, is not a proper charge against the insolvent company. Contrary to the drift of some decisions, we hold that the status of delinquency tax claims becomes fixed upon the appointment of liquidators or receivers. The property then comes into custodia legis, subject to be handled and the proceeds of its sale distributed by the court, the instrument of the law, according to principles which govern the settlement of estates of that kind. In such an instance, the state cannot impose a penalty upon the lawful custodian. Had the property and assets of the insurance company come to the liquidator burdened with penalties, then, of course, he must pay them; but if it comes to the liquidator free from such burden, neither the liquidator nor the estate can be penalized for making distribution in the way the court directs. Liquidators are sub potestate curiae; and insolvent estates are under the protection of the law. Delay incident to the orderly settlement of an estate is an act of the law, not to be disturbed by impatient claimants. We think the instant case is controlled by the general rule that after property of an insolvent corporation has passed into the hands of its receivers, interest or penalties for the nonpayment of taxes, which penalties arise after such passing, are not allowable on claims against the funds or assets of such insolvent company. In the case before us, the status of all claims against the insolvent company, including tax claims, became fixed as of November 10, 1932, when the Superior Court made its order for liquidation, and the rights of the company creditors, including the state of California, and the liabilities of the insolvent company to its various obligees, including the state, became fixed as of that date. Williams v. American Bank, 4 Metc. (Mass.) 317, 323; McGinnis v. Corporation Funding Co. (D. C.) 8 F.(2d) 532; People v. American Loan & Trust Co., 172 N.Y. 371, 65 N.E. 200; Thomas v. Western Car Co., 149 U. S. 95, 96, 13 S.Ct. 824, 37 L.Ed. 663.

[4] Concerning appellant's final contention, that in the event of our holding that the state is not entitled to the penalties, the trial court should nevertheless have ordered the liquidator to pay, in the regular course of administration, the ordinary legal rate of interest on the state's claim, if there be sufficient funds therefor, we find ourselves in accord with the holding in First Nat. Bank v. Cent. Coal, etc., Co. (D.C.) 3 F.Supp. 433, 438, where it is said: "It remains to consider the item of interest and penalties. It is apparent from the facts disclosed by the record in this case that interest and any penalties accrued after the property passed into the hands of the receiver. I am of the opinion that the better rule is that interest and penalties are not allowable in receivership proceedings. The reason is fairly stated in Thomas v. Western Car Co., 149 U.S. 95, 13 S.Ct. 824, 37 L.Ed. 663." In the decision of the Supreme Court of the United States in Thomas v. Western Car Co., supra, it is said of "interest in the nature of a penalty" that: "As a general rule, after property of an insolvent passes into the hands of a receiver * * * in-

terest is not allowed on the claims against the funds. The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate." The order made by the trial court in connection with the application for imposition of penalties upon deliquent taxes was correct.

For the foregoing reasons, the judgment or "order" appealed from is in all respects affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

19 Cal.App.2d 314

In re TSHEPPE'S ESTATE.

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. ELDRED.

Civ. 11189.

District Court of Appeal, Second District, Division 1, California.

Feb. 23, 1937.

Rehearing Denied March 15, 1937.

Hearing Denied by Supreme Court April 22, 1937.

1. Wills 🔑439

Primary rule for construction of will is to ascertain testator's intention.

2. Wills 🔑440, 441

Testator's intention must be ascertained from words of will, considering circumstances under which made (Probate Code, §§ 101, 105).

3. Wills 🔑467

Clause in will, recommending that testamentary trustee employ testator's housekeeper to assist in renting and care of his property and authorizing trustee to pay her stated sum monthly or such other sum as he thought expedient for her services, *held* directory, not optional, except as to amount of her salary.

◆

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

In the matter of the estate of Adolph Tsheppe, deceased. From an order construing a clause of a testamentary trust in deceased's will in favor of Elizabeth Eldred on the petition of the Bank of America National Trust & Savings Association as testamentary trustee, the latter appeals.

Affirmed.

See, also, Eldred v. Tsheppe's Estate, 65 P.(2d) 88.

Harold Richardson, of Whittier, for appellant.

M. I. Church, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from an order construing a certain clause in a testamentary trust contained in the last will and testament of Adolph Tsheppe, deceased, based upon a petition filed by appellant as testamentary trustee.

The clause of the will, in question, is as follows: "In as much as my said housekeeper, Elizabeth Eldred, is familiar with my houses I recommend that my said trustee employ her to assist in the renting and care of said property and authorize my said trustee to pay her the sum of One Hundred Dollars ($100.00) per month and an apartment in the annex of the property located at 325 North Painter Avenue, Whittier, California, free of rent, for her services, or such other sum as said trustee may think expedient, in grateful recognition of her care and services to me. * * *" The court construed the clause to be directory and not optional, and held that the trustee must follow the terms of the will except as to the amount of salary that shall be paid said Elizabeth Eldred.

[1,2] It is contended by appellant that the trial court erred in holding that the clause recommending the employment of respondent was binding upon the trustee. The primary rule for the construction of all wills is to ascertain the intention of the testator; and this intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made. Estate of Mitchell, 160 Cal. 618, 620, 117 P. 774; sections 101 and 105, Probate Code. The word "recommend" in a Wisconsin case was held to have mandatory force. Webster v. Morris, 66 Wis. 366, 28 N.W. 353, 57 Am.Rep. 278.

At the hearing of the order to show cause in the instant case, oral and documentary evidence was submitted, including the last will and testament of the decedent which theretofore had been admitted to probate, after which hearing the court made the order construing the clause as hereinbefore stated.

[3] The authorities are numerous construing precatory words and in this connection it should be noted that in each case, almost without exception, the ultimate determination of the question involved depended upon the context of the will and the circumstances surrounding the use of the precatory word. This is true with respect to the authorities relied upon by appellant. In the case at bar it cannot be said that the evidence was insufficient to justify the order, nor that the trial court erred in the construction and interpretation of the clause in question.

The order appealed from is affirmed.

We concur: HOUSER, P. J.; YORK, J.

---

19 Cal.App.2d 745

CLOUGH et al. v. SUPERIOR COURT IN AND FOR TEHAMA COUNTY et al.

Civ. 5733.

District Court of Appeal, Third District, California.

March 9, 1937.

Mandamus 🔑190

Petitioners' cost bill, filed in original mandamus proceedings, was stricken, on motion, where judgment in cause did not award costs to petitioners.

◆

Original proceedings in mandamus by Geo. A. Clough and others against the Superior Court of the State of California, in and for the County of Tehama, and the Honorable H. S. Gans, Judge thereof, wherein petitioners filed a cost bill. On respondents' motion to strike out cost bill. Motion granted.

See, also, (Cal.App) 61 P.(2d) 375.

Pugh & Pugh, of Red Bluff, and George A. Clough, of San Francisco, for petitioners.

Clarence W. Morris, of San Francisco, for respondents.

PER CURIAM.

Motion to strike out petitioners' cost bill filed in original proceedings in mandamus. The judgment in this cause did not award costs to the petitioners.

On the authority of Gould v. Moss, 158 Cal. 548, 111 P. 925, the respondents' motion to strike out petitioners' cost bill is granted.

---

19 Cal.App.2d 416

BENEDICT v. CALKINS et al.

Civ. 5767.

District Court of Appeal, Third District, California.

March 3, 1937.

1. Vendor and purchaser 🔑299(2)

Vendor cannot claim default on land contract until he has himself performed whatever he agreed to perform under contract.

2. Vendor and purchaser 🔑299(2)

Deposit in bank of deed to "undivided one-third of the N. W. ¼ of Section 33, Tp. 11 North, Range 12 M. D. B. & M.," did not comply with requirement of land contract that vendor deposit proper deed to undivided one-third interest in NW¼ of section 33, township 11 north, range 12 west, San Bernardino Base and Meridian, and hence vendor could not forfeit contract for purchasers' default in payment.

3. Vendor and purchaser 🔑299(3)

To obtain forfeiture of land contract, vendor must show, not only that purchasers failed to pay purchase price, but that purchasers had no excuse for their failure.

4. Vendor and purchaser 🔑299(4)

In suit to forfeit land contract, equity will relieve purchaser of forfeiture where breach of duty by purchaser was not fraudulent, grossly negligent, or willful (Civ.Code, § 3275).

5. Vendor and purchaser 🔑299(4)

In vendor's suit to forfeit land contract, evidence sustained finding that purchasers' failure to make payment on land contract was not fraudulent, or grossly negligent, or willful, and hence entitled purchasers to be relieved of forfeiture (Civ.Code, §§ 1492, 3275).

6. Vendor and purchaser ⟹299(4)

In vendor's action to forfeit land contract, interlocutory decree, whereby defaulting purchaser is given definite time within which to make defaulted payments, is within trial court's discretion (Civ.Code, § 1492).

7. Appeal and error ⟹946

Rulings within trial court's discretion will not be interfered with, in absence of a clear showing of abuse.

◆

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by Frank M. Benedict, also known F. M. Benedict, against C. C. Calkins and others. From both an interlocutory and a final decree rendered against him, plaintiff appeals.

Affirmed.

Harvey & Johnston, of Bakersfield, and Ford, Benedict & Ford, of Los Angeles, for appellant.

Siemon, Claflin & Maas, of Bakersfield, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff appeals from both an interlocutory and a final decree rendered against him. In form the action was one to quiet title to an undivided one-third interest in certain real property in the county of Kern, and to obtain the cancellation of an agreement for the sale of said interest to the defendants. The real property in question consisted of the northwest quarter of section 33, township 11 north, range 12 west, San Bernardino Base and Meridian, upon which certain mine prospecting had been carried on, and was situated a short distance from established mining properties.

At one time title to this property stood in the name of respondent Calkins, but he had conveyed to W. W. Kaye, who held the legal title in trust for his grantor. Kaye, with the consent of Calkins, conveyed an undivided one-third interest to Benedict, plaintiff and appellant herein, at which time it was understood as testified by Calkins and found by the court to be true Benedict agreed that Calkins should have the right and power to sell or lease the entire tract it being agreed that Benedict however was to receive his share of any proceeds therefrom. Apparently Calkins and Benedict could not agree as to the handling of the property and Benedict conveyed his title to Atkin.

On April 7, 1931, Atkin contracted to sell to respondents by a written agreement. This agreement recited that in consideration of $400, $50 of which at the time of execution, was paid by Calkins to him, he, Atkin, sold to Calkins and Siemon all right, title, and interest in and to the property in question; the balance of the purchase price to be paid on or before July 15, 1931. Atkin upon his part agreed to execute a proper deed of conveyance of the undivided one-third interest within ten days of the date of the agreement and deposit the same in the First National Bank of Glendale with instructions to deliver the same to Calkins and Siemon upon payment of the balance with interest. If the balance was not paid on that date the bank was to return the deed to Atkin. The balance was not paid on or before July 15, 1931, nor was the same paid until after the interlocutory judgment in this action in 1935.

[1] Appellant, to whom Atkin reconveyed his interest, is seeking to forfeit the rights of respondents under the contract by reason of their failure to comply with the terms thereof. It may be that time was made of the essence of the agreement by the language of the contract, or the subject of the contract being mining property, it may be time became of the essence independent of any express stipulation (Skookum Oil Company v. Thomas, 162 Cal. 539, 123 P. 363, citing 2 Lindley on Mines, § 859), both of which contentions are advanced by appellant, but we need not pass upon these points for it is fundamental that appellant cannot claim a default until he had himself performed whatever he agreed to perform under the contract. The agreement provided appellant was to "deposit a proper deed of conveyance within ten days and allow it to remain there until July 15, 1931."

[2] The amended answer to the amended complaint denies that Atkin deposited a deed of conveyance to said property with the bank as required by the agree-

ment, and upon that issue the trial court found no such deed had been deposited. An examination of the deed left with the bank pursuant to this provision described the property as "an undivided one-third of the NW¼ of Section 33, Tp. 11 North, Range 12, M.D.B.&M," which very obviously is not a description of the property agreed to be conveyed, and justifies the finding of the trial court. Before appellant may forfeit the contract he must either show he made the tender contracted for or that he made some other tender, and no such showing was attempted.

[3] Appellant, to prevail, must show not only that respondents failed to pay the purchase price of the land, but it must also appear that respondents had no excuse for their failure to so comply with their agreement. In Gist v. Security Trust & Savings Bank, 218 Cal. 581, 24 P.(2d) 153, the purchaser mistook the location of the lot and brought the matter to the attention of the seller. While making no commitment, the seller by his conduct led the purchaser to believe the mistake would be rectified. No further payments were made by the purchaser, as he waited for action by the seller. The latter undertook to cancel the contract because the payments had not been made strictly within the time required. The court held the seller was estopped to so do.

It was testified, and found to be true by the court, that Atkin, before the commencement of this action, told these defendants on several occasions he was in no hurry for the payment of the balance due on the contract and that defendants could take such time as they desired to pay the balance, and that he would not require them to pay until he had need of the money. At no time while title stood in his name did Atkin notify the defendants to pay the balance or that he needed the money, and at all times recognized the contract as an existing agreement. The complaint in this action was filed December 23, 1923, and early in December of that year respondent Calkins received a letter from Atkin, in regard to which Calkins testified and the court so found, that Atkin at a meeting in response to said letter had offered to discount the contract $100.

Some time prior thereto, and as claimed by appellant through mistake and inadvertence, a deed had been placed on record from Atkin to Calkins. Calkins testified he believed the deed had been delivered to his associate as the consummation of the agreement. The deed, valid upon its face, was effective to convey title unless rescinded. No such proceeding was taken, and while Calkins was investigating this deed the present action was filed.

[4, 5] This action being an equitable proceeding, equity will relieve respondents of forfeiture where the breach of duty had not been fraudulent, grossly negligent or willful. Civ.Code, § 3275. Appellant claims the evidence is not sufficient to sustain the finding that the failure to make the payment was not fraudulent or grossly or willfully negligent, but we believe in view of the foregoing, the evidence clearly supports such finding.

[6, 7] It is also provided in section 1492 of the Civil Code that performance may be made at any time after it is due upon making full compensation, where time has not been expressly declared to be of the essence of the contract. An examination of contract will reveal that it contains nothing expressly making time of the essence, and in Veterans' Welfare Board v. Burt, 4 Cal.App.(2d) 659, 41 P.(2d) 587, 588, it is said: "Interlocutory decrees in actions of this kind, whereby a defaulting party is given a definite time within which to make defaulted payments, are within the discretion of the trial court. Los Angeles Auto Tractor Co. v. Superior Court, 94 Cal.App. 433, 271 P. 363. Rulings within the court's discretion will not be interfered with in the absence of a clear showing of abuse. Waybright v. Anderson, 200 Cal. 374, 253 P. 148."

We are of the opinion that the judgments from which the appeals herein are taken should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

19 Cal.App.2d 340

PEOPLE v. WILSON.

Cr. 341.

District Court of Appeal, Fourth District, California.

Feb. 25, 1937.

1. Gaming 🔑63(3)

Statute legalizing pari-mutuel betting on horse races did not repeal provisions of Penal Code prohibiting receiving or holding bets on horse races, but merely provided an exception thereto (Pen.Code, § 337a, subd. 3; St.1935, p. 1943, § 3; Const. art. 4, § 25a).

2. Gaming 🔑72½

Receiving bet on horse race held in Rhode Island by officers or employees of club in California would be violation of Penal Code, under which only exception to prohibition of receiving such bets permitted betting conducted on track duly licensed by California authorities (Pen.Code, § 337a, subd. 3; St.1935, p. 1943, § 3; Const. art. 4, § 25a).

3. Gaming 🔑98(1)

Evidence that accused was found in club where bets on horse races were unlawfully taken and admitted that he was in charge of room containing teletype, broadcasting microphone, and other facilities for receiving and holding bets on races in other states and announcing results in another room, including telephones listed in accused's name over which calls were received from persons attempting to place bets, *held* to sustain conviction for violation of statute prohibiting receiving or holding of bets on horse races (Pen.Code, § 337a, subd. 3; St. 1935, p. 1943, § 3; Const. art. 4, § 25a).

4. Criminal law 🔑338(4)

In prosecution for violation of statute prohibiting receiving or holding of bets on horse races, admitting in evidence contract between another than accused and telephone company showing installation of teletype allegedly used in commission of crime, listing of which was subsequently changed to accused's name, *held* error, in absence of evidence connecting accused and other party, or explaining method and reason for change of listing (Pen.Code, § 337a, subd. 3; St.1935, p. 1943, § 3; Const. art. 4, § 25a).

5. Criminal law 🔑338(4)

In prosecution for violation of statute prohibiting receiving or holding of bets on horse races, admitting testimony as to business of party who contracted with telephone company for installation of teletype allegedly used in commission of crime *held* error, in absence of evidence showing connection between accused and other party and his business (Pen.Code, § 337a, subd. 3; St. 1935, p. 1943, § 3; Const. art. 4, § 25a).

6. Criminal law 🔑730(14)

Where intemperate argument of district attorney pertaining to bribery and racketeering was permitted in prosecution for violation of statute prohibiting receiving and holding of bets on horse races, but court instructed that there was no evidence to show bribery or racketeering and that jury should disregard such argument, error was at least partially cured, as respects whether error, with others, resulted in miscarriage of justice requiring reversal of conviction (Pen.Code, § 337a, subd. 3; St.1935, p. 1943, § 3; Const. art. 4, § 25a; art. 6, § 4½).

7. Criminal law 🔑1186(4)

Where violation in gambling resort of statute prohibiting receiving and holding of bets on horse races was clearly shown, and accused admitted he was in charge of teletype room in such resort, error in permitting intemperate argument, later partially cured by instruction, and errors in admitting evidence relating to teletype, *held* not sufficiently prejudicial to require reversal (Pen.Code, § 337a, subd. 3; St.1935, p. 1943, § 3; Const. art. 4, § 25a; art. 6, § 4½).

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

H. B. Wilson was convicted of violating the provisions of the Penal Code prohibiting the receiving or holding of bets on horse races, and he appeals.

Affirmed.

S. B. Kaufman and Z. B. West, both of Santa Ana, and Robbie Anderson, of Anaheim, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

MARKS, Justice.

This is an appeal from a judgment in which appellant was sentenced to be confined in the county jail of Orange county after being convicted of violating the provisions of subdivision 3 of section 337a of the Penal Code.

Appellant and four others were charged in a first count of an information with violating the provisions of this subdivision and in a second count with violation of the provisions of subdivision 1 of the same section. One defendant was acquitted under both counts, and appellant and three others were convicted under the first count. The jury was not able to agree on their guilt or innocence of the offense charged in the second count.

The only cases in California involving the violation of any of the subdivisions of section 337a of the Penal Code, decided since the adoption of section 25a of article 4 of the Constitution and the effective dates of the law permitting the operation of pari-mutuel betting machines (Stats.1933, p. 2046) and of its amendatory act (Stats. 1935, p. 1943), seem to be Ex parte McKelvey (Cal.App.) 64 P.(2d) 1002, and People v. Torrey (Cal.App.) 60 P.(2d) 900, 901. In the Torrey Case it was said:

"Appellant maintains that the information failed to charge him with the commission of a public offense, and that the evidence failed to prove him guilty of any offense. He bases this contention upon the theory that pari-mutuel betting was legalized under a constitutional amendment which effected a repeal of those provisions of section 337a of the Penal Code, which prohibited all forms of betting and registering of bets on horse races.

"It is evident from the mere reading of the quoted provisions of section 337a of the Penal Code that it prohibited all betting and registering of bets on horse races. In 1933 the Legislature adopted an act which would permit pari-mutuel betting on horse races. Stats.1933, c. 769, p. 2046. This act took effect upon the adoption by the people of section 25a, article 4, of the Constitution on June 27, 1933. This act permitted pari-mutuel betting on horse races conducted on duly licensed tracts where the wagers were made and placed within the inclosures containing such tracks. In 1935, section 3 of the act was amended by the addition of the following provisions:

"'A wager made inside an enclosure under the pari-mutuel system for a principal who is not within the enclosure shall be considered a wager made within the enclosure for the purpose of this act and any activity of the principal in connection with such wager shall not be considered a wager made outside the enclosure.' Stats. 1935, c. 719, p. 1943.

[1] "We are of the opinion that the act of 1933, as amended in 1935, permitting pari-mutuel betting on horse races, did not effect a repeal of the provisions of section 337a of the Penal Code which prohibited any betting and registering of bets on horse races. It merely provided one exception under which one form of betting on horse races was permissible in California. It is clear from a study of the act of 1933, as amended, that the Legislature not only did not intend to repeal the general law prohibiting general betting and registering of bets on horse races, but intended that the law remain in force subject to one exception, namely, that pari-mutuel betting be permitted if conducted in the manner and under the conditions specified in the act."

The information in the Torrey Case involved a violation of the provisions of subdivision 4 of section 337a of the Penal Code, while in the instant case a violation of subdivision 3 of that section is charged. Subdivision 4 prohibits placing, recording, or registering a bet or wager upon a horse race. Subdivision 3 prohibits receiving or holding bets on horse races. Both subdivisions are subject to the exception contained in the law permitting betting through the means of pari-mutuel machines, if the bets are placed in a pari-mutuel machine and those machines are located and the races held within inclosures containing tracks duly licensed by constituted authorities of the State.

[2] In the instant case it is not disputed that the bet was made at the Restful Club at Balboa in the city of Newport Beach in Orange county on a horse running in a race on the track in Narragansett Park at Pawtucket in the state of Rhode Island. As this track was outside the state of California, it was beyond the jurisdiction of any of its officers and could not have held any valid license by any authority of this state. Therefore, the necessary elements of the offense charged were proved when it was established that the officers or employees of the Restful Club received a bet on a race held at Narragansett Park because that track could not be licensed by California authorities, and placing the bet in pari-mutuel machines in that park could not relieve the person or persons receiving the bet from the criminal consequences of that act.

Appellant urges that the evidence is insufficient to show that he was connected with the receiving or holding of the bet in question here. The answer to this argument requires a review of the evidence bearing upon that question. A great deal of the evidence introduced was directed towards the alleged violation of subdivision 1 of section 337a of the Penal Code. As appellant was not convicted of the violation of the provisions of that subdivision, we may disregard that part of the evidence and any errors committed in admitting any of it.

Robert H. Sandon was the chief investigator in the office of the district attorney of Orange county. On the morning of August 20, 1936, he gave W. A. Ralls a $20 bill and retained a record of its number. Ralls was an employee of a private detective agency and was working under authority of the district attorney.

Ralls went to the Restful Club in Balboa in the city of Newport Beach. There he saw about twenty people. Defendants Walter Hite and John Callahan were behind a counter. Hite was taking money and making change, and Callahan was marking on charts odds on different horses as they were announced over a loud speaker in the room. Ralls went up to the counter and said to Hite, "Two dollars on Retard, number thirty-nine at Narragansett." He gave Hite the $20 bill and received $18 in change.

A few minutes later the sheriff of Orange county and several of his deputies appeared, armed with a search warrant. They arrested Callahan and Hite and Anderson, who arrived at the club a few minutes later. They found the $20 bill in a money box near where Hite was working. They also found other money and a large collection of sheets, charts, racing forms, run-down sheets, and other such paraphernalia used by bookmakers in receiving, making, and registering bets on horse races.

Two deputy sheriffs proceeded to a small room on the second floor of the Restful Club, which we will refer to as the teletype room. There they found and arrested Bassett and Wilson. Wilson told the deputies that he was in charge there. There were three telephones, a teletype, a microphone and control box, a large table, chairs, and various charts and papers described in the evidence as those used by bookmakers in receiving and recording bets on horse races. Appellant was sitting at the table with the microphone and teletype machine at his right. In a closet of this room was found an envelope and a letter with a copy of the articles of incorporation of the Restful Club. The envelope and letter were addressed to H. B. Wilson, Balboa, Cal. The letter was merely one of transmittal of the articles of incorporation. In the articles of incorporation H. B. Wilson was named as one of the original incorporators and directors of the Restful Club.

Wires from the microphone control box ran to the loud speaker in the first floor room which we have already described. The teletype was in operation and was recording information concerning races run and to be run on eastern race tracks which corresponded with what was described as being broadcast over the loud speaker and recorded on the run-down sheets. Somewhat similar information concerning the eastern races was found recorded on sheets found in the teletype room. Also various memoranda were found there which were described as records of bets that had been placed.

Several telephone calls were received by one of the deputy sheriffs while he was in the teletype room, one of which was detailed in the evidence. This conversation was described as follows:

"A. He called me and he said 'Is this Butch?' and I said 'Yes' and he said 'I want to bet two dollars on Lieutenant Greenock in the fifth at Narragansett' and I said 'What?' I said 'Will you spell that out for me?' and so he spelled it out and I spelled it back to make sure, Lieutenant Greenock, and he said he wanted to bet two dollars, I don't recall what he said 'Across the board' or what or some such expression that I am not familiar with and then he said 'I want to bet two dollars on Blessed Event in the Seventh race at Narragansett' and I repeated it back to him.

"Q. Any other conversation? A. That was practically all, there was a little more but I can't recall all of it at this time.

"Q. Was there anything said about the name of this party at that time? A. Yes, at the beginning of the conversation, the first thing I asked him, I said 'Who is this?' and he said 'This is Hoffman at San Clemente.'"

The deputy sheriff repeated this conversation and spelled out the names of the two horses in the presence of appellant, who remained silent. The deputy subsequently contacted Emil Hoffman of San Clemente, Cal., and recognized his voice as the one he had heard during the telephone conversation. Hoffman was produced as a witness and substantially admitted having had such a conversation. He also admitted having placed at the Restful Club other bets on horse races over a telephone that was listed in the telephone directory under the name of Anderson & Wilson Café. This telephone was located in the teletype room. The two other telephones in that room were listed in the name of H. B. Wilson.

[3] This evidence is sufficient to connect appellant with active participation in the operation of the Restful Club and is sufficient to sustain his conviction under count one of the information. All of the necessary elements of the offense were proved by direct and undisputed evidence and, as appellant was actively engaged in the operation of the Restful Club where the Ralls bet was illegally received, his conviction must be affirmed unless there are prejudicial errors in the record.

We have studied the record and have reached the conclusion that the trial judge erred in two particulars in overruling appellant's objections to questions asked and exhibits offered by the people and in denying his motions to strike such evidence from the record. We find no serious prejudice in the rulings on any of the other objections or motions to strike made by counsel for appellant.

[4] A district manager for the Southern California Telephone Company was produced as a witness for the people. He produced a contract for an interexchange private line teletype system which was admitted in evidence. The contract was between the telephone company and Eugene Normile. It showed the installation of a teletype machine at Balboa under a notation of "S. Scoby." This was later changed by the telephone company to "H. B. Wilson." How, why, by whom, or at whose direction or request the change was made does not appear. It does not appear that appellant ever heard of this contract or of the notations. Under such circumstances the contract and notations should not have been received in evidence.

[5] Another witness was produced who knew Eugene Normile and who testified at some considerable length concerning his business. Normile was not connected with the case in any manner except through his contract with the telephone company. As this contract should not have been admitted in evidence, it follows that any evidence concerning the business of Normile should have been excluded. The contract with the telephone company and the business of Normile could have become competent evidence only if appellant could have been sufficiently connected with the contract or with Normile and his business.

[6] Appellant complains of intemperate remarks by a deputy district attorney during his argument to the jury. At the request of counsel for appellant the trial judge said: "The record will show the exception. Of course, Ladies and Gentlemen of the Jury, there isn't any evidence to show any bribery or anything in the way of racketeering and you are not to infer from the argument of the District Attorney that there is any evidence tending to show that fact or evidence of those facts." While it would have been better to have stopped the argument of the deputy district attorney on the first objection made by appellant, the error was at least partially cured by the quoted instruction.

When we find errors in the record such as confront us here it becomes our duty to weigh them and all of the evidence in the case with the provisions of section 4½ of article 6 of the Constitution in mind. That section prohibits us from reversing a judgment for such errors as we have here unless, after a review of the entire case, we reach the conclusion that they have resulted in a miscarriage of justice.

[7] That the crime of receiving a bet on a horse race, which bet was not placed in a pari-mutuel machine within the inclosure of a race track licensed by California authorities, was committed, is too clear to admit the possibility of any doubt. Appellant does not seriously challenge the sufficiency of this evidence but argues that his participation in the commission of the crime is not sufficiently proved. We cannot agree with this contention. There is clear and convincing evidence that appellant was actively engaged in the operation of the gambling features of the Restful Club. In addition to all the other evidence pointing to the guilt of appellant we cannot overlook his statement made at the time of his arrest that he was in charge of the teletype room. In connection with the other evidence this can only be construed as having the effect of an admission of guilt.

In that room there was received over the teletype information without which the club could not have operated as a gambling resort. This information was relayed from that room to the other room, where the Ralls bet was received. The club telephones were in that room over which other bets were received. To conclude that there had been a miscarriage of justice we would have to conclude that appellant told an untruth when he admitted that he was in charge of the teletype room. It is difficult to understand how he can be heard to complain because the jury took his own statement at its face value and acted upon it. His conviction is supported by his own admission.

Under the facts of this case we cannot conclude that the errors complained of are sufficiently prejudicial to require a reversal of the judgment. The record shows that there has been no miscarriage of justice.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

RAYNOR v. CITY OF ARCATA. *

Civ. 5553.

District Court of Appeal, Third District, California.

March 3, 1937.

Hearing Granted by Supreme Court April 29, 1937.

1. Automobiles 🔑244(16)

Evidence *held* to sustain judgment for motorist against city for injuries sustained when his automobile was struck at intersection by automobile driven by city fire chief while on his way to fire.

2. Automobiles 🔑187

That fire chief was on his way to fire outside of city boundaries in response to alarm from box within city *held* not to preclude recovery by motorist from city for injuries when struck at intersection by automobile of fire chief, since fire chief was under duty to be at hand to protect property within city, though fire was burning across boundary line of city.

3. Automobiles 🔑175(4)

Though driver of automobile of fire department is not restricted to maximum speed, automobiles may not be driven with absolute indifference to others legitimately using streets, but drivers must exercise proper degree of care, which is greater than that required of drivers of vehicles, speed of which is fixed by law.

4. Appeal and error 🔑999(3)

Finding of jury on testimony of motorist and wife that motorist had sustained injuries when struck by automobile *held* binding on appellate court.

5. Appeal and error 🔑173(4)

City could not raise for first time on appeal from judgment against it fact that claim had not been filed with city prior to institution of suit.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by I. W. Raynor against the City of Arcata, a municipality. From a judgment in favor of the plaintiff, the defendant appeals.

Affirmed.

Blaine McGowan, of Eureka, for appellant.

E. S. Mitchell, of Eureka, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

A jury awarded plaintiff $5,000 against the City of Arcata for damages sustained by reason of the negligent operation of an automobile belonging to the city fire department and operated by the chief while responding to an alarm of fire.

Plaintiff was a salesman employed by the United States Rubber Company. He was proceeding southerly along the Redwood highway at 5:30 o'clock in the afternoon of a day in March, 1933, and at the intersection of Sixteenth street and the Redwood highway in the City of Arcata, he was struck by the car of the fire chief and suffered injury.

At about 5:30 o'clock of that afternoon an alarm of fire was turned in from an alarm box within the city limits of the City of Arcata. The fire chief was at his home about five blocks from the intersection of Sixteenth street and the highway. When the alarm was sounded he got in the chief's car, which was a Ford, painted red and equipped with the standard type of siren. He lighted the red emergency light on the front of the car and started for the fire, traveling in excess of 50 miles an hour, although he slackened speed somewhat as he approached the intersection. At the same time plaintiff was traveling between 15 and 20 miles an hour along the highway which was posted as a boulevard or arterial street. He testified he heard no siren or other warning and looked both to the right and left before entering the intersection, but saw no cars approaching.

---

*For subsequent opinion see 77 P.2d 1054.

A witness, immediately following plaintiff's car, testified plaintiff was in the intersection when the red car of the fire chief, traveling at approximately 50 miles an hour, flashed in view and struck the car of plaintiff. This witness heard no siren or other warning. Several other witnesses testified they heard the siren, and others who were in an equally favorable position to have heard the siren, testified they did not hear any warning of any kind whatever.

As the result of the collision plaintiff was bruised and suffered severe nervous shock, and at the trial, some two years after the accident, testified he was still suffering from the effects of the accident with severe headaches and nervous instability, which made it impossible for him to perform as efficiently the work he had previously done.

Appellant contends the verdict is against the evidence and not supported by the evidence, that plaintiff was guilty of contributory negligence, and that the court erred in instructing the jury.

[1] We need not set forth in great detail the testimony which would tend to support the verdict of the jury. An examination of the transcript shows that the plaintiff testified as to what occurred at the scene of the accident and the injuries which he sustained. Imogene Platt, registrar of Humboldt State Teachers College, who was at the scene of the accident when it occurred, testified as to facts which fully supported all the allegations of the complaint. Wilfred Brown, who was in a car at the intersection when the collision occurred, likewise testified for the plaintiff, as did Mrs. Jenkins and Mr. Danielson, who testified as to the location of the cars at the time in question, and the damage to the car of plaintiff. Mrs. Raynor, the wife of plaintiff, also testified as to the injuries suffered by plaintiff and its effect upon his health and ability to transact his business affairs.

[2] It is claimed by appellant that inasmuch as the fire was actually burning outside of the boundaries of the City of Arcata, the chief was not then in the performance of his duties and the city therefore was not liable. However, the alarm was sounded from a box within the city and the chief testified that it was his duty to respond to a fire alarm sounded within the City of Arcata. It is also, without doubt, the duty of the fire chief to be at hand to protect property within the city, even conceding that the fire was burning across the line and outside of the city limits.

[3] It is also argued that the chief had the right of way at the intersection. While it is a fact that the driver of a fire car is not restricted to a maximum speed at which they may be driven, it is held in City of Sacramento v. Hunger, 79 Cal.App. 234, 249 P. 223, such cars may not be driven with absolute indifference to others legitimately using such streets or with reckless disregard of the lives and property of others, and the operators of such vehicles are not relieved from the duty of exercising the proper degree of care when operating such vehicles over and along the streets of the city. As a matter of fact, inasmuch as such public automobiles are permitted to operate at an unlimited speed, a greater amount of care is required than in those cases where the speed of the motor vehicle is fixed by law. The Hunger Case also holds that where there is evidence that the siren of the fire car was sounded, and there is no direct evidence that plaintiff heard the siren at any time before the accident, he denying having heard the same, the question whether he did hear the same is one of inference to be drawn by the jury from all the evidence in the case.

[4] We do not believe we need consider at length the point raised by the defense that there is no proof that the injuries of plaintiff were the result of the accident. There was testimony both by plaintiff and by his wife that he had sustained injuries, and upon this evidence the jury, having found as a fact that injuries were sustained, is binding upon this court.

We have also examined the instructions refused, but which appellant claims the court should have given, but in comparing the instructions refused with the instructions given, we find that the principles set forth in appellant's instructions and refused, were fully covered in other instructions which were given.

[5] Some point also was made of the fact that the claim filed with the City of Arcata by plaintiff prior to the institution of the suit, was defective and was not filed within time. This question was not presented to the lower court, either by way of pleading or by appropriate motion, and being in the nature of a statute of limitation, cannot for the first time be raised on appeal. McDonald v. Bear River, etc., Mining Co., 13 Cal. 220; Eucalyptas Growers Association v. Orange County Nursery & Land Co., 174 Cal. 330, 163 P. 45; Halstead Lumber Co. v. Security Title Insurance & Guarantee Co., 116 Cal.App. 679, 3 P.(2d) 52.

Finding no error, the judgment must be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

19 Cal.App.2d 397

PEOPLE v. BOWLIN.

Cr. 2931.

District Court of Appeal, Second District, Division 1, California.

March 2, 1937.

1. Automobiles 🔑316
Constitutional law 🔑255

Statute requiring motorist who injured or killed person in accident to stop and render assistance *held* not unconstitutional as depriving motorist of his liberty without due process, as against contention that statute did not make knowledge of accident an element of the offense, since knowledge of accident was implied as element of offense (St. 1935, p. 170, § 480; Const. art. 1, § 13).

2. Constitutional law 🔑42

Defendant accused of hit and run driving could not complain that statute making such driving unlawful was indefinite, so as to deprive a defendant of his rights, in that statute required driver of any vehicle "involved" in accident to stop even though driver by his mere presence on road may have unknowingly caused accident, where principal issue was whether defendant's truck collided with another automobile and whether defendant stopped to render assistance to persons injured in collision (St.1935, p. 170, § 480).

3. Automobiles 🔑355(8)

Evidence that defendant's truck "sideswiped" automobile, that defendant knew that accident had occurred, and that defendant failed to stop his truck and render assistance to any persons injured in accident, warranted conviction for hit and run driving (St. 1935, p. 170, § 480).

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Gus Bowlin was convicted for drunken driving and for hit and run driving. From an order denying his motion for a new trial, he appeals.

Order affirmed.

Joseph W. Ryan, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the People.

HOUSER, Presiding Justice.

Following defendant's conviction by the trial court, sitting without a jury, on each of two charges, to wit, those which are commonly known as "drunk driving" and "hit-and-run," the court denied defendant's motion for a new trial, but granted his subsequent application for probation; whereupon defendant appealed from the order by which his motion for a new trial was denied.

[1] Appellant presents neither argument nor authority with relation to his conviction on the charge of "drunk driving," but confines his efforts on this appeal to the sole point that the trial court erred in refusing to grant a new trial. In that regard, his first contention is that the statute under the terms of which he was convicted on the "hit-and-run" charge is unconstitutional, in that it purports to deprive defendant of his liberty "without due process of law"; and consequently, that it is violative of section 13 of article 1 of the State Constitution.

In support of such contention, appellant directs attention to the fact that nowhere in the statute (section 480, Vehicle Code [St.1935, p. 170]) does it appear that before one may legally be convicted of the offense, it must affirmatively appear that the defendant had knowledge of the fact that the automobile which he was driving had collided with another automobile and that by reason thereof someone either was or might be in need of assistance. But for many years last past, it has been consistently ruled by the appellate tribunals of this state that notwithstanding the absence of express words in the statute, "the element of knowledge of the fact of the collision is necessarily to be implied from the requirements of the act" (syllabus, People v. Fodera, 33 Cal.App. 8, 164 P. 22; People v. Graves, 74 Cal.App. 415, 240 P. 1019); from which it follows that appellant's contention in that regard cannot be successfully maintained.

[2] Appellant next devotes his efforts to an attempt to show that because the statute provides that "the driver of any vehicle involved in an accident resulting in injury to or death of any person" shall immediately stop his vehicle, etc.,—it is "indefinite," and thus "deprives a defendant of his rights." In that connection his plaint is not that he was not "involved" in the accident out of which his prosecution arose, but that if the word "involved" be given its fullest and broadest construction, "the driver of an automobile on a public highway, (who) by his mere presence thereon, may have unknowingly and unconsciously, without any neglect or criminal intent upon his part, caused or brought about a collision or injury to occupants of another car, with a third car," may be subjected to prosecution.

Although granting that such a situation might arise, it is apparent that the determinative question that would ensue thereon would relate not to the validity of the statute, but to a decision by the trial court regarding the intent with which the word "involved" was used by the Legislature in the enactment of the statute; in other words, what construction should be placed on the word "involved"? Moreover, the evidence that was educed in the instant case establishes the fact that a determination herein of the meaning of the word "involved" is wholly unnecessary. On the trial of the action, the principal and deciding issues were, first, whether defendant's automobile collided with that of the complaining witness; and, secondly, assuming the fact that such a collision did occur, did defendant immediately stop his automobile and render or offer to render the assistance, etc., specified in the statute? It therefore is clear that appellant is needlessly concerned about the possible construction that may be placed upon the word to which he has directed the attention of this court; and in such circumstances the authorities are numerous to the effect that even though his point may be meritorious, he is in no position to raise it, much less to require an appellate tribunal to pass its judgment with respect thereto. 6 R.C.L. 89; Castillo v. McConnico, 168 U.S. 674, 680, 18 S.Ct. 229, 42 L.Ed. 622; Ramish v. Hartwell, 126 Cal. 443, 451, 58 P. 920; Max Factor & Co. v. Kunsman, 5 Cal.(2d) 446, 55 P.(2d) 177; People v. Rogers, 112 Cal.App. 615, 297 P. 924; Ex parte Durand, 6 Cal.App.(2d) 69, 44 P.(2d) 367; Day v. Metropolitan Life Ins. Co., 11 Cal.App.(2d) 681, 54 P.(2d) 502.

[3] Finally, appellant insists that the evidence was insufficient to sustain the judgment. In that regard, without here attempting to set forth in detail the various items of testimony and other evidence that tended to establish the guilt of defendant, it may suffice to state generally that although not presented by the witnesses in the most satisfactory manner, nor of the best quality, the testimony that was given not only by the prosecuting witness, but also by a man who was riding with the prosecuting witness in his automobile at the time when the accident occurred, was to the effect that, while being driven by defendant, his truck "side-swiped" the automobile that was then and there being driven by the complaining witness; that, judging from the entire evidence in the case, defendant knew that the accident had occurred; and that upon its occurrence, he failed to immediately stop his truck and thereupon to comply with the provisions of the statute which relate to the rendering of assistance to any person who was injured as the result of the collision.

It follows that the order should be affirmed. It is so ordered.

We concur: YORK, J.; DORAN, J.

MORIARTY v. CALIFORNIA WESTERN STATES LIFE INS. CO. (JOHNSON, Intervener). *

Civ. 9908.

District Court of Appeal, First District, Division 2, California.

March 5, 1937.

Rehearing Granted March 9, 1937.

Rehearing Granted March 10, 1937.

1. Insurance ⚷177

When corporation was adjudged bankrupt, it ceased to be an employer and its former employees ceased to be employees, as respects group insurance policies taken out by the corporation.

2. Appeal and error ⚷909(5)

In absence of showing as to whether group life policy incorporated statutory provisions giving employee option to take new policy on cessation of employment, it will be presumed that the policy contained such provisions (Code Civ.Proc. § 1963, subd. 33; Pol. Code, § 629b, subd. 2, par. (d).

3. Appeal and error ⚷933(1)

Presumption on review is that trial court correctly decided motion for new trial.

4. Appeal and error ⚷979(1)

Where trial court granted new trial of action on group life policy, on ground that it had erred in not directing verdict for insurer, and record does not clearly show that evidence of waiver of nonpayment of premium was competent, or that motion for directed verdict was properly denied, order granting new trial will be affirmed (Code Civ.Proc. § 1963, subd. 33; Pol.Code, § 629b, subds. 1, 2, pars. (b, d).

5. Appeal and error ⚷901

On review of order granting defendant a new trial, burden is on plaintiff to show that order was improper.

◆

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action on group life policy by Mervyl Moriarty against California Western States Life Insurance Company, wherein Mildred P. Johnson, individually and as executrix of the last will of Spencer Jackson Johnson, deceased, intervened. From an order granting defendant's motion for new trial, plaintiff appeals.

Affirmed.

Livingston & Livingston, of San Francisco, for appellant.

Hartley F. Peart, of San Francisco (Howard Hassard, of San Francisco, of counsel), for respondent.

STURTEVANT, Justice.

In an action brought to recover the amount due the beneficiary of Spencer J. Johnson, deceased, under a group insurance policy, the jury returned a verdict in favor of the plaintiff. The trial court granted the defendant's motion for a new trial. From that order the plaintiff has appealed.

After all of the parties had finished introducing evidence, the defendant made a motion that the jury be directed to bring in a verdict in its favor. The trial court denied that motion. Thereafter the defendant made a motion for a new trial. Later the motion was granted. The wording of the order granting the motion was as follows: "The motion for a new trial having been heretofore submitted to the court for decision, and the court having fully considered the same, it is ordered that the said motion for new trial be and the same is hereby granted upon the sole ground that the court erred in denying defendant's motion for a directed verdict for the reason that the premium which became due on January 19, 1932, on the policy described in the complaint was not paid within the grace period expiring February 19, 1932, and that defendant did not waive the payment thereof and is not estopped to forfeit said policy on account of such nonpayment." The plaintiff asserts that the sole question presented by this appeal is whether the trial court erred in denying the defendant's motion for a directed verdict and if it did not then it erred in granting the motion for a new trial and the order should be reversed. The defendant contends that in its motion for a new trial it made many assignments of error and if any one of said assignments was such that there has been a miscarriage of justice then the order should be affirmed. From the conclusion which we have reached it will not be necessary to discuss anything excepting the order refusing to grant defendant's motion for a directed verdict.

---

*For subsequent opinion see 70 P.2d 684.

Mullin-Acton Company and Mullin-Johnson Company were affiliated corporations engaged in the insurance business in San Francisco. The uncontradicted testimony showed that Mullin-Johnson Company was the alter ego of Mullin-Acton Company and for reasons best known to the latter its brokers were incorporated and in that manner acted as the brokers of Mullin-Acton Company. With the facts all known to both parties the insurance contract involved in this action was executed. It covered as one group nominal employees of both companies. On September 18, 1931, the California Western States Life Insurance Company (then Western States Life) wrote a policy of group insurance upon the lives of the employees of the affiliated corporations. That document was known as the master contract of group insurance. The original was lost, but evidence proving its contents was offered at the trial. To each employee a certificate was issued showing his interests under the master policy. By the terms of the policy the premium fell due on September 18, 1931, and monthly thereafter. A representative of Mullin-Johnson Company collected from its employees and a representative of the Mullin-Acton Company collected the amounts due from its employees and the latter company transmitted the premium moneys to the defendant's home office. In that manner every premium was paid down to and including the month of November. As to each premium the practice was for the insurance company to send to the policyholder a statement as to the amount of each premium as it fell due. Having received such statements with such notice so printed thereon, the policyholder was monthly advised as to the amount of the premium and the date the same was payable. Such a statement and such a notice went forward regarding the premium payable December 31, 1931. The policy provided thirty-one days as a period of grace. On January 14, 1932, Mullin-Acton Company drew and forwarded its check in the sum of $69.72. At that time Mullin-Acton Company was becoming financially embarrassed. On receiving the check the defendant did not immediately deposit it and when it did attempt to collect the check the bank on which it was drawn refused to pay the check because the bank had been compelled to exercise its banker's lien to protect its own self and no funds remained to pay the check. In the meantime the creditors of Mullin-Acton Company filed an involuntary petition to have the latter adjudged a bankrupt. When the defendant was informed that said check had not been paid it sent Robert F. Benjamin to attempt to collect the amount of the check from the policyholder. He called on Mr. George H. Mullin, president of Mullin-Johnson Company and formerly president of Mullin-Acton Company. Mr. Mullin advised him to call on Mr. Raymond A. Burr, the receiver in bankruptcy of Mullin-Acton Company. Benjamin did so, but without success, and when he returned to Mr. Mullin the latter caused another check to be issued and delivered to Mr. Benjamin. That check was cashed February 10, 1932. It paid the premium that fell due December 19, 1931.

Apparently while straightening out the check tangle Mr. Mullin became aware of the dangerous condition in which the insurance of the employees was becoming involved. The pro rata contributions of the Mullin-Johnson Company amounted to $10.40. That sum he offered to pay Mr. Benjamin but he declined to accept it. In doing so he stated to Mr. Mullin that the bankruptcy of the Mullin-Acton Company had resulted in the appointment of a receiver, Mr. Burr, and that Mr. Burr refused to continue the policy so far as the employees of Mullin-Acton Company were concerned; under those circumstances it was necessary to recalculate premiums; and until the latter step had been taken Mr. Benjamin did not know what sum or sums to collect. About this time several conversations were had between Mr. Mullin and Mr. Benjamin. No other tender was made to Mr. Benjamin, nor was any sum sent to the home office of the defendant. Affairs stood as stated above when, on February 24, 1932, Spencer J. Johnson died. The last date on which the premium which fell due January 19, 1932, could have been paid under the terms of the policy expired February 19, 1932—that is, five days before the date of the death of Mr. Johnson.

[1, 2] The plaintiff does not claim the policyholder paid the premium but she asserts that the defendant is estopped from setting up that defense by reason of things said and done by Mr. Benjamin. The defendant replies that it is not estopped and quotes from the policy as follows: "Modifications and Authority. 18. No

agent can make, alter or discharge this policy or extend the time for payment of premiums, nor can this policy be varied or altered or its conditions waived or extended in any respect, except by the written agreement of the Company, signed by the President, or Vice-President, or Secretary, or Assistant Secretary, whose authority will not be delegated." It was not claimed that Mr. Benjamin held any one of the offices mentioned in clause 18. Nor was there a particle of evidence that he was anything other than a special agent. His powers were, in general, expressed in his written appointment which provided: "The Company appoints the above-named its special agent, to solicit applications for insurance on the lives of individuals, to collect and pay over to the Company only such premiums as directed by the Company, to perform such other duties in connection therewith as shall be required by the Company, and for no other purpose whatsoever." There was direct evidence that he was directed to collect the check returned "no funds." There was no evidence he was authorized nor directed to make any contract for the defendant. Mr. Mullin, over the objection of the defendant and under the promise of the plaintiff that the proof would be connected up later, testified that when Mr. Benjamin refused to accept the $10.40 tendered to him he stated that the policy was still in force and would continue in force until the defendant notified the insured of the amount of the recalculated premium. A motion to strike out was later made, but the motion was denied. The defendant asserts the testimony so given by Mr. Mullin was improperly received and that it tended to show that Mr. Benjamin attempted orally to modify a written contract which he did not have power either to write or to modify. The plaintiff contends that in this assertion the defendant is in error. The record before us does not show what was the fact. A document was introduced in evidence by the defendant which it claimed was a copy of the policy as written. That document was not copied by the reporter and the exhibits have not been brought up. Whether the contract contained covenants allowing a recalculation of the premium, and, if so, the terms of such covenants, we are not advised. By paragraph (b), subdivision 2, section 629b, Political Code it is provided that the policy, the application of the employer, and the application of the individual shall constitute the entire contract between the parties. No one of those papers is before us. By subdivision 1, section 629b, Political Code it is provided that a policy of group insurance may issue to cover not less than fifty employees. When, as here, the number of the employees is reduced more than 50 per cent. by discharge and the number remaining is twenty-five or less, the record is silent as to the provisions of the contract applicable to such contingency. Under the uncontroverted facts, Mullin-Acton Company was the employer. Mullin-Johnson Company was the broker of the former. When Mullin-Acton Company was adjudged a bankrupt it ceased to be an employer. By the same token plaintiff's decedent and the other certificate holders ceased to be employees of Mullin-Acton Company. In paragraph (d), subdivision 2, section 629b, Political Code, it is provided that to each employee will be issued a certificate reciting that in case of the termination of the employment for any reason whatsoever the employee shall be entitled to have issued to him by the company upon application made to the company within thirty-one days a policy of life insurance, etc. But the record before us does not show whether the policy was so written nor the provisions relative thereto. It will be presumed that its provisions conformed to the law. Code Civ.Proc. § 1963, subd. 33.

[3-5] The motion for a directed verdict was expressly directed to the issues of waiver and estoppel. The presumption is that the trial court correctly decided the motion for a new trial. As this record is presented to us it is clear we may not say the oral evidence of Mr. Mullin was competent, that the court properly received it, nor that the court properly denied the motion for a directed verdict. The burden rests with the plaintiff on this appeal. It follows that we may not say the trial court erred in granting the motion for a new trial on the ground on which it based its order.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

In re STRONG'S ESTATE.

STRONG v. BURNS et al. *

Civ. 11347.

District Court of Appeal, Second District, Division 2, California.

March 10, 1937.

Rehearing Denied March 29, 1937.

Hearing Granted by Supreme Court May 3, 1937.

1. Appeal and error ⚷150(3)

Executrix, even though she was a residuary legatee of decedent's estate, *held* not entitled to appeal from order and decree determining manner in which estate should be distributed as between various legatees, since executrix has no interest in manner in which estate is distributed between legatees.

2. Wills ⚷684(5)

Inheritance tax on contingent interest created by will *held* payable by executrix out of corpus of trust fund and not to be deducted from contingent reversioner's legacy under statute in effect at testatrix' death (St.1929, p. 1842, § 8(1, 3); St.1921, p. 1510, § 9(1).

3. Appeal and error ⚷762

Question raised for first time in appellant's reply brief was not considered in absence of any excuse for point not having been presented in opening brief.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Proceedings in the matter of the estate of Alice B. Strong, deceased, wherein Georgia Lacey Burns and others filed objections to the petition of Hattie Strong, executrix of the estate of Alice B. Strong, deceased, for distribution of the estate. From specific parts of the decree determining certain matters with respect to distribution and to payment of inheritance taxes, the executrix appeals.

Appeal from that part of order decreeing distribution dismissed and order in the decree with respect to payment of inheritance tax affirmed.

LeCompte Davis and MacDonald & Thompson, all of Los Angeles, for appellant.

Bradner & Weil, by Jerold E. Weil, all of Los Angeles, for respondents Georgia Lacey Burns and Alice L. Lacey.

Brooks Gifford and T. W. Ward, both of Pasadena, for respondent Helen McCreary.

McCOMB, Justice pro tem.

This is an appeal by the executrix of the will of Alice B. Strong, deceased, from specific parts of a decree determining certain matters as to (I) distribution and (II) payment of inheritance taxes.

The conceded facts are these:

I.

Appellant, executrix of the will of Alice B. Strong, is also the residuary legatee of decedent's estate. Georgia Lacey, the devisee named in clause 7 of the will, has passed the age of twenty-five years and her married name is Georgia Lacey Burns.

At the time of her death decedent owned notes secured by trust deeds and mortgages of a total appraised value of $44,162.50. However, at the date of the order of distribution set forth below, the value of notes, mortgages, and other interest bearing securities remaining in the estate did not equal $5,000.

Clause 7 of decedent's will read thus:

"If, after paying all my just debts, funeral expenses and costs of administration of my estate and after the distribution of the personal property hereinbefore bequeathed, there still remain notes and mortgages or other interest bearing securities in an amount equal to or in excess of Five Thousand ($5,000.00) Dollars then, and in that event, I give and bequeath the sum of Five Thousand ($5,000.00) Dollars of such securities—the particular securities to be designated by the Court, to Title Insurance & Trust Company, a corporation of Los Angeles, California, and its successors, as trustee, to have and to hold, in trust for the uses and purposes and with the powers hereinafter stated: Provided, however, that in the event the amount of such securities so remaining does not exceed the sum of Five Thousand ($5,000.00) Dollars, then this Trust shall be null and void and of no effect.

"Said Trustee shall, so far as the same are appropriate, have the power to invest and reinvest the principal of such securities, using every precaution to protect all persons interested herein from loss by reason thereof, and after deducting all proper expenses, including the reasonable compensation of said Trustee, shall pay the net income derived from said securities, in quarterly installments, to Georgia Lacey, of Berkeley, California, until she attains the age of twenty-five (25) years.

---

*For subsequent opinion see 74 P.2d 231.

"Delivery of the principal of said net trust estate shall be made by said Trustee in the event or when the beneficiary entitled thereto shall have attained the age of twenty-five (25) years."

The material part of the decree of distribution applicable to the foregoing is:

"It is further ordered, adjudged and decreed that Georgia Lacey Burns is entitled to the legacy and bequest provided for in Clause 7 of the will and that said legacy and bequest be distributed to said Georgia Lacey Burns out of the property hereinafter described, and that the particular property or properties and the manner of such distribution shall be as hereafter designated and approved by the court, the inheritance tax on said legacy of Georgia Lacey Burns under said clause seven of the will to be deducted therefrom; that the properties out of which such distribution shall be made to Georgia Lacey Burns are described as follows, to-wit: (Description of various properties.)"

II.

Alice L. Lacey, as a contingent reversioner under decedent's will, received a legacy of $5,000 on which the California state inheritance tax was $103.71. This sum was deducted by the executrix from the cash legacy paid to Alice L. Lacey and the court made the following order relative to it:

"It is further ordered, adjudged and decreed that the inheritance taxes on the contingent interests of Helen McCreary, Alice L. Lacey, Georgia Lacey Burns, Anna Carlat and Catherine Carlat under clause Ten of the will should be paid by the executrix out of the corpus of the hereinafter described property devised and bequeathed in trust under clause Ten of the will, and should not be collected by the executrix from the said contingent beneficiaries; that said Alice L. Lacey should be reimbursed for the amount of said tax on the contingent interest of Alice L. Lacey heretofore deducted from the cash legacy of Alice L. Lacey and paid to the State of California in the amount of $103.71."

These are the questions necessary for us to determine:

First: Does an executrix as such have the right to appeal from an order and decree determining the manner in which an estate shall be distributed as between various legatees and devisees?

Second: Under the provisions of the Inheritance Tax Act in effect February 19, 1933 (Act 8443, Deering's General Laws, Supp.1929, Cal.St.1921, p. 1500, as amended by Cal.St.1929, p. 1834 et seq.), is the tax on the interest of a contingent reversioner deductible from the corpus of the trust fund?

[1] The first question must be answered in the negative. The law is settled in California by a uniform line of decisions that an executrix *as such,* even though she be also a residuary legatee of the estate, has no interest in the manner in which an estate is distributed between various legatees and, therefore, has no right to appeal from an order or decree distributing the estate. In re Estate of Babb, 200 Cal. 252, 255, 252 P. 1039; In re Estate of Murphy, 145 Cal. 464, 468, 78 P. 960.

In the instant case appellant appeals solely in her capacity as executrix; hence she has no standing in this court, even though she is a residuary legatee of decedent's estate. In re Estate of Murphy, 145 Cal. 464, 468, 78 P. 960. Therefore, the appeal from the portion of the order decreeing distribution must be dismissed.

[2] As to the second question, the material sections of the Inheritance Tax Act of the state of California (Act 8443, Deering's General Laws, Supp.1929, Cal.St. 1921, pp. 1500, 1507, 1510, as amended by Cal.St.1929, p. 1834 et seq.) in effect at the time of the testatrix's death are:

Sec. 8: "(1) When any grant, gift, legacy, devise or succession upon which a tax is imposed * * * shall be an estate, income, or interest for a term of years, or for life, or determinable upon any future or contingent event, or shall be a remainder, reversion, or other expectancy, real or personal, the entire property or fund by which such estate, income, or interest is supported, or of which it is a part, shall be appraised * * * and the market value thereof determined, * * * and the tax * * * shall be and remain a lien on said property until the same is paid."

"(3) *Property transferred in trust.* When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended, or abridged, a tax shall be imposed upon said transfer * * * and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred."

Sec. 9: "(1) *Collection of tax by administrator, etc.* Any administrator, executor, or trustee having in charge or trust any legacy or property for distribution, subject to the said tax, shall deduct the tax therefrom, or if the legacy or property be not money he shall collect the tax thereon, upon the market value thereof, from the legatee or person entitled to such property, and he shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until he shall have collected the tax thereon; and whenever any such legacy shall be charged upon or payable out of real estate, the executor, administrator, or trustee shall collect said tax from the distributee thereof, and the same shall remain a charge on such real estate until paid."

We believe the proper construction of the foregoing provisions is that the inheritance tax on a contingent interest is to be paid by the executrix out of the corpus of the trust fund and is not to be deducted from a contingent reversioner's legacy. This construction is in accord with that reached by the court of appeals of New York in construing identical provisions of the Transfer Tax Act of that state (Tax Act N.Y. [Consol.Laws c. 60] § 220 et seq.). In re Estate of Vanderbilt, 172 N.Y. 69, 72, 64 N.E. 782, 783; In re Tracy et al., 179 N.Y. 501, 72 N.E. 519, 521. In the last two cited cases will be found full reasons which we believe to be sound for the conclusions reached by the court.

[3] As indicated at the time of the oral argument, the new point raised for the first time in appellant's reply brief will not be considered by us, since no reason or excuse has been offered for not having presented the point in her opening brief. Newcomb v. Title Guarantee & Trust Co., 131 Cal.App. 329, 333, 21 P.(2d) 456, 22 P.(2d) 552; Lady v. Palen, 12 Cal.App. (2d) 3, 5, 54 P.(2d) 1134.

For the foregoing reasons (I) the appeal from that part of the lower court's order decreeing distribution is dismissed and (II) the order in the decree determining that the inheritance tax should be paid by the executrix from the corpus of the trust fund is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

---

19 Cal.App.2d 366

HALES v. SNOWDEN et al.

Civ. S. C. 44.

District Court of Appeal, Second District, Division 1, California.

Feb. 26, 1937.

Hearing Denied by Supreme Court April 26, 1937.

1. Constitutional law ⚷168
Mortgages ⚷559(2)

Statute providing that no deficiency judgment shall lie after sale under purchase-money trust deed or mortgage, as applied to contracts executed prior to its adoption, *held* unconstitutional as impairing obligations of contract (Code Civ.Proc. § 580b, as added by St.1933, p. 1673; Const.U.S. art. 1, § 10; Const.Cal. art. 1, § 16).

2. Contracts ⚷167

Laws which subsist at time and place of making of contract, and where it is to be performed, enter into and form part of contract, as if expressly referred to or incorporated in its terms, whether laws affect validity, construction, discharge, or enforcement of contract.

3. Contracts ⚷167

Laws of state existing at time contract is made which affect rights of parties to contract enter into and become part of contract, and are as obligatory upon all courts which assume to give remedy on contracts as if laws were referred to or incorporated in terms of contracts.

4. Constitutional law ⚷115

Obligations of contract are impaired by law which renders them invalid, or releases or extinguishes them (Const.U.S. art. 1, § 10; Const.Cal. art. 1, § 16).

5. Constitutional law ⚷115

Impairment of obligations of contract may be effected by laws which without destroying contracts derogate from substantial contractual rights, since "obligation of contract" is the law which binds parties to perform their agreement (Const.U.S. art. 1, § 10; Const.Cal. art. 1, § 16).

[Ed. Note.—For other definitions of "Obligation of Contract," see Words & Phrases.]

6. Mortgages ⚷559(3)

Under law as of April, 1927, purchase-money mortgagee could sue maker of mortgage note on default and obtain judgment for any deficiency remaining after crediting proceeds of sale of property on indebtedness.

7. Constitutional law ⚷169

Remedy on contract, where it affects substantial rights, is included in term "obligation of contract," and cannot be altered by legislation so as to materially impair such obligation (Const.U.S. art. 1, § 10; Const.Cal. art. 1, § 16).

8. Constitutional law ⚷149

Relief granted mortgage debtors by Legislature during period of economic stress must be reasonable and just from standpoint of both mortgagor and mortgagee, and, in any event, should be limited to exigency to which legislation is addressed.

9. Constitutional law ⚷149

Statute providing for appointment of appraiser to appraise property being foreclosed and limiting amount of deficiency judgment to difference between entire indebtedness and fair market value of property at time of sale *held* unconstitutional, as applied to mortgages executed prior to its enactment, as impairing obligation of contract (Code Civ.Proc. § 726, as amended by St.1933, p. 2118; Const. U.S. art. 1, § 10; Const.Cal. art. 1, § 16).

10. Appeal and error ⚷931(1), 1010(1)

Reviewing court must resolve all intendments in favor of judgment, and, if there be any substantial evidence tending to sustain judgment, it must be upheld, unless record demonstrates that in very nature of things evidence is so improbable as to be untrue.

11. Appeal and error ⚷996

Where trial court has adopted one of conflicting inferences which may be drawn by reasonable minds from state of facts, its decision is binding on reviewing court.

12. Appeal and error ⚷996

Where contradictory inferences can reasonably be drawn from facts, reviewing court will not substitute other inferences for those adopted by trial court, even where reviewing court might have reached different conclusion.

13. Appeal and error ⚷1012(1)

Reviewing court may disregard evidence which is inherently improbable, but to warrant disregarding of evidence there must exist physical impossibility of evidence being true or falsity of evidence must be apparent without any resort to inferences or deductions.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Fannie Hales against Earl F. Snowden and others and Curtis C. Colyear and his wife. Judgment for plaintiff, and defendants Curtis C. Colyear and wife appeal.

Affirmed.

Henry O. Wackerbarth, of Los Angeles, for appellants.

Doyle, Clark & Thomas, of Long Beach, and Austin & Austin, of Compton, for respondent.

WHITE, Justice pro tem.

This is an action for the foreclosure of three purchase-money mortgages, executed in April, 1927, by defendants Snowden and by defendants and appellants Colyear, in the total amount of $21,000, upon which $1,000 had been paid at the time of trial. The complaint tendered three causes of action. Judgment went for plaintiff in the amount claimed to be due; and also ordered a sale of the mortgaged premises and directed execution to issue against the defendants for any deficiency.

Three grounds are urged by appellants for reversal of the judgment herein: (1) That the court erred in ordering a deficiency judgment, for the reason that the mortgages in question were purchase-price mortgages, by reason of which it is claimed that under the provisions of section 580b of the Code of Civil Procedure (as added by St.1933, p. 1673) respondent was not entitled to such deficiency judgment; (2) that error was committed when the trial court denied appellants' application under the provisions of section 726 of the Code of Civil Procedure (as amended by St.1933, p. 2118) that one of the inheritance tax appraisers be appointed to appraise the property being foreclosed; and (3) that the evidence clearly indicates that subsequent to the execution and delivery of the notes and mortgages, the parties thereto entered into an agreement for a segregation or division of the liability evidenced by said notes, under the terms of which it was agreed that appellants would be liable for and pay only one-half of the principal and interest, the defendants Snowden being answerable for the remaining half.

As to appellants' first ground, section 580b of the Code of Civil Procedure, in effect during August, 1933, provided as follows: "No deficiency judgment shall lie in any event after any sale under a deed of trust or mortgage given to secure payment of the balance of the purchase price of real property."

[1-5] It is earnestly urged that inasmuch as the mortgages themselves do not confer any right to a deficiency judgment, respondent's sole claim thereto is dependent upon statutory enactments, and that such rights may be withdrawn and taken away by other statutory enactments. Conceding the correctness of this principle as an abstract proposition of law, nevertheless, can such restrictive legislation be applied retroactively to contracts executed prior to its adoption? If section 580b is retroactive in its application, then the mortgagee under a purchase-money mortgage is limited in his recovery to such an amount as a foreclosure sale of the mortgaged property will obtain. It is contended by respondent that if the law so applies, it impairs the obligation of a contract within the meaning of the Federal and State Constitutions prohibiting such legislation. Article 1, § 10, Const.U.S.; article 1, § 16, Const.Cal. We find ourselves in accord with this claim of respondent. As was said by the Supreme Court of the United States, speaking through Chief Justice Hughes, in the case of Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 237, 78 L.Ed. 413, 88 A.L.R. 1481: "* * * the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement." It is settled that all the laws of a state existing at the time a contract is made which affect the rights of the parties to the contract enter into and become a part of it, and are as obligatory upon all courts which assume to give a remedy on such contracts as if they were referred to or incorporated in the terms of the contract. Von Hoffman v. City of Quincy, 4 Wall. 535, 550, 18 L.Ed. 403; Brine v. Hartford Fire Ins. Co., 96 U.S. 627, 24 L.Ed. 858. As was further pointed out in the Blaisdell Case, supra: "The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them (Sturges v. Crowninshield, supra, 4 Wheat. [122] 197, 198, 4 L.Ed. 529 [549]) and impairment, as above noted, has been predicated of laws which without destroying contracts derogate from substantial contractual rights. * * * The obligation of a contract is the law which binds the parties to perform their agreement."

[6, 7] Under the law existing at the time the notes and mortgages here sued upon were made, upon default the mortgagee might sue the maker of the note and, among other things, obtain judgment for any deficiency remaining after crediting the proceeds of the sale of the property upon the indebtedness. If the notes and mortgages come within the provisions of the new law, the right to a deficiency judgment has been entirely taken away from the creditor. These are substantial rights which are entirely abrogated, and the fact that this is accomplished by legislation which has to do with the remedy rather than the substance of the contract, is not controlling. Brown v. Ferdon, 5 Cal.(2d) 226, 231, 54 P.(2d) 712. The remedy, where it affects substantial rights, is included in the term "obligation of a contract," and the remedy cannot be altered so as to materially impair such obligations. Edwards v. Kearzey, 96 U.S. 595, 600, 24 L.Ed. 793. In the case of Barnitz v. Beverly, 163 U.S. 118, 16 S.Ct. 1042, 1046, 41 L.Ed. 93, it is held that a statute which authorized the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which *extends the period of redemption beyond the time formerly allowed,* cannot constitutionally apply to a sale under a mortgage executed before its passage. The court, after citing many cases, said: "But it seems impossible to resist the conviction that such a change in the law is not merely the substitution of one remedy for another, but is a substantial impairment of the rights of the mortgagee as expressed in the contract." See, also, Welsh v. Cross, 146 Cal. 621, 624, 628, 81 P. 229, 106 Am.St.Rep. 63, 2 Ann.Cas. 796.

[8] The act under consideration here fixes no conditions whatever for its operation. It purports to give relief to every debtor under a purchase-money mortgage, irrespective of the amount of the indebtedness, the condition of the security, or his ability to pay the full amount of his indebtedness. It affords no forum for the creditor to present the situation from his standpoint. It simply gives the debtor a preference, without any consideration of the rights of the creditor, and it cannot, therefore, be sustained under our constitutions.

Shouse v. Quinley, 3 Cal.(2d) 357, 45 P.(2d) 701. See, also, Islais Co. v. Matheson, 3 Cal.(2d) 657, 45 P.(2d) 326. The code section before us is general in its application and is not confined to purchase-money obligations involving homes or property occupied by the debtor. Whatever the elements of social justice and social security may warrant the legislature in doing by way of extending relief during economic stress, that relief must be reasonable and just from the standpoint of both mortgagor and mortgagee, and in any event should be limited to the exigency to which the legislation was addressed. Home Bldg. & Loan Ass'n v. Blaisdell, supra. See, also, W. B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 55 S.Ct. 555, 79 L.Ed. 1298, 97 A.L.R. 905. None of these considerations appear in the legislation under attack here. It applies to all ordinary commercial transactions in which the debtor has executed a trust deed or mortgage as part of the purchase consideration of any real property, whether purchased for business or speculative purposes. The substantive right of the mortgagee, under the mortgage now before us, to be repaid the entire amount of the indebtedness had accrued some six years before section 580b became effective, and the preference for the mortgagor which it contemplates could not be construed as having entered into the dealings between the parties when the contract was made. The operation of the statute in the circumstances is far more than procedural. The statute attempts to so affect the contract that only a portion of the indebtedness may be recovered, notwithstanding the borrower of the money may well be able to pay in full. This certainly impairs the obligation of contracts. Bennett v. Superior Court, 5 Cal.App.(2d) 13, 42 P.(2d) 80.

[9] Much of what we have said in connection with appellants' first ground of appeal applies to the second specification of error, which has to do with the application made to the trial court, prior to the date of trial, for the appointment of one of the inheritance tax appraisers to appraise the property involved in accordance with the terms of section 726 of the Code of Civil Procedure, as amended in the year 1933, and which application was denied. Upon the authority of Wilson v. Superior Court, 8 Cal.App.(2d) 14, 16, 47 P.(2d) 331, and Bennett v. Superior Court, supra, it is the opinion of this court that the position taken by the trial court was correct, and the provisions of section 726 of the Code of Civil Procedure cannot be enforced against the respondent in this action. This is also supported by the reasoning set forth by the Supreme Court in its decision in the case of Morris v. Pacific Electric Ry. Co., 2 Cal.(2d) 764, 43 P.(2d) 276, wherein the effect of remedial legislation, in so far as the same principle here raised is concerned, is discussed and the limitations circumscribing the effect of so-called remedial legislation are fully set forth.

[10-13] With reference to appellants' final claim, that there was an agreement between respondent, appellants, and defendants Snowden which constituted an oral modification of the written agreement to pay interest, and that as to so much of such agreement as was executed, the same was valid and constituted a modification of the written notes to the extent of releasing appellants from the payment of more than one-half of the interest, we are impressed with the fact that a consideration of the evidence in connection therewith, most of which was documentary, taken in conjunction with all the other facts and circumstances in evidence in the case, justified the trial court in concluding that no sufficient showing was made to establish the fact that W. T. Hales was authorized by respondent to make an agreement segregating the liability of the joint mortgagors, and that the conduct of respondent herself was not such as to justify the conclusion that she assented to such agreement in modification of the terms of the written notes. We must resolve all intendments in favor of the judgment, and, if there be any substantial evidence tending to sustain the same, it must be upheld, unless the record demonstrates that in the very nature of things the evidence is so improbable as to be untrue. Badover v. Guaranty Trust, etc., Bank, 186 Cal. 775, 200 P. 638. It will serve no useful purpose to here set forth the evidence. Conceding that conflicting inferences may be drawn by reasonable minds from the state of facts in this case, the trial court having adopted the one and rejected the other, its decision is binding on the appellate court, the case being in substance the same as where the court decides upon the weight of contradictory evidence. Boland v. Gosser, 5 Cal.App.(2d) 700, 43 P.(2d) 559; MacDermot v. Hayes, 175 Cal. 95, 104, 170 P. 616; Haight v. Haight, 151 Cal. 90, 90 P. 197; Paine v.

San Bernardino, etc., Co., 143 Cal. 654, 77 P. 659. Where the facts are such that contradictory inferences can reasonably be drawn from them, an appellate court will not substitute other inferences for those adopted by the trial court. Hughes v. Quackenbush, 1 Cal.App.(2d) 349, 354, 37 P.(2d) 99; Ketelhut v. Gunther, 100 Cal. App. 409, 279 P. 1083; Coats v. Hathorn, 121 Cal.App. 257, 8 P.(2d) 1038. This is the rule even where the reviewing court might have reached a different conclusion. Conness v. McCarty, 216 Cal. 415, 14 P.(2d) 507; Foxe v. Southern Pacific Co., 121 Cal.App. 633, 9 P.(2d) 514; McGlothin v. Larussa, 122 Cal.App. 324, 10 P.(2d) 116. Of course testimony which is inherently improbable may be disregarded (Neilson v. Houle, 200 Cal. 726, 254 P. 891), but to warrant such action there must exist either a physical impossibility of the evidence being true, or its falsity must be apparent, without any resort to inferences or deductions. Powell v. Powell, 40 Cal.App. 155, 180 P. 346; Stahmer v. Stahmer, 125 Cal. App. 132, 13 P.(2d) 833.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

---

19 Cal.App.2d 429

WELDY v. OAKLAND HIGH SCHOOL DIST. OF ALAMEDA COUNTY.

Civ. 10296.

District Court of Appeal, First District, Division 2, California.

March 5, 1937.

1. Schools and school districts 🔑120

Complaint against school district for injuries student sustained at football game when struck by bottle thrown by fellow student stated no cause of action, although alleging that school district negligently failed to exercise supervision and to take any steps to prevent rowdyism of certain students in throwing objects, where complaint did not allege that district or any of its employees had knowledge of rowdyism, nor that employees failed to do any act which failure was negligence on their part (School Code, § 2.801, as amended by St.1931, p. 2487).

2. Schools and school districts 🔑89

Statute authorizing recovery against school district for injuries to students which arise from negligence of district, or its officers or employees, does not impose liability on district for injuries arising from unlawful or willful misconduct of its students, nor for injuries arising from negligence of fellow student (School Code, § 2.801, as amended by St.1931, p. 2487).

3. Schools and school districts 🔑89

To hold school district liable for injuries student received from unlawful, willful, or negligent misconduct of fellow student, it is necessary to allege and prove that district was guilty of some act of commission or omission amounting to negligence (School Code, § 2.801, as amended by St.1931, p. 2487).

4. Schools and school districts 🔑89

School district, although required to exercise reasonable supervision over its students while school is in session, is not insurer of safety of students at play or elsewhere (School Code, § 2.801, as amended by St.1931, p. 2487).

◆

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Bethyl Eloise Weldy, a minor, by her guardian ad litem, Myrtle Weldy, against the Oakland High School District of Alameda County. From a judgment in favor of defendant, plaintiff appeals.

Affirmed.

James R. Agee and Minett F. Hallmark, both of Oakland, for appellant.

Earl Warren, Dist. Atty., of Oakland, and Charles V. Barfield and John J. Healy, Jr., both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for injuries incurred while a spectator at a football game. A demurrer to her second amended complaint was sustained without leave to amend. She appeals from the judgment following that order.

[1] The complaint alleges that a football game was held in the California Memorial Stadium at Berkeley under the direction, supervision, and management of the school district; that the plaintiff and numerous other students of the school district attended the game as paying spectators;

that the district undertook to have teachers employed by it to attend the game to supervise the students during the game; that certain students seated behind and above plaintiff engaged in a course of rowdyism and dangerous conduct consisting of throwing objects upon those seated below; "that said school district negligently and carelessly failed to take any steps whatsoever to prevent this dangerous course of conduct and failed to do anything to prevent its continuance"; that one of said students so engaged in such conduct tossed a heavy glass bottle, which struck the plaintiff, causing the injuries complained of. Since we are satisfied that this complaint does not state a cause of action against the school district, we will not discuss any of the other points raised.

[2] The liability of a school district for injuries to its students rests upon section 2.801 of the School Code (Stats.1931, p. 2487), which permits recovery only when the injuries arise from "the negligence of the district, or its officers or employees." The statute does not create a liability upon the district for injuries arising from the unlawful or willful misconduct of its students [Whiteford v. Yuba City Union H. S. Dist., 117 Cal.App. 462, 464, 4 P.(2d) 266], nor for injuries arising from the negligence of a fellow student [Hack v. Sacramento City Junior College Dist., 131 Cal.App. 444, 448, 21 P.(2d) 477; McCloy v. Huntington Park Union H. S. Dist., 139 Cal.App. 237, 33 P.(2d) 882; Goodman v. Pasadena City H. S. Dist., 4 Cal.App.(2d) 65, 40 P.(2d) 854, 855; Underhill v. Alameda Elem. S. Dist., 133 Cal.App. 733, 24 P.(2d) 849; Kerby v. Elk Grove Union H. S. Dist., 1 Cal.App.(2d) 246, 36 P.(2d) 431, 94 A.L.R. 1502].

[3, 4] To hold the school district liable for injuries received in this manner, it is necessary to allege and prove that the district was guilty of some act of commission or omission amounting to negligence. Thus, if experience had demonstrated that a game of football was likely to be attended by rowdyism and injury to spectators the school district might be held bound to anticipate "such consequences as a reasonably prudent man would anticipate as likely to result therefrom." Katz v. Helbing, 205 Cal. 629, 634, 271 P. 1062, 1064, 62 A.L.R. 825. But we cannot say as a matter of law that rowdyism is the natural attendant of a game of football or that the district should have foreseen that such would be the result of this particular game. The complaint does not allege that the district, or any of its employees, had knowledge of the alleged rowdyism, nor that these employees failed to do any act which failure was negligence on their part. The general allegation that the district negligently and carelessly failed to exercise supervision over the conduct of the students is unavailing when no facts are alleged upon which the conclusion of negligence is based. It may be taken for granted that a school district is required to exercise reasonable supervision over its students while the school is in session, but, even under such circumstances "the law does not make school districts insurers of the safety of the pupils at play or elsewhere." Goodman v. Pasadena City H. S. Dist., supra.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

---

19 Cal.App.2d 455

PEOPLE v. WATERS.

Cr. 2948.

District Court of Appeal, Second District, Division 2, California.

March 8, 1937.

Hearing Denied by Supreme Court April 5, 1937.

1. Homicide 🔑253(3)

Testimony in murder prosecution, that defendant after drinking excessively cut and slashed deceased without previous quarrel or provocation and at same time cut other persons, *held* to justify verdict of first-degree murder, as against contention that conviction could not be for more than manslaughter.

2. Witnesses 🔑337(5)

Though state may prove defendant's previous conviction of felony, to impeach him as a witness it may not prove his conviction of misdemeanor.

3. Criminal law 🔑1186(4)

Alleged errors in prosecution for murder, in allowing evidence and argument as to defendant's previous confinement at Alcatraz, *held* not to require a reversal where record as a whole did not indicate miscarriage of justice (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Walter J. Waters was convicted of murder in the first degree, and he appeals.

Affirmed.

Kirtland I. Perky and James E. Fenton, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

WOOD, Justice.

[1] Defendant was convicted of murder in the first degree and appeals from the judgment and from an order denying his motion for a new trial. Early in the morning of September 6, 1936, in front of the Stag Café on South Main street in the city of Los Angeles defendant stabbed and cut Walter D. Parkins in such a manner as to cause the death of Parkins. Defendant and a number of others had been drinking excessively. A number of witnesses for the prosecution testified that defendant slashed and cut deceased about the face, neck, and abdomen without a previous quarrel and without provocation and that about the same time defendant cut several other persons with a knife. The proprietor of the café, upon being called to the scene, knocked defendant down three times with a broom before he was quelled. Defendant contends that the evidence does not justify a conviction of an offense greater than manslaughter. Defendant testified in his own behalf that there was a quarrel and that he had been attacked by deceased. His statement finds little support in the testimony of the other witnesses. There is ample evidence in the record to justify a verdict of murder in the first degree.

[2, 3] Defendant contends that the trial court erred in permitting the district attorney, upon cross-examination of defendant, to elicit the information that defendant had been convicted of an assault while he was in the army and had been confined for one year at Alcatraz. The district attorney in his questions referred to the place of confinement as a penitentiary, but defendant testified that it was "a disciplinary barracks of the army." Defendant complains of the action of the district attorney in placing this matter before the jury and in referring to it in his argument. The district attorney had the right to prove that defendant had been convicted of a felony but had no right to prove conviction of a misdemeanor. Proof of the conviction of a felony is permitted for the purpose of impeaching the witness. It is an attack on his credibility. We need not decide whether the proof established a conviction of a felony since we must conclude from an examination of the entire record that the rulings of the court in this regard would not in any view of the question involved justify a reversal of the judgment of conviction. Const.Cal. art. 6, § 4½.

The judgment and order are affirmed.

We concur: McCOMB, Justice pro tem; CRAIL, P. J.

---

21 Cal.App.2d Supp. 759

NICCOLI v. McCLELLAND, Chief of Police.

No. A 3551.

Appellate Department, Superior Court, Los Angeles County, California.

Feb. 25, 1937.

1. Lotteries 🔑3

"Chain-letter store," wherein names of "customers" were placed on list upon payment of dollar and as soon as $50 accumulated such sum was paid to person whose name then stood at top of list, *held* a lottery under statute, being a scheme for distribution of property by chance (Pen.Code, § 319).

2. Lotteries 🔑18

Where operator of "chain-letter" scheme was arrested and charged with pool selling and property used in such scheme was seized, subsequent dismissal of charge of pool selling *held* not to authorize him to recover property so seized, since it was subject to forfeiture under statute as property offered in lottery (Pen.Code, § 325).

3. Constitutional law 🔑303
Lotteries 🔑2

Statute providing for forfeiture of property used in lottery by attachment of such property in manner of civil attachment *held* not lacking in due process of law, since such attachment and implied substitute service of process afford sufficient notice to owner (Pen. Code, § 325).

4. **Lotteries** ⚿19

In statutory proceeding by information and attachment for forfeiture of property offered in lottery, court acquires jurisdiction of the property by substitute service of process without actual notice to owner; it being a proceeding in rem or quasi in rem (Pen. Code, § 325).

5. **Lotteries** ⚿18

Property used in conducting "chain-letter store," including cashier's checks and lists of "customers," *held* subject to forfeiture under statute as property offered in a lottery, since under "chain-letter" scheme all assets would be distributed among participants at time of liquidation (Pen.Code, § 325).

6. **Lotteries** ⚿19

Law will not aid person engaged in lottery in enforcement of rights or recovery of property involved therein.

◆

Appeal from Municipal Court of Long Beach; Oscar E. Houston, Judge.

Claim and delivery by M. C. Niccoli against Joseph H. McClelland, Chief of Police of the City of Long Beach, California. From a judgment for defendant, plaintiff appeals.

Affirmed.

H. C. Millsap, of Los Angeles, for appellant.

George W. Trammell, Jr., City Atty., Harlan V. Boyer, Asst. City Atty., and Walhfred Jacobson, Deputy City Atty., all of Long Beach, for respondent.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., amici curiæ for the People.

SHAW, Presiding Judge.

This appeal is from a judgment in favor of defendant in a claim and delivery action brought to recover possession of $852.34 in cash, eight cashier's checks for $50 each, and several packages of papers containing signatures of various individuals. Each cashier's check was payable to a different person. All of the property described in the complaint was seized by police officers of the city of Long Beach when they arrested appellant and charged him with the crime of pool selling in violation of subdivision 1 of section 337a of the Penal Code. This charge was subsequently dismissed.

The trial court found that appellant, at the time of his arrest, "was conducting a lottery" and that the personal property sought to be recovered in this action "was money and property offered for distribution by appellant as a lottery." As conclusions of law the court found that the said property was subject to forfeiture to the state of California, and plaintiff was not entitled to recover it. Both the finding of fact and these conclusions of law must be sustained.

Appellant operated a so-called "chain-letter store," his plan of operation having been substantially as follows: His "customers" paid him the sum of $1.05 each, whereupon their names were placed upon a list in the order of payment. Five cents of each amount was retained by appellant for expenses and one dollar was retained in a fund or pool. When forty-nine others had made similar payments, the person making the first payment received $50, and thereafter when each customer's name reached the top of the list he received a like sum. Appellant was permitted to pay in $1 and to place his own name on the list about once for every twenty-five other names. The packages of papers containing signatures, which plaintiff seeks to recover, were no doubt the lists thus made up.

Before appellant's arrest he had paid the sum of $50 out of the pool to each of several persons. The cash and the cashier's checks which are the subject of this action represented payments made to appellant by persons pursuant to the above described plan. The fact that every person who participated in this scheme would not receive the full sum of $50, and that the amount to be received by each was dependent upon chance, is evident from the plan of operation, as well as from appellant's testimony that: "A pool cannot pay out indefinitely. No pool can go and pay out whatever they promise because all pools eventually break but they still retain an ownership or equity in the pool which they will receive eventually. * * * Of course in operating a pool naturally the operators always have a certain amount of money or certain names to bank that pool in case of liquidation because all money taken in would be for liquidation whether it was ten cents on the dollar or a hundred cents on the dollar." Appellant testified that he had been in the banking business for eighteen years, and when asked whether he had calculated the chances of the people who paid money into the pool of ever getting their money back, he replied: "Yes, absolutely, I had it all fixed to get it back. They might not have gotten $50 but they would have gotten back money." He also stated that if the pool dissolved, "they would get what was left. * * * Perhaps whatever was left after defraying expenses."

[1] Section 319 of the Penal Code reads as follows: "A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift-enterprise, or by whatever name the same may be known." The enterprise carried on by appellant contained all of the elements of a "lottery" as defined in that section. See People v. Hecht (1931) 119 Cal.App. (Supp.) 778, 3 P.(2d) 399. (1) The scheme was "for the disposal or distribution of property," to wit, the money placed in the pool above described. (2) The money was distributed "by chance." If and when a person's name reached the top of the list, he received $50, provided sufficient cash were in the pool to pay that amount. If there were a deficiency the pool would be liquidated and each person would receive less than $50, and appellant, as the operator of the pool, would receive a share by reason of the presence of his name on the list. (3) The distribution was to persons who had paid a "valuable consideration for the chance of obtaining such property," or a share or an interest therein. (4) Each amount received by appellant was paid to him upon the "agreement, understanding, or expectation" that the fund was "to be distributed or disposed of by lot or chance".

[2-4] The dismissal of the criminal charge against appellant does not entitle him to maintain this action for a return of the property seized by the police at the time of his arrest. Even though he may not have been guilty of the crime of pool selling with which he was charged, nevertheless the property was subject to forfeiture under section 325 of the Penal Code, which provides: "All moneys and property offered for sale or distribution in violation of any of the provisions of this chapter are forfeited to the state, and may be recovered by information filed, or by any action brought by the attorney-general, or by any district attorney, in the name of the state. Upon the filing of the information or complaint, the clerk of the court, or if the suit be in a justice's court, the justice, must issue an attachment against the property mentioned in the complaint or information, which attachment has the same force and effect against such property, and is issued in the same manner as attachments issued from the district courts in civil cases." Plaintiff attacks this section as lacking in due process of law, but we do not regard it as deficient in that respect. It provides that the forfeited property may be recovered by an information filed or action brought, and that in connection therewith an attachment "must" be issued against the property with the same force and effect given to attachments in civil cases. The mere provision for an information or action imports an adversary proceeding in which the owner or claimant of the property shall have notice and an opportunity to be heard before the forfeiture is established. In addition to this is the express requirement for an attachment of the property alleged to be forfeited. The attachment or other seizure of property in a judicial proceeding is in itself notice to the owner that the court has assumed control of the property. By virtue of such a seizure the proceeding becomes one in rem or quasi in rem, in which the court has jurisdiction to deal with and dispose of the property on substituted service of process, without actual notice to the owner. Nichols v. Superior Court (1934) 1 Cal.(2d) 589, 598, 599, 36 P.(2d) 380, 95 A.L.R. 894; Murray v. Murray (1896) 115 Cal. 266, 276, 47 P. 37, 37 L.R.A. 626, 56 Am.St.Rep. 97; Blanc v. Paymaster M. Co. (1892) 95 Cal. 524, 530, 30 P. 765, 29 Am.St.Rep. 149; Herbert v. Bicknell (1914) 233 U.S. 70, 74, 34 S.Ct. 562, 58 L.Ed. 854; Cole v. Cunningham (1890) 133 U.S. 107, 116, 10 S.Ct. 269, 33 L.Ed. 538; Pennoyer v. Neff (1877) 95 U.S. 714, 727, 24 L.Ed. 565. Such substituted service, at least, is implicit in the provisions of section 325, and it provides due process of law as defined in People v. Broad (1932) 216 Cal. 1, 7, 12 P.(2d) 941, on which plaintiff relies.

[5] As already stated, the trial court found that all the property sued for was subject to forfeiture under section 325, and we find sufficient support in the evidence for this finding. As to the cashier's checks and the money, there is no room for question. It is readily inferable from the evidence that the cashier's checks were for sums which had become due to the payees named therein under the operation of plaintiff's plan and were being held by him for delivery to said payees, and that the cash was being held for like payments to unidentified persons, some of which perhaps had not yet accrued. While the other property was not directly offered as prizes, the testimony of plaintiff in regard to liquidation, part of which is above quoted, would bear the construction evidently put upon it by the trial court, that this property was to be disposed of on liquidation and its proceeds divided among the contributors. This would bring it also within the terms of section 325. But even if, as to this property, the finding were unsupported, the judgment in regard thereto would be right. This property is of trifling value and was all used by plaintiff in the operation of his lottery; in fact, most of it is of doubtful utility for any other purpose.

[6] The law does not favor one who either operates or patronizes a lottery, and in a great variety of cases it has been held that the courts will not aid such a person to enforce his supposed rights, although in a like situation they would be open to one engaged in an innocent business or transaction. Pacific Debenture Co. v. Caldwell (1905) 147 Cal. 106, 81 P. 314; Collins v. Lean (1885) 68 Cal. 284, 9 P. 173; 16 Cal.Jur. 716; 38 Corpus Juris, 319–323, and cases there cited. See, also, Johnston v. Russell (1869) 37 Cal. 670; Gridley v. Dorn (1880) 57 Cal. 78, 40 Am. Rep. 110; Takeuchi v. Schmuck (1929) 206 Cal. 782, 787, 276 P. 345; where the same rule was applied to illegal transactions other than lotteries. More specifically, the court will not aid a party to recover property which has been used by him in violating the laws prohibiting lotteries, or which is designed for that purpose. Lew U. Fon v. Chambers (1924) 68 Cal.App. 244, 251, 228 P. 865; Collins v. Lean, supra. The reasons for refusing the aid of the court become even stronger when the property, by reason of its illegal use, has incurred a forfeiture and is liable to proceedings by the state to ascertain and enforce that forfeiture. On both these grounds we think the decision of the trial court was right.

The judgment is affirmed, respondent to recover his costs of appeal.

SCHAUER, J., and WILSON, Judge pro tem., concur.

8 Cal.2d 316

TREAT et al. v. MURDOCK et al.

Sac. 5055.

Supreme Court of California.

Feb. 24, 1937.

Rehearing Denied March 25, 1937.

1. **Mines and minerals** ⚷97

Evidence *held* to show that mining partner's assignment of interest in agreement providing for sale and operation of mine to parties who loaned money to work the mine was not accepted by lenders so as to render them liable as mining partners for goods sold and cash advanced for use in mining operations (Civ.Code, §§ 2511, 2512).

2. **Mines and minerals** ⚷97

Agreement between parties who loaned money to work a mine to mining partners which provided that certain funds should be applied to payment of lenders' note with interest and that, in addition, lenders should receive either 14 per cent. of the net proceeds of the mine or 10 per cent. of the stock of a corporation to be formed as compensation for use of money *held* to show that transaction was merely a loan and did not establish a "mining partnership," so as to render lenders liable for goods sold and cash advanced for use in mining operations, where lenders had no interest in the mine but only the right to require payment of the amount owing from the proceeds thereof (Civ.Code, §§ 2511, 2512).

[Ed. Note.—For other definitions of "Mining Partnership," see Words & Phrases.]

3. **Mines and minerals** ⚷97

Under Code provisions concerning mining partnerships, "mining partnership" does not exist in absence of ownership of mine, interest therein, option to purchase mine, or a right to its possession, and partners must actually "engage in working the mine" which does not mean that each of the mining partners must perform physical labor in the mine, but does require that each partner must have some part in carrying on the mine operations (Civ.Code, §§ 2511, 2512).

4. Mines and minerals ⚿97

Transaction looking to repayment of loan to mining partners by which lenders acquired no interest and had no rights to operate any of the mining property, or have anything to do with the management *held* to establish a "debtor-creditor" relationship and not a "mining partnership" so as to render lenders liable as mining partners for goods sold and cash advanced for use in mining operations, notwithstanding lenders were to be given certain stock in corporation to be formed and that mining partners were to pay lenders' note out of a percentage of the net proceeds of the mine and to continue to pay to lenders the share of the proceeds after the note was satisfied (Civ.Code, §§ 2511, 2512).

[Ed. Note.—For other definitions of "Debtor and Creditor," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action by William T. Treat and another, as copartners doing business under the firm name and style as Treat Bros., against James A. Murdock, Roger Moreno, and Connie Moreno, and others. From an adverse judgment, Roger and Connie Moreno appeal.

Reversed.

Prior opinion, 55 P.(2d) 547.

Andrew J. Copp, Jr., of Los Angeles, for appellants.

Charles P. Snyder and George F. Snyder, both of San Andreas, for respondents.

EDMONDS, Justice.

The appellants in this case were held liable for the balance alleged to be due to the respondents upon an open book account. The judgment against them is based upon a finding that they were copartners with the defendant Murdock and others in a mining venture. Appellants contend that the evidence shows that at the times in question they were creditors of Murdock and that no partnership existed.

Prior to July, 1933, James A. Murdock had acquired some interest in what is known as the Rising Star placer mining claim in Calaveras county. He commenced to operate the mine in July, and continued these operations until the month of December in that year. During that period the respondents furnished groceries and supplies which were used at the mine and also advanced money to its superintendent. The account was kept in the name of Rising Star Mine or Rising Star Mining Company.

The appellants' connection with the enterprise commenced in July, 1933, when they loaned Murdock $2,300. They afterward made further loans, which reached a total of $4,550 in September. They then held the note of Murdock for $1,500, but had no note for the balance and no security for any of the money which they had advanced. At that time, according to the testimony of the appellant Roger Moreno, he felt that the transaction should be on a more businesslike basis. To accomplish this, he went to Calaveras county from his home in Los Angeles and told Murdock that he must give a note and some security for this amount. Thereupon Murdock gave Moreno his promissory note for $4,550 and a document dated September 30, 1933, which purported to assign to the Morenos "a proportional interest in and to that certain contract and agreement" which "provided for the sale and operation of * * * the Rising Star Placer Mining Claim." The assignment which Murdock gave to Moreno also recited that "this proportional interest shall be divided by a Board of Directors selected by the stockholders after the first meeting of a corporation to be formed."

Roger Moreno took this instrument to Los Angeles for approval. Later, when the assignment was examined by appellants' attorney in Los Angeles, he advised the Morenos in a conference at which Murdock was present that it was ineffective to convey any interest either as security or otherwise. Thereupon Murdock agreed that the note and agreement should be canceled and that he would execute a new note for the total amount which had been then advanced to that date (the appellants having given Murdock other amounts in the meantime), and a contract under which he would undertake to pay the note out of 14 per cent. of the net proceeds of the mine.

A written contract executed under date of October 27, 1933, was drawn to evidence this understanding. It recites that Murdock is the owner of an interest in the mine and also the owner of an option to purchase the remaining interests in it; that the Morenos have loaned $6,193 to him to be used in the development and operation of the mine; that Murdock agrees to execute his note for that sum and to pay the note "out of the net proceeds of the production of said mine, it being understood and agreed that fourteen per cent (14%) of the net proceeds of the production of said mine shall be paid * * * beginning with the date of this contract and continuing until the amount of said note, together with accrued interest shall have been paid in full." A further agreement of Murdock is that he will "as soon as practical" cause a corporation to be formed to acquire the mine and that 10 per cent. of the stock of such corporation shall be issued to the Morenos, or that he will continue to pay appellants the 14 per cent. of net proceeds.

It appears that Florence Moreno, the wife of Roger Moreno, George A. Michael, and Vincent Moreno had some interest in the loans. Some or all of the notes and contracts which were made during the transactions with Murdock name them with the appellants. However, they were not made parties to the action and their interest, whatever it was, will be disregarded in considering the liability of the appellants.

The complaint alleged that the appellants and their codefendants were "co-partners in the business of mining in the County of Calaveras," and it was stipulated upon the trial of the case that unless such a partnership was established, respondents could not recover. The trial court found that appellants were members of "a mining partnership actually engaged as co-partners in the business of mining the Rising Star Placer Claim" and this finding is challenged by the appellants as having no evidentiary support.

[1] Under section 2511 of the Civil Code, "a mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same." The Code also provides: "An express agreement to become partners or to share the profits and losses of mining is not necessary to the formation or existence of a mining partnership. The relation arises from the ownership of shares or interests in the mine and working the same for the purpose of extracting the minerals therefrom." Section 2512, Civ.Code. Under these provisions the first requirement to constitute such a partnership is that the partners must have some ownership or interest in the mine. The respondents assert that the contracts of September 30, 1933, and October 27, 1933, gave appellants such an interest. But the evidence does not bear out these assertions.

In the first place, the contract of September 30th was never accepted. Appellant Roger Moreno testified in detail concerning his trip to Calaveras county to see Murdock. He said, "I loaned him all this money, and I wanted some security for it. Mr. Murdock said 'I will go in the Security Trust and draw up some security and you can take it down to Los Angeles and show your brother and Mr. Michael and if agreeable with them—it is agreeable with me—we will sign.'" This testimony was corroborated by that of Charles Pohl, superintendent of the mine, who was present at the conversation related by Moreno. Pohl testified that Moreno "wanted to show it to his people in Los Angeles and to talk it over with his attorney before they signed it." This testimony was undisputed, and, coupled with the evidence concerning the negotiations which resulted in the contract of October 27th, it shows that the first assignment was never accepted by the appellants.

[2] Nor does the contract of October 27th, which fixed the agreement of the parties, establish any partnership relation of Murdock with the appellants. It gave appellants no interest in the mine, but only the right to require payment of the amount owing to them from a percentage of the net proceeds of the mine. It provides that they should receive stock in a corporation to be formed by Murdock when and if he secured some outstanding interests in the mine. But the entire tenor of the instrument shows that its purpose was to evidence an agreement that certain funds should be applied to payment of appellants' note, with interest, and that in addition they should receive either 14 per cent. of the net proceeds of the mine or 10 per cent. of the stock of the corporation to be formed as compensation for the use of the money. These provisions clearly show the transaction to have been a loan, and that the appellants never acquired or contracted to secure title to the mining property or any interest in it.

[3, 4] The Code provisions concerning mining partnerships have been considered

in numerous cases. It has uniformly been held that ownership of the mine, or an interest in it or an option to purchase it or the right to possession of it is a prerequisite for the existence of such a partnership. Michalek v. New Almaden Co., Inc., 42 Cal. App. 736, 184 P. 56; Stuart v. Adams, 89 Cal. 367, 26 P. 970; Prince v. Lamb, 128 Cal. 120, 60 P. 689. There is also the further requirement that the partners actually engage in working the mine. This does not mean that each of the partners must perform physical labor in the mine. But it does require that each of the partners have some part in carrying on the mining operations. "The partnership arises only when the co-owners unite and co-operate in working the mine." Peterson v. Beggs, 26 Cal.App. 760, 148 P. 541, 542. Each of these elements of a mining partnership is entirely lacking in the record in the instant case. The appellants never acquired any interest whatever in the mining property and the uncontradicted evidence is that they never did any work on the property, they never directed any of the mining operations or had anything to do with the management of the mine.

On the contrary, the conduct and writings of the parties point unmistakably to the relationship of debtor and creditor. The fact that Murdock agreed to give appellants certain stock in a corporation if and when it was formed does not supply any of the requirements of a mining partnership. Nor does the agreement of Murdock to pay appellants' note out of a percentage of the net proceeds of the mine and to continue to pay them a share of those proceeds after the note was satisfied fix the relationship of partners. In the case of Spier v. Lang, 4 Cal.(2d) 711, 713, 716, 53 P.(2d) 138, 141, the court said that "this feature of the agreement has long been held not to require a conclusion that a partnership relation existed where also there was no joint participation in the management and control of the business, and the proposed profit-sharing was contemplated only as compensation or interest for the use of the money advanced."

A somewhat similar situation was before the court in Chung Kee v. Davidson, 102 Cal. 188, 36 P. 519. In that case the owners of a mine conveyed it to their creditors, retaining possession but agreeing to turn over to them "the entire result of each cleanup" as soon as made. The amount so received was to be applied by the creditors to the payment of the running expenses of the mine and the indebtedness owing to them. In discussing the relationship which was thus created, the court said: "It is true that, if any profit resulted from the mining operations conducted by the Cooks, it was to be received and retained by the respondents, as they were to receive all the gold produced; but such profits were not to be received as profits, but to be applied as payment pro tanto, of the prior indebtedness of the Cooks to them. No single feature of a partnership existed. Respondents were not co-owners, but incumbrancers, of the mines, and were not in possession, and were interested in the work done only as creditors, for advancements made and to be made, and, if any profits resulted, the Cooks received the whole benefit by its application to the payment of their pre-existing debt."

The evidence does not support the finding that appellants in the instant case were engaged in a mining partnership. On the contrary, it conclusively shows that during the time covered by respondents' account they were also creditors of Murdock.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; THOMPSON, J.; SHENK, J.; LANGDON, J.

8 Cal.2d 405

BUENEMAN et al. v. CITY OF SANTA BARBARA et al.

L. A. 14753.

Supreme Court of California.

Feb. 27, 1937.

1. Injunction 🔑85(2)

Provision of statute that injunction cannot be granted to prevent execution of a public statute by officers of the law for the public benefit does not apply to an unconstitutional statute or ordinance (Code Civ.Proc. § 526, subd. 4; Civ.Code, § 3423, subd. 4).

2. Injunction 🔑85(2)

Suit for injunction in behalf of one specially interested, to prevent attempted execution of void statute and the exercise of an office claimed to have been created thereby, but in fact and in law nonexistent, is proper remedy to obtain relief required.

3. Injunction ⚷85(2)

Where penal statute causes irreparable damage to property rights, injured party may attack its constitutionality by action to enjoin its enforcement.

4. Injunction ⚷105(2)

Though equity will not ordinarily enjoin criminal prosecution, it will entertain suit brought to test validity of enactment where persons have been arrested and further arrest and prosecution are threatened under allegedly void enactment, enforcement of which seriously interferes with property rights.

5. Licenses ⚷35

Equity court would entertain laundry's suit to enjoin enforcement of ordinance imposing license fee on laundries maintaining distributions in city without having plants in city, on theory that, under appropriate allegations, ordinance, being void was nonexistent, since plaintiff laundry's business was lawful and was being seriously hampered by enforcement.

6. Licenses ⚷7(6)

Ordinance which taxes those having their places of business within a city equally with those who may come into the city to transact the same kind of business does not discriminate.

7. Licenses ⚷7(6)

City ordinance imposing license fee of $200 yearly on laundries maintaining distribution systems in city without having plant in city *held* unconstitutional as an attempt to discriminate in favor of laundries in the city (Const.U.S. Amend. 14, Const.Cal. art. 1, §§ 13, 21).

SEAWELL and LANGDON, JJ., dissenting.

◆

In Bank.

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Action by Fred T. Bueneman and others, as trustees for the Wardrobe Laundry Company, a trust estate, against the City of Santa Barbara, a municipal corporation, and others. From a judgment of dismissal rendered following an order sustaining defendants' demurrer to plaintiffs' complaint without leave to amend, the plaintiffs appeal.

Reversed.

Prior opinion, 59 P.(2d) 998.

Burnett Wolfson and Earl I. Swetow, both of Hollywood, for appellants.

J. F. Goux, former City Atty., and Maxwell Nichols, City Atty., both of Santa Barbara, for respondents.

J. W. Henderson and Henderson, Henderson & Carey, all of San Francisco, amici curiæ.

Harold P. Huls, City Atty., and Leroy A. Garrett, Deputy City Atty., both of Pasadena, Ray L. Chesebro, City Atty., and Leon T. David, Asst. City Atty., both of Los Angeles, and Louis Burke, City Atty., of Montebello, amici curiæ.

EDMONDS, Justice.

This appeal presents for decision the constitutionality of an ordinance of the city of Santa Barbara, which imposes a license fee upon every person who engages in the laundry business in that city where the actual work is not done therein. The demurrer of the respondents was sustained and plaintiffs were denied leave to amend their complaint. The question to be determined, therefore, is whether the appellants' complaint states a cause of action.

The complaint alleges that for a long time prior to August, 1933, and subsequent thereto, the plaintiffs have been engaged in the general laundry, towel, and linen supply business, some of which was transacted in the city of Santa Barbara. However, it is alleged that appellants do not maintain or have a fixed place of business in that city, nor do they do any of the actual work of laundrying therein.

The complaint further alleges that the respondent city adopted an ordinance which became effective in August, 1933, imposing a license fee of $200 per year for revenue and not for any other purpose upon "every person in the City of Santa Barbara who conducts or carries on or engages in the business of, or solicits orders for or accepts orders for, or maintains a regular delivery or distribution system for customary or usual delivery to and from regular customers as such of a laundry or a towel or linen supply service or a dry cleaning service, or any one or more of said three classes of business, where the plant or establishment used for the actual work of laundering or dry cleaning, or of both where both laundry and dry cleaning services are involved, is not maintained within said City Santa Barbara at a fixed and regular place of business within said City." It also alleges that no tax is imposed upon any person conducting a like business where the plant or establishment is maintained within the city; that by another section of the ordinance the carrying on of business by one whose plant is outside the city limits without payment of the license fee is made a misdemeanor; and that every day or part thereof on which he carries on the business he is guilty of a separate offense, punishable by not exceeding $300 fine or 90 days in jail, or by both fine and imprisonment. It appears from the complaint that plaintiffs have refused to pay the tax and secure the license provided for in the ordinance for the reason that they believe it to be unconstitutional and void; that respondents have arrested and threaten to continue to arrest appellants' employees; that such arrests and threats have interfered with their business and will continue to hamper and hinder their business; and that unless the respondents are restrained from enforcing the ordinance appellants will suffer irreparable damage. Appellants charge that the ordinance violates the Fourteenth Article of the Amendments to the Constitution of the United States, and also sections 13 and 21 of article 1 of the Constitution of California, in that it denies to appellants the equal protection of the laws and grants privileges and immunities to one class of citizens which are not accorded to all citizens similarly situated.

Only two points are presented for consideration: First, whether an action may be maintained to restrain the enforcement of a license ordinance; and, second, whether this ordinance falls within the constitutional inhibitions.

[1-3] Concerning the first point, while "an injunction cannot be granted * * * to prevent the execution of a public statute by officers of the law for the public benefit" (section 526, subd. 4, Code Civ.Proc., section 3423, subd. 4, Civ.Code), it has been uniformly held that this provision does not apply to an unconstitutional statute or ordinance. "A suit for injunction in behalf of one specially interested, to prevent the attempted execution of a void statute and the exercise of an office claimed to have been created thereby, but in fact and in law nonexistent, is a proper remedy to obtain the relief required." Wheeler v. Herbert, 152 Cal. 224, 228, 92 P. 353, 355. In the more recent case of Jones v. City of Los Angeles, 211 Cal. 304, 306, 295 P. 14, 16, the court said: "It is settled that where a penal statute causes irreparable damage to property rights, the injured party may attack its constitutionality by an action to enjoin its enforcement. * * * Hence, if the ordinance is unconstitutional in its application to these plaintiffs, they are entitled to the decree which they seek." The same conclusion is reached in other cases. Bramman v. City of Alameda, 162 Cal. 648, 124 P. 243; Abbey Land & Imp. Co. v. County of San Mateo, 167 Cal. 434, 139 P. 1068, 52 L.R.A.(N.S.) 408, Ann.Cas.1915C, 804; E. A. Hoffman Candy Co., Inc., v. Newport Beach, 120 Cal.App. 525, 8 P.(2d) 235, 238; City of Danville v. Quaker Maid, Inc., 211 Ky. 677, 278 S.W. 98, 43 A.L.R. 590; Thompson v. Smith, 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604.

[4, 5] Also, while ordinarily equity will not enjoin a criminal prosecution, yet where persons have been arrested and further arrests and prosecutions are threatened under a void municipal ordinance, the enforcement of which seriously interferes with property rights, it will entertain a suit brought to test the validity of the enactment. Carey v. Atlanta, 143 Ga. 192, 84 S.E. 456, L.R.A.1915D, 684, Ann.Cas.1916E, 1151. The complaint clearly shows that the business of plaintiffs, which is a perfectly lawful one, is being interfered with by the steps which have already been taken to enforce the ordinance. Plaintiffs under the circumstances shown must either comply with the terms of the ordinance or defend each person who is arrested for a violation of it. In such a situation, a court of equity will entertain the suit.

The second question is the principal point of controversy. With the great improvement in means of transportation, business which was formerly conducted entirely within the limits of a city now spreads over a territory limited only by the cost of economical distribution and without regard to the boundary lines of political subdivisions. The desire of the legislative body of a city to keep the business of its residents for those who maintain stores, factories, or other business establishments within its boundary is a natural one. At least efforts to protect the merchants of a city from outside competition commenced in California as early as 1877. In the case of Ex parte Frank, 52 Cal. 606, 28 Am.Rep. 642, an ordinance of the city of San Francisco was considered. By that ordinance a merchant whose goods were located within the city paid a quarterly license fee of $100, while a merchant doing the same volume of business but whose goods were outside the corporate limits when offered for sale was required to pay a license fee of $2,000 for the same period. The ordinance was held to be void. In the case of In re Hines, 33 Cal.App. 45, 164 P. 339, 340, an ordinance identical in principle with the one here considered was held void. Its provisions were said to have been "plainly devised as a protective tariff for the benefit of laundries located in the city of Venice." The ordinance there attacked fixed a license fee of $12 per annum for every laundry located within the city. It also fixed a license fee of $120 per annum for every person operating a wagon or other vehicle for the delivery of laundry work to and from any laundry situated outside the limits of the city. The court said that its provisions "attempt to create and enforce a discrimination not based upon differences in the nature of the business being transacted or differences in the manner of conducting the same business, or any other difference other than the mere fact of difference in destination of the goods collected and delivered by wagons collecting for laundries located outside of the city and the destination of goods collected for delivery to laundries within the city." The same conclusions were reached in the cases of In re Hart, 36 Cal.App. 627, 172 P. 610, and In re Riley, 39 Cal.App. 58, 177 P. 854. In each of these cases the ordinance was held void.

The case of Town of St. Helena v. Butterworth, 198 Cal. 230, 244 P. 357, 358, arose over the attempt to enforce an ordinance imposing a license fee of $15 per quarter for every traveling salesman or merchant carrying his goods in an automobile or other vehicle operated over the streets of the town of St. Helena for sale to the merchants of the town and who did not maintain a fixed place of business within it. For those merchants maintaining business establishments within the corporate limits, the ordinance fixed a license tax from $5 to $15 per quarter, determined by the amount of business done. No license was imposed on any merchant selling at wholesale only from a place of business outside the limits of the town but making no deliveries with his own conveyance. The ordinance was held void. The court said: "It discriminates between the wholesale merchant whose place of business is outside the town of St. Helena and who ships his goods to the merchants in the town by any other method than by personal delivery in a wagon, truck, automobile, or other vehicle, and the wholesale merchant whose place of business is outside St. Helena, and who uses those means of delivering his goods within the town. The wholesale merchant in the first class is exempted; the merchant in others is placed under the burden of the tax. We are unable to perceive any rational reason for such discrimination in favor of the one class as against the other."

An ordinance of the city of Sacramento was challenged in the case of In re Robinson, 68 Cal.App. 744, 230 P. 175. That ordinance imposed a license tax upon a solicitor selling or taking orders for merchandise for future delivery unless he was employed by a regularly established business house located within the city. The amount of the license was fixed at $200 per quarter. The court said: "It will be observed that the boundary line of the incorporation known as the city of Sacramento determines the applicability of the provisions of the ordinance relating to the payment of a license fee. It is not the character of the business transacted. It is the place of the location of the storehouse or warehouse or headquarters from which a solicitor draws his supplies that determines whether or not he (the solicitor) is subject to the pains and penalties of the ordinance. If he draws his supplies and fills his orders from a house situated within the exterior limits of the city of Sacramento, then he is free from all the provisions of the ordinance, but if he fills his orders from a house situated outside the city limits, whether it be in or outside of the state of California, then he must necessarily pay the sum of $200 per quarter, and also give a bond to protect the persons from whom he may have taken orders." The ordinance was said to discriminate between persons doing exactly the same kind and character of business and conducting it in the same manner.

The respondents rely principally upon Ex parte Haskell, 112 Cal. 412, 44 P. 725, 32 L.R.A. 527, and E. A. Hoffman Candy Co. v. City of Newport Beach, supra, as sustaining their position. In the Haskell Case this court upheld an ordinance imposing a license tax upon "persons, outside of those conducting regular places of business," selling different articles to persons other than merchants. In other words, the ordinance laid a tax on itinerants, and the court held that the manner in which such persons conduct business is so different from the method of the ordinary merchant as to furnish a reasonable basis for classification. Also, the court said that when the legislative body of a city has seen fit to impose a heavier license upon the business when so conducted than where carried on in a different way the ordinance is not on its face necessarily unreasonable. "Indeed," the court said, "the right to make such discriminating distinctions, based upon like grounds, is amply sustained by authority, and in many cases involving a much greater disparity between the rates charged than is exhibited here."

It, therefore, appears that the decision in this case was based upon a recognition of the right of the legislative body of the city to classify the different kinds of business conducted within the city for the purposes of taxation. In affirming this right the court said: "The very power to license for purposes of regulation and revenue involves the right to make distinctions between different trades, and between essentially different methods of conducting the same general character of business or trade. And that is all that is done here." But the right to make such distinctions is not broad enough to allow a municipality to tax persons doing a particular kind of business within the city and to entirely exempt other persons doing the same kind of business in essentially the same way. Nothing in the reasoning or decision of the Haskell case may be said to do so.

In the case of E. A. Hoffman Candy Co. v. City of Newport Beach, supra, the court sustained an ordinance which imposed a license tax of $12 per annum upon places of business within the city and a further tax of $10 per annum for each automobile or vehicle operated over the streets of the city by a person not having a business establishment within it. But the court, while recognizing that a discrimination for purposes of taxation solely because of the different sites of the principal places of business of those who sell goods or furnish service within the city and for no other reason "has been held illegal without deviation in decision," said that the case of California Fireproof Storage Co. v. City of Santa Monica, 206 Cal. 714, 275 P. 948, controlled its decision. But in the latter case the ordinance, which was upheld, taxed all persons operating motor propelled vehicles within the city.

[6] It is clear that an ordinance which taxes those having their places of business within a city equally with those who may come into the city to transact the same kind of business does not discriminate. On the contrary, it places all on exactly the same basis.

But respondents insist that the ordinance must be upheld under the decisions of the Supreme Court of the United States. However, each one of such cases which has been cited in support of the ordinance is based upon facts essentially different from those presented by the Santa Barbara ordinance.

The case of State Board of Tax Commissioners of Indiana v. Jackson, 283 U.S. 527, 51 S.Ct. 540, 545, 75 L.Ed. 1248, 73 A.L.R. 1464, is cited by respondents as the leading case on the subject. In that case the court by the narrow margin of a five to four decision upheld a statute of Indiana imposing a license tax upon chain stores. But that statute, the court held, was based on distinctions other than the ownership of stores, the difference consisting "in organization, management, and type of business transacted." In the later case of Liggett Co. v. Lee, 288 U.S. 517, 53 S.Ct. 481, 77 L.Ed. 929, 85 A.L.R. 699, the court emphasized this when it said that its decision in the Jackson Case was based upon a fundamental difference in the form of merchandising between a chain of stores and the ordinary individually operated store. It is to be noted also that the statute placed a license tax upon all stores, whether owned by a chain or by individuals. The Santa Barbara ordinance exempts the local laundry entirely.

The case of Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 48 S.Ct. 423, 425, 72 L.Ed. 770, is of interest in this connection. In that case the court passed upon a statute in Kentucky which levied a tax upon the indebtedness secured by a mortgage lodged for record where the indebtedness did not mature within five years. In holding the statute unconstitutional, the court stated that there are certain general and fundamental rights which must be recognized under the equal protection clause. It recognized the power of the state to classify for purposes of taxation, and that its right to classify for such purposes is of wide range and flexibility. But it pointed out that the classification " 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"

It is certain, the court said, that one who secures priority for his lien for a period less than five years enjoys the same privilege as one who secures such priority for a shorter period. "The former reasonably may be required to pay proportionately less than the latter; but to exact, as the price of a privilege which, for obvious reasons neither safely can forego, a tax from the latter not imposed in any degree upon the former produces an obvious and gross inequality." The tax imposed by the Santa Barbara ordinance upon one class of laundry owners while exempting all others produces that same obvious and gross inequality. For mere difference in classification does not meet constitutional requirements. Classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis." Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150, 155, 17 S.Ct. 255, 257, 41 L.Ed. 666.

Respondents point to Armour & Co. v. Virginia, 246 U.S. 1, 38 S.Ct. 267, 268, 62 L.Ed. 547, where a statute imposing a state license tax on persons selling goods within Virginia but manufactured without the state was upheld. By that statute the amount of the tax to be paid by each merchant was determined by the aggregate sum of purchases of merchandise to be sold or offered for sale, but "manufacturers taxed on capital by this state, who offer for sale at the place of manufacture, goods, wares and merchandise manufactured by them" were excluded from its operations. It is clear that the state imposed its tax burdens upon all merchants with particular provision for those who were also manufacturers. Those manufacturers who were taxed on capital and sold their product at the place of manufacture were not required to pay an additional license tax. Merchants who were manufacturers and who were not taxed on capital paid a license tax based on the value of the goods purchased by them and the value of merchandise manufactured by them. Obviously all manufacturers were thus taxed. That those in the different classifications were taxed in different ways and in different amounts is unimportant. The constitutional requirements were met.

In the case of Richmond Linen Co. v. Lynchburg, 160 Va. 644, 169 S.E. 554, 556, the court reviewed an ordinance of the city of Lynchburg imposing a license tax upon laundries soliciting general laundry work within the city and having it done outside the city. But the ordinance by its terms did not apply to a laundry located in the city of Lynchburg paying the regular license fee. The court in upholding the ordinance said that the outside laundries could not complain because the tax imposed upon them was not the same as that fixed for the establishments within the city limits because "equality in taxation * * * is a dream unrealized." Here again all in the same business were taxed, although in different amounts.

The case of Singer Sewing Machine Co. v. Brickell, 233 U.S. 304, 34 S.Ct. 493, 497, 58 L.Ed. 974, is also strongly relied upon by respondents. In that case a state law for revenue purposes required each person selling or delivering sewing machines to pay a license tax of $50 annually for each county in which he sold or delivered such articles. It also fixed an additional tax of $25 annually for each wagon or team used in delivering or displaying sewing machines but exempted merchants selling them at regularly established places of business. The court upheld the statute upon the ground that "there is an evident difference, in the mode of doing business, between the local tradesman and the itinerant dealer, and we are unable to say that the distinction made between them for purposes of taxation is arbitrarily made."

The difference in the mode of doing business was also the basis for the decision in Rast v. Van Deman & Lewis Co., 240 U.S. 342, 36 S.Ct. 370, 377, 60 L.Ed. 679, L.R.A. 1917A, 421, Ann.Cas.1917B, 455. A statute of Florida imposed a license tax in a basic amount upon merchants and required an additional amount from those giving coupons, profit sharing certificates, or trading stamps. It was upheld upon the ground that the method of doing business of the merchants who give something away with articles sold is of a particular character which gives a reasonable basis for classification. It appeared to the court that these merchants "tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity [they] lure to improvidence." This, the court held, authorized the Legislature to classify such merchants as a separate group and to tax them accordingly.

Questions which arise when legislative bodies impose taxes based upon a classification of businesses or occupations are always difficult to solve. Those difficulties stand out in the many cases decided by closely divided courts. There is little difference in opinion concerning the fundamental principles involved. The application of those principles to particular situations brings the difference in views.

The very basis of constitutional government is equal protection of the law. The power to tax is the power to destroy. If taxes may be arbitrarily levied, there is no protection for either personal or property rights. Constitutional provisions, it was said in Bell's Gap. R. R. Co. v. Pennsylvania, 134 U.S. 232, 237, 10 S.Ct. 533, 535, 33 L.Ed. 892, were not intended "to prevent a state from adjusting its system of taxation in all proper and reasonable ways." But what have been termed clear and hostile discriminations against particular persons and classes cannot be upheld.

[7] There can be no doubt that the Santa Barbara ordinance is an attempt to discriminate in favor of laundries within the city. That legislation of such character may discriminate is not denied. There may be discrimination founded upon a reasonable classification of all persons transacting the same kind of business. But discrimination cannot go to the extent of being a mere subterfuge for legislation directed against a particular group of taxpayers. Justice Field in the case of County of Santa Clara v. Southern Pac. R. Co. (C.C.) 18 F. 385, 399, stated the rule with clarity and vigor. He said: "Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the [Fourteenth] amendment. There undoubtedly are, and always will be, more or less inequalities in the operation of all general legislation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result."

The judgment is reversed.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; CURTIS, J.

SEAWELL, Justice.

I dissent.

I am of the opinion that the rule enunciated in Ex parte Haskell, 112 Cal. 412, 44 P. 725, 32 L.R.A. 527, E. A. Hoffman Candy Co. v. City of Newport Beach, 120 Cal.App. 525, 8 P.(2d) 235, California F. S. Co. v. Santa Monica, 206 Cal. 714, 275 P. 948, and Richmond Linen Co. v. Lynchburg, 160 Va. 644, 169 S.E. 554, is controlling. Those cases, in my opinion, clearly establish that the ordinance of Santa Barbara under consideration herein does not unlawfully discriminate between classes, and is a reasonable exercise of municipal power. Once it is conceded, as does the majority opinion, that the power exists to classify between inside and outside businesses, then the sole question is whether the particular ordinance is reasonable. The mere fact that inside business is not taxed at all under the present ordinance is immaterial. The question is simply one of degree.

I concur: LANGDON, J.

8 Cal.2d 400

AITCHISON et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Sac. 5035.

Supreme Court of California.

Feb. 27, 1937.

Rehearing Denied March 29, 1937.

1. Waters and water courses 🔑156½

Even if beneficiary of trust deeds purchasing at foreclosure sales acquired title to original water rights, such fact would not affect right of trustors to receive unpaid installments provided for in contract whereby trustors conveyed water rights to irrigation district (Gen.Laws 1931, Act 3854).

2. Mortgages 🔑271

Landowner who has given trust deed covering his property is holder of legal title and may convey property subject to such deed (Civ.Code, §§ 865, 866).

3. Waters and water courses 🔑156½

Where landowners conveyed water rights to irrigation district in consideration of certain amount to be paid in annual installments, beneficiary of existing trust deeds covering lands was not entitled to any part of consideration and beneficiary did not acquire right to unpaid installments after foreclosure of trust deeds, and neither deeds given to beneficiary on foreclosure nor deeds given in lieu of foreclosure vested in beneficiary any interest in unpaid installments (Gen.Laws 1931, Act 3854; Civ.Code, §§ 865, 866).

4. Waters and water courses ⚷156(2)

Contract conveying landowners' water rights to irrigation district, but not containing agreement of district to thereafter give landowners water, could not be construed as agreement to substitute one water right for another, even though landowners relied on fact that they were owners of land within district and as such would be entitled to water, as regards right of landowners' successor in interest to unpaid installments on water rights.

In Bank.

Appeal from Superior Court, Merced County; J. J. Trabucco, Judge.

Action by J. W. Aitchison and others against the Bank of America National Trust & Savings Association and another. From an adverse judgment, the named defendant appeals.

Affirmed.

Louis Ferrari and George D. Schilling, both of San Francisco, C. Ray Robinson, of Merced, and Keyes & Erskine, of San Francisco, for appellant.

Treadwell, Laughlin & Treadwell, of San Francisco, for respondents.

H. K. Landram, of Merced, for respondent Merced Irr. Dist.

EDMONDS, Justice.

The question for decision in this case concerns the right to certain amounts owing by the Merced Irrigation District for water rights transferred to it by the plaintiffs. The Irrigation District and Bank of America National Trust & Savings Association are defendants. The amounts unpaid are claimed by the plaintiffs and also by the bank as the present owner of the various parcels of land to which the water rights were originally appurtenant. Judgment went in favor of the plaintiffs and the bank has appealed.

The action is one for declaratory relief, and was brought by a large number of persons holding contracts with the Irrigation District upon which various amounts are unpaid. It is alleged that in 1924 plaintiffs sold and conveyed to the Irrigation District all and any rights they had to receive water under certain contracts with Crocker-Huffman Land & Water Company, and in consideration thereof that the district agreed to pay plaintiffs various amounts in annual installments over a period of years; that the agreements of the district are contained in several instruments, all of which were intended to constitute one transaction; that certain of the payments due upon said contracts have not been made for the reason that Bank of America claims some right to them based upon a claim that it or its predecessor had or has some lien upon the several parcels of land formerly owned by the plaintiffs, but that such claim is without right. Edward F. Treadwell is also a plaintiff, and it is alleged that the district agreed to pay 5 per cent. of the several amounts to him. The relief asked is that the court ascertain and declare the rights of the parties.

The trial court declared by its findings and judgment that the contracts made by plaintiffs with the Irrigation District do not run with the land but belong to the parties to them and their assigns; that the right to receive the amounts payable to the plaintiffs thereunder never passed to the bank by the foreclosure of the deeds of trust or the deeds made in lieu of foreclosure; and that the bank has no interest in any amounts payable thereunder except in those instances where the contracts were assigned to it. The judgment also provides that each of the plaintiffs except those who assigned their contracts to the bank recover from the Irrigation District the amount due under his contract. Treadwell is also declared to be entitled to certain sums. And the bank is given judgment for the amounts due and unpaid on all contracts which have been assigned to it.

There is no dispute concerning the facts. Prior to 1924 the Crocker-Huffman Land & Water Company conveyed land to the plaintiffs and their predecessors in interest under instruments designated as a "deed and contract" by which the grantor, "in consideration of the purchase and sale of said land above described, agrees to furnish to the second party water not exceeding at any time ⅛ of one cubic foot per second, under the terms, conditions, limitations and restrictions herein stated." The contract further provided that the agreement to furnish water was limited to water to be used to irrigate the land described and that it should not exceed such quantity as might be required for economical use. There was also a reservation of ditch rights of way. It is conceded that these contracts ran with the land.

Certain of the plaintiffs were the original purchasers from the Crocker-Huffman company, while others are grantees from such purchasers. All at one time or another prior to 1924 executed deeds of trust in favor of the predecessor of the bank. Some of the plaintiffs also executed a second deed of trust to the bank or its predecessor in renewal of one previously given. Subsequent to 1924 the bank foreclosed practically all of the deeds of trust and became the owner of the various parcels of real estate under deeds made by the trustee. Several of the plaintiffs gave a deed in lieu of foreclosure. A few assigned their contracts to the bank.

In 1924 the Merced Irrigation District, organized as a public corporation under the California Irrigation District Act (Stats.1897, p. 254, as amended, Deering's Gen.Laws, 1931 Ed. Act 3854), acquired the Crocker-Huffman water system, and entered into the contracts with the plaintiffs which are now in dispute. By these contracts, all of which are in substantially the same form, the plaintiffs, each of whom was the owner of the land within the district which had been conveyed to him or his predecessors by the "deed and contract" of the Crocker-Huffman company, transferred and conveyed to the district all and any rights to receive water under the Crocker-Huffman agreement. The consideration of each contract was by its terms stated to be the agreement of the district to pay the landowner a certain amount in annual instalments over a term of 17 years. A considerable portion of the amounts called for by the contracts has been paid and the district makes no attempt to repudiate its agreements. On the contrary, it affirms its obligations to pay, but seeks a judicial determination as to who is legally entitled to the amounts unpaid under each of the contracts.

[1] The bank contends that as the purchaser at the foreclosure sales under the various deeds of trust it secured title to the original water rights granted by the Crocker-Huffman deeds free and clear of the contracts with the Irrigation District. But if this be the situation, it does not affect the rights of the plaintiffs to the consideration payable by the district for the real property conveyed to it. The district is satisfied with what it has received under the conveyances made to it. If the bank owns the original water rights conveyed by the Crocker-Huffman deeds its remedy is to assert its title to those rights in appropriate actions brought against those claiming to own them in fee simple. The title which the Irrigation District received is not at issue in the present action.

The further claim is made by the bank that the contracts with the district substituted for the original water rights new ones also appurtenant to the land. It maintains in this connection that the effect of the Irrigation District contracts is to give the landowner the right to water at a preferential rate, the amounts agreed to be paid under those contracts constituting rebates to the consumers.

[2] The fallacy of such reasoning is the result of a failure to recognize the fundamental nature of the transaction between the landowners and the district. In 1924, when the disputed contracts were executed, each landowner who had given a deed of trust upon his property held a legal estate in it as against all persons except the trustee and those claiming under such trustee. Sheldon v. La Brea Materials Co., 216 Cal. 686, 15 P.(2d) 1098. The trustor in such a case is considered as the holder of the legal title. MacLeod v. Moran, 153 Cal. 97, 100, 94 P. 604. "And so notwithstanding the execution of a trust deed as security for payment of a debt, the grantor may convey the property subject to such deed." 25 Cal. Jur. p. 45; sections 865, 866, Civ.Code. He may "exercise all the ordinary incidents of ownership, in regard to the property, subject always, of course, to the execution of the trust." Wasco Creamery Co. v. Coffee, 117 Cal.App. 298, 301, 3 P.(2d) 588, 589. In the case of the holder of a mortgage it was said "a mortgagee is bound to know that his mortgagor may convey the premises subject to his mortgage." Filipini v. Trobock, 134 Cal. 441, 62 P. 1066, 66 P. 587.

[3] Applying these principles to the situation of the landowners at the time they made the contracts with the Irrigation District, it is obvious that each one owned a legal estate in real property which he might sell. Upon a sale no part of the consideration could be claimed by the beneficiary of a deed of trust upon the property sold. And

if the bank had no right to the consideration at that time, it obtained no further rights to the unpaid instalments after foreclosure of the deeds of trust.

[4] Also, there is nothing in the contracts of the Irrigation District which affords the slightest basis for construing them as agreements to substitute one water right for another. By these contracts the landowners for certain considerations "hereby severally sell, transfer and convey to the district all and any rights to receive water which they have or may have under the said [Crocker-Huffman] contracts." There is no agreement by the district to thereafter give the sellers water at any particular price or at all. Undoubtedly the grantors relied upon the fact that they were owners of land within the district and as such would be entitled to water. But that fact cannot change the contract of the district into one for an exchange of water rights where the language is clear and unequivocal and clearly indicates that there was no such purpose. Except in the few instances where contracts were assigned to it the bank is a stranger to the conveyances of the landowners. Neither the deeds to it upon foreclosure nor the deeds given in lieu of foreclosure vest in it any interest in the consideration for those conveyances.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

19 Cal.App.2d 432

UNITED PRESS ASSOCIATIONS v. STOCKTON INDEPENDENT PUB. CO., Inc.

Civ. 10430.

District Court of Appeal, First District, Division 2, California.

March 5, 1937.

Appeal and error 🔑790(2)

Plaintiff's appeal from order discharging writ of attachment *held* not dismissable on ground that questions presented had become "moot" and "academic" because action in which writ was issued had been dismissed in trial court, since despite dismissal question of rights and liabilities of parties under the undertaking remained subject of controversy and solution thereof depended on whether trial court correctly or erroneously discharged attachment (Code Civ.Proc. § 537).

[Ed. Note.—For other definitions of "Moot Case," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by the United Press Associations against the Stockton Independent Publishing Company, Inc. From an order discharging a writ of attachment, plaintiff appeals. On motion to dismiss appeal.

Motion denied.

Cooley, Crowley & Supple, of San Francisco, for appellant.

Philip S. Ehrlich and Albert A. Axelrod, both of San Francisco, for respondent.

SPENCE, Justice.

Respondent has made a motion to dismiss upon the ground that the "questions involved on this appeal have become moot and academic questions and require no further consideration."

The showing made by respondent is that the appeal was taken from an order discharging a writ of attachment and that since the taking of the appeal, the action in which the writ of attachment was issued has been dismissed. By way of answer, appellant makes the showing that as a condition to the issuance of the writ of attachment, it was required to file an undertaking in the sum of $15,150; that one of the conditions of said undertaking was "that if the said attachment is discharged on the ground that the plaintiff was not entitled thereto, under section five hundred and thirty seven (537), Code of Civil Procedure, the Plaintiff will pay all damages which the Defendant may have sustained by reason of the attachment, not exceeding the sum specified in the undertaking."

We are of the opinion that the motion to dismiss should be denied. The questions involved on this appeal are not mere moot and academic questions, but are questions of great practical importance to the parties. Despite the dismissal of the action in the trial court, the question of the rights and liabilities of the parties under the undertaking still remains the subject of controversy. The solution of this question depends upon the determination of whether the trial court correctly or erroneously ordered the attachment discharged. Appellant is therefore entitled to a hearing of this appeal upon the merits. Eastern Union Co. v. Moffat Tunnel Imp. Dist. (Del.Super.) 178 A. 864; Williams v. Montgomery, 148 N.Y. 519, 43 N.E. 57; Harris v. Barrett, 206 Ala. 263, 89 So. 717; Crom v. Frahm, 33 Idaho, 314, 193 P. 1013; Massengill v. City of Clovis, 33 N.M. 394, 268 P. 786; Noce v. Noce, 34 N.M. 335, 281 P. 460; F. Burkart Mfg. Co. v. Case (C.C.A.) 39 F.(2d) 5; 4 Cor.Jur. Secundum, Appeal and Error, p. 1945, § 1354.

The motion to dismiss is denied.

We concur: NOURSE, P. J.; STURTEVANT, J.

---

19 Cal.App.2d 382

STRATH v. CITY OF SANTA ROSA.

Civ. 5684.

District Court of Appeal, Third District, California.

Feb. 27, 1937.

1. Municipal corporations ⚷741(1)

Statutory requirement that claim for damages must be filed with municipality within 90 days after occurrence of accident is mandatory (Gen.Laws 1931, Act 5149).

2. Municipal corporations ⚷812(2)

Under statute, pedestrian's failure to timely file claim against municipality for personal injuries, received as result of municipality's maintenance of defective and dangerous sidewalk, precluded pedestrian from maintaining action against municipality for damages for such injuries (Gen.Laws 1931, Act 5149).

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Action by Ellen I. Strath against the City of Santa Rosa. From the judgment, the plaintiff appeals.

Affirmed.

H. B. Churchill and J. Harold McAlpine, both of Santa Rosa, for appellant.

Edward T. Koford, of Santa Rosa, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered against her pursuant to an order sustaining a demurrer to her complaint without leave to amend the pleading. The suit was instituted to recover damages for personal injuries received as a result of the maintenance of a defective and dangerous sidewalk by the City of Santa Rosa. The demurrer was sustained on the ground that it does not appear in the complaint that the plaintiff filed a claim for damages with the clerk of the municipality within ninety days after the accident occurred, or at all, as required by the statute. At the time the demurrer was presented, it was then too late to file the claim. It is conceded that if the statute requires the filing of a claim under the circumstances of this case, then the demurrer was properly sustained without leave to amend the pleading.

[1, 2] The demurrer was properly sustained without leave to amend. The suit is based solely upon a claim against the City of Santa Rosa for personal injuries alleged to have been received as the result of the maintenance of a defective and dangerous sidewalk by the city. Under the circumstances of this case it was necessary for the claimant to file with the clerk of the municipality a verified claim for damages, within ninety days after the accident occurred. This requirement has been held to be mandatory as a prerequisite to maintaining the action. Stats.1931, p. 2475, 2 Deering's Gen.Laws of Calif. of 1931, p. 2562, Act 5149; Norton v. City of Pomona, 5 Cal.(2d) 54, 63, 53 P.(2d) 952; Thompson v. County of Los Angeles, 140 Cal. App. 73, 35 P.(2d) 185; Spencer v. City of Calipatria, 9 Cal.App.(2d) 267, 49 P.(2d) 320; Johnson v. City of Glendale, 12 Cal.App.(2d) 389, 55 P.(2d) 580; White-Satra v. City of Los Angeles, 14 Cal.App.(2d) 688, 58 P.(2d) 933.

The case of Jackson v. City of Santa Monica, 13 Cal.App.(2d) 376, 57 P.(2d) 226, upon which the plaintiff relies, is not in point. In the Jackson Case the plaintiff was injured through the personal negligence of the driver while riding as a passenger in a motorbus belonging to the city of Santa Monica. The bus was being operated by employees of the city at the time of the accident. He was not injured on account of "the dangerous or defective condition of any public street, highway, building, park, grounds, works or property" belonging to or maintained by the city. The Jackson Case is not in conflict with the authorities previously cited.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

19 Cal.App.2d 503

PEOPLE v. SCHENK.

Cr. 1939.

District Court of Appeal, First District, Division 2, California.

March 12, 1937.

1. Criminal law ⚷1141(2)

Reviewing court will not search for error in order to reverse judgment, and, unless appellant shows prejudicial error, judgment must be affirmed (Const. art. 6, § 4½).

2. Criminal law ⚷1151

Accused *held* not entitled to reversal on showing that offenses charged were committed on October 20th, accused was represented by public defender until November 18th, when he was called for plea and substituted private counsel, whose request for continuance was refused, trial was set for November 25th, at which time accused's counsel asked for continuance and stated that he had witness whose attendance he would like to secure and codefendant changed his plea to guilty, that accused's counsel then asked for continuance on ground of surprise, and that motions were denied (Const. art. 6, § 4½).

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Robert Schenk was convicted of robbery, of assault with intent to commit murder, and of offense commonly referred to as that of an ex-convict carrying a concealed weapon, and he appeals.

Affirmed.

Victor Wells, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

The defendant and one Avelino entered a bookmaking place operated in a second floor flat and robbed the proprietor and one of the patrons. The defendant used a forty-five automatic pistol in the hold-up; his companion used a thirty-two. The police were notified and surrounded the place while the hold-up was in progress. In attempting to escape through the kitchen they were stopped by a police officer, who was shot in the shoulder by the defendant Schenk using the forty-five gun. This defendant then forced a woman to precede him down the rear stairs, where they were met by other officers. One of these shot Schenk in the arm; he was arrested and surrendered the gun used in the shooting of the officer. Every element of the crimes charged was proved to a moral certainty and without any substantial conflict. The defendant took the witness stand in his own behalf and testified that, as he was attempting to enter the flat by the rear door, he was met by another man who looked like him, was dressed in the same kind of suit, overcoat and cap, and carried the same kind of gun as the one he carried, and that this other man had engaged in the hold-up and had shot the police officer.

Upon this evidence the defendant was tried with a jury upon four informations—two charging robbery, one charging assault with intent to commit murder, and one charging the offense commonly referred to as that of an ex-convict carrying a concealed weapon. The defendant was also charged with prior convictions of grand larceny, assault to commit murder, and robbery, all of which were admitted. The jury found the defendant guilty on all four informations and he appeals from the judgments.

[1, 2] The appellant complains that he was not given sufficient time to plead or to prepare his defense. The crimes were committed on October 20, 1936. The appellant was represented by the public defender until November 18, 1936, when he

was called for plea. He then substituted private counsel, whose request for a continuance was refused. His trial was set for November 25th. At that time his counsel asked for a continuance, and stated that he had a witness whose attendance he would like to secure. At the same time the codefendant Avelino changed his plea to guilty. Appellant's counsel then asked for a continuance on the ground that this change was a surprise to him. All motions were denied, and these are the only grounds argued for a reversal.

It is elementary that an appellate court will not search for error in order to reverse a judgment of a trial court, and that, unless the appellant shows prejudicial error, the judgment must be affirmed. Article 6 § 4½, Const. The mere statement by counsel that additional time was needed, and that some witness (unnamed and unidentified) might give material testimony, without a supporting affidavit in either case, presents no issue either before the trial court or before this court on an appeal from the judgment. Similarly, the mere statement that the trial court and the district attorney were both guilty of misconduct presents nothing calling for a decision.

A full and careful examination of the transcript of the trial shows that the appellant was given a fair and impartial trial, and that he was fairly convicted on all four charges.

The judgments are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

KEY NUMBER SYSTEM

---

19 Cal.App.2d 409

UNION OIL CO. OF CALIFORNIA et al. v. MUTUAL OIL CO. et al.

Civ. 10413.

District Court of Appeal, First District, Division 2, California.

March 3, 1937.

Hearing Denied by Supreme Court May 1, 1937.

1. Appeal and error 🔑907(3)

On appeal on judgment roll alone, it must be assumed that there was ample evidence to sustain trial court's fact findings.

2. Pleading 🔑279(3)

Where complaint of oil lessees alleged continuing trespass by defendants and conversion of oil produced by means of trespass, and prayed for injunction, accounting, and judgment for value of oil removed, oil lessees *held* not required to file supplemental pleading to sustain money judgment which included value of oil taken by defendants both before and after filing of complaint and up to time of entry of judgment, since it was duty of trial court to adjust rights of parties.

3. Principal and agent 🔑159(1)

Defendants *held* not excused from liability for their agent's trespass and for conversion of oil and gas effected as consequence of trespass because defendants did not participate in trespass and had no knowledge thereof.

4. Mines and minerals 🔑51(5)

Lessees under lease granting them exclusive right to explore for and remove oil from premises *held* entitled to recover from trespasser value of oil removed from premises and converted to trespasser's use during term of lease, since title to and right to possession of oil removed from premises by trespasser during term of lease became vested in lessee.

5. Mines and minerals 🔑52

In suit for injunction by oil lessee against trespasser who removed oil from leased premises, where lessees were entitled to recover value of oil removed, trial court, in granting injunctive relief, properly granted relief by way of accounting and money judgment for amount found to be due from trespasser.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the Union Oil Company of California and others against the Mutual Oil Company, George E. Cryer, R. Alston Jones, and others. From a judgment in favor of plaintiffs, defendants Cryer and Jones appeal.

Affirmed.

Oliver O. Clark, Victor T. Watkins, George E. Cryer, and R. Alston Jones, all of Los Angeles, for appellants.

Paul M. Gregg, Andrews, Blanche & Kline, Douglas C. Gregg, and Mortimer A. Kline, all of Los Angeles (Arthur R. Smiley, of Los Angeles, of counsel), for respondents.

SPENCE, Justice.

Plaintiffs, as owners of a certain lease, which lease conferred upon them as lessees the exclusive right to explore for and remove oil and gas from the premises therein described, brought this action against defendants to enjoin them from removing oil and gas from the strata underlying said premises and particularly from operating a certain well known as Carpenter No. 1 well. Other relief was asked, including an accounting and payment by defendants of the value of all oil and gas produced through said Carpenter No. 1 well. The trial court made its findings of fact and conclusions of law in favor of plaintiffs and judgment was entered thereon granting an injunction against defendants, including defendants Cryer and Jones, and granting to plaintiffs money judgments against defendants in varying amounts. The judgment against defendants Mutual Oil Company, Bysshe, Barrott, and Anderson was in the sum of $102,410.40. The judgment against defendant Cryer was in the sum of $22,110.11. The judgment against defendant Jones was in the sum of $189.57. Other money judgments were granted against other defendants, but it is unnecessary to set them forth as only defendants Cryer and Jones have appealed. They present their appeal solely upon the judgment roll.

While the appeal is taken from the entire judgment, no attack is made upon any portion thereof except the portions granting money judgments against the appealing defendants. The appealing defendants apparently contend that said money judgments were based upon findings entirely outside of the issues and that plaintiffs were not entitled to an accounting and judgment for the value of the oil produced and sold by defendant Mutual Oil Company on behalf of the various defendants. We find no merit in these contentions.

[1] The pleadings and findings are rather voluminous and in our opinion there is much immaterial matter contained therein. The material allegations of the complaint, for the purpose of this discussion, showed that defendants had committed and were continuing to commit a subsurface trespass upon the premises covered by plaintiffs' lease by means of said Carpenter No. 1 well, which was so drilled as to slant into, to be bottomed within, and to produce oil and gas from within the limits of said premises; that defendants had removed and were continuing to remove oil and gas from said premises of plaintiffs by means of said well and had converted said oil and gas to the use of defendants. Appropriate allegations were made as the basis for injunctive relief and further allegations were made showing that the amount of oil and gas removed was unknown to plaintiffs and that the records thereof were exclusively in the control of defendants. The trial court found that all the aforesaid material allegations of the complaint were true; "that 2,260 feet of the said Carpenter No. 1 Well trespasses upon and lies within the property limits of plaintiffs' property, and said well extends horizontally within the limits of plaintiffs' property more than 1,000 feet. That all of the petroleum produced from said Carpenter No. 1 Well (meaning petroleum, gas and other hydrocarbon substances) was produced from, through and by means of the casing perforations mentioned above in this paragraph, and was accomplished by said well inside and within the property limits of the plaintiffs' property, and in violation of plaintiffs' rights." As to the appealing defendants, the trial court found that defendant Mutual Oil Company acted as the agent of each of said defendants in the production and sale of certain quantities of petroleum produced from said Carpenter No. 1 well; that the value of petroleum so produced and sold by said company as agent of defendant Cryer was $22,110.11 and that the value of the petroleum so produced and sold by said company as agent of defendant Jones was $189.57; and that said sums were turned over to the respective defendants or their nominees. On this appeal upon the judgment roll alone, it must be assumed that there was ample evidence to sustain all of said findings.

[2] There were many other findings made by the trial court, but we believe that it sufficiently appears from what has been said that the findings upon the material issues were within the issues made by the pleadings. The complaint alleged a continuing trespass by defendants and a conversion of the oil and gas produced by means of said trespass. The prayer was for equitable relief by way of injunction and also for an accounting and judgment for the value of the oil and gas thus taken. The findings and judgment were responsive

to the issues thus made and in our opinion it was unnecessary for plaintiffs to file supplemental pleadings in order to sustain the money judgments which included the value of the oil and gas so taken both before and after the filing of the complaint and up to the time of the entry of judgment. It was the duty of the trial court under the circumstances to adjust the rights of the parties up to the time of the entry of judgment and to leave nothing open to further litigation. Anglo-California Trust Co. v. Oakland Rys., 193 Cal. 451, 225 P. 452; Collins v. Sargent, 89 Cal.App. 107, 264 P. 776; 21 Cor.Jur. 134, § 117.

[3] The position of the appealing defendants seems to be based upon the following facts: The complaint alleged "that the drilling of said well by said defendants was deliberately and intentionally controlled and managed as to course and direction thereof so that said well crossed within the boundary lines" of plaintiffs' premises. The trial court found these allegations to be true as to defendants Mutual Oil Company and certain other defendants, but as to the appealing defendants and others, the trial court found that they "did not participate in the drilling of the Carpenter No. 1 Well upon and into the land of the plaintiffs and that during the time the Carpenter No. 1 Well was being drilled, said defendants had no knowledge whatever that said well had been or was being" so drilled. Upon these findings, the appealing defendants claim that they were entitled to judgment in their favor. This position cannot be sustained in the light of the remaining findings. The question of whether the well was intentionally or unintentionally drilled so as to slant into plaintiffs' premises, is immaterial here. In either case a trespass was committed in the drilling of the well and the trial court further found "that the maintenance of said Carpenter No. 1 Well and the production of petroleum therefrom constituted a continuing trespass" upon plaintiffs' premises. It also found that in the production and sale of the petroleum from said well defendant Mutual Oil Company acted not only on its own behalf, but also as the agent of the appealing defendants. Thus the appealing defendants were chargeable with trespass as well as conversion by reason of the acts of their agent, Mutual Oil Company, for "neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action." Poggi v. Scott, 167 Cal. 372, 139 P. 815, 816, 51 L.R.A.(N.S.) 925; Edwards v. Jenkins, 214 Cal. 713, 7 P.(2d) 702; Vagim v. Haslett Warehouse Co., 131 Cal.App. 197, 20 P.(2d) 992.

On their contention that plaintiffs were not entitled to an accounting and judgment for the value of the oil produced and sold by the Mutual Oil Company as the agent of the appealing defendants, numerous authorities are cited on the general proposition that neither the owner of real property nor his lessee has absolute title to "oil in place." This may be conceded. Callahan v. Martin, 3 Cal.(2d) 110, 43 P.(2d) 788, 101 A.L.R. 871; Western Oil, etc., Co. v. Venago Oil Corp., 218 Cal. 733, 24 P.(2d) 971, 88 A.L.R. 1271. The questions here are: (1) Where the lessees under a lease granting to them the exclusive right to explore and remove oil from the premises entitled to recover from a trespasser the value of oil removed by such trespasser from said premises and converted to the trespasser's use during the term of the lease? and (2) If such lessees were entitled to recover the value of the oil so removed, was it proper for the trial court in granting injunctive relief to also grant relief by way of an accounting and a money judgment for the amount found to be due from the trespasser?

[4] Upon the first proposition, we are of the opinion that the lessees were entitled to recover the value of the oil so removed and converted by the trespasser. Our attention has not been called to any decision in this state directly in point and the decisions of the courts of other jurisdictions appear to be in conflict. In People v. Brunwin, 2 Cal.App.(2d) 287, 37 P.(2d) 1072, 1073, the court discussed the sufficiency of an indictment charging the trespasser with larceny under somewhat similar circumstances. The complainant there was the lessee holding the exclusive right to remove oil from the premises. Defendants were charged with unlawfully entering upon the premises, converting a certain quantity of oil of the value of $572.28 "into personal property by severing the same from said lands" and taking and carrying away said oil. The indictment was upheld, the court resting its decision in part upon its conclusion found on page 299 of 2 Cal.App.(2d), on page 1078 of 37 P.(2d), that the indictment was "entirely sufficient to charge a

larceny of personal property." On page 290 of 2 Cal.App.(2d), on page 1074 of 37 P.(2d), the court said, "Obviously, oil which has been removed from the ground is personal property and the unlawful taking thereof would constitute larceny just as would the unlawful taking of any other form of personalty." On page 299 of 2 Cal.App.(2d), on page 1078 of 37 P.(2d), it was held that the lease placed the lessee "in possession of whatever rights to the oil in place as were held by the owner of the leased premises," and we believe it necessarily follows that upon the removal of oil from the premises by a trespasser during the terms of the lease, the title to and the right to possession of the oil so removed became vested in the lessee. Plaintiffs were therefore entitled to recover the value of said oil just as any person having title to and the right to possession of any personal property may recover its value from one unlawfully converting it to his own use. Even if the question were an entirely open one in this state, we would not be inclined to follow the rule adopted in some jurisdictions which denies to the lessee the right to recover the value of the oil taken but confines his recovery to such damage to his leasehold interest as he may be able to prove. Such rule appears to be based upon an unreasonable extension of the doctrine which declares that because of the fugitive nature of oil, neither the owner nor the lessee has absolute title to "oil in place" and we do not believe such extension to be warranted. It is apparent that the application of such rule would work to the advantage of the trespasser and to the detriment of the lessee because of the practical impossibility of proving damage to the leasehold resulting from the removal of the oil. When oil is removed from the ground by either the lessee or a trespasser, it becomes personal property and, as above indicated, we are of the opinion that title to and the right to possession of the oil so removed becomes vested in the lessee holding the exclusive right to remove such oil from the premises. It may be that in an action brought to recover the value of the oil so removed by an innocent trespasser, such innocent trespasser would be entitled to receive credit for his expenditures made in removing the oil (see discussion and cases cited in Southern California Law Review, volume III, number 2, page 102), but that question is not presented by the appealing defendants here.

[5] Having determined that the lessees were entitled to recover the value of the oil so removed and converted we think there is no doubt that it was proper for the trial court, sitting as a court of equity and granting injunctive relief, to also grant relief by way of an accounting and a money judgment for the amount found to be due. 10 Cal.Jur. pp. 496–500; 1 Cal. Jur. p. 169; Bettencourt v. Bank of Italy, etc., Ass'n, 216 Cal. 174, 13 P.(2d) 659; McCarthy v. Gaston Ridge Mill, etc., Co., 144 Cal. 542, 78 P. 7; Big Sespe Oil Co. v. Cochran (C.C.A.) 276 F. 216; United States v. Midway Northern Oil Co. (D.C.) 232 F. 619; Midland Oil Co. v. Turner (C.C.A.) 179 F. 74; New Domain Oil & Gas Co. v. McKinney, 188 Ky. 183, 221 S. W. 245; South Penn Oil Co. v. Haught, 71 W.Va. 720, 78 S.E. 759.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

KEY NUMBER SYSTEM

19 Cal.App.2d 392

PEOPLE v. SWEET.

Cr. 1929.

District Court of Appeal, First District, Division 1, California.

March 2, 1937.

Rehearing Denied March 17, 1937.

Hearing Denied by Supreme Court April 1, 1937.

1. Criminal law 🔑1165(2)

Where only matters substituted counsel desired to present on behalf of defendant prior to pronouncement of sentence in addition to grounds already urged by former counsel for a new trial were the application for disqualification of the judge and motion to vacate trial court's finding of conviction and to grant defendant a jury trial, denial of substitution *held* not prejudicial, where trial court not only permitted application and motion to be filed but prior to pronouncement of sentence ruled adversely thereon, which ruling was before reviewing court on appeal for determination.

2. Judges 🔑39

Application to disqualify trial judge on ground that some six years prior to commission of offense charged, trial judge had occupied position of deputy district attorney and entertained a high regard for such office *held* properly denied as frivolous, where no ruling made by trial court was assigned as error nor was it intimated that evidence was legally insufficient to sustain finding as to defendant's guilt (Code Civ.Proc. § 170, as amended by St.1933, p. 1828).

3. Judges ⚷49(1)

Before bias or prejudice can disqualify a judge, it must be shown to exist against particular party moving for substitution of judge (Code Civ.Proc. § 170, as amended by St.1933, p. 1828).

4. Judges ⚷51(2)

Application to disqualify trial judge which was not made until after all issues of fact in the case had been heard and determined *held* properly denied as not timely (Code Civ.Proc., § 170, as amended by St. 1933, p. 1828).

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Louis J. Sweet was convicted of an attempt to commit the felony denounced by Penal Code, § 288a, and he appeals.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

KNIGHT, Justice.

The defendant was convicted of an attempt to commit the felony denounced by section 288a of the Penal Code, and he has appealed.

The sufficiency of the evidence to sustain the conviction is not questioned, nor are any of the rulings made during the course of the trial assigned as error. The points urged for reversal arise out of the proceedings had at the time of the pronouncement of judgment. In this connection the record shows that at the time defendant was first arraigned on the charge, he appeared with counsel of his own selection, entered a plea of not guilty, and waived a trial by jury. The cause was tried on a date agreed upon by counsel, and defendant was found guilty as charged. The matter was then, at defendant's request, referred to the probation officer and continued approximately a month. The probation officer filed an adverse report, and following a hearing thereon probation was denied. Thereupon, in conformity with statutory procedure defendant was arraigned for judgment and his counsel, Mr. Creely, made and submitted a motion for new trial on all statutory grounds. At this stage of the proceedings defendant's present counsel, Mr. Ewell, appeared, stating he had just been employed in the case, and insisted on being substituted at once in the place of Mr. Creely. The court refused to permit the substitution to be made at that particular time, giving its reasons therefor; and during the discussion which followed between Mr. Ewell and the court, Mr. Ewell asked permission to file a written application for the disqualification of the judge, and for a change of venue; also a written motion to vacate the judgment of conviction, to allow defendant to withdraw his waiver of a jury trial, and to grant him a trial by jury; and in support of the application and the motion he presented and asked permission to file also an affidavit made by the defendant. The court permitted the three documents to be filed, but denied the application and the motion. Thereupon the court asked if defendant had any further cause to show why judgment should not be pronounced. Mr. Creely replied in the negative; and the court imposed sentence, immediately following which an order was made for substitution of attorneys. Thereupon Mr. Ewell moved to set aside the pronouncement of sentence, and again urged the application and the motion theretofore filed by him. The motions and the application were denied, whereupon Mr. Ewell gave oral notice of appeal.

[1] The substance of defendant's contention on the appeal is that the trial court's refusal to allow the substitution of attorneys to be made prior to the imposition of sentence was error in that such refusal deprived defendant of his legal right to show cause why judgment should not be pronounced. It appears, however, that the only matters Mr. Ewell desired to present on behalf of the defendant, prior to the pronouncement of sentence, in addition to the grounds already urged by Mr. Creely for a new trial, were the application for disqualification and the motion to vacate the trial court's finding of conviction and to grant defendant a jury trial; and in this regard the record shows that the trial court not only permitted such application and motion together with the supporting affidavit to be filed, but that prior to the pronounce-

ment of sentence it ruled adversely thereon; and all of said documents, along with a complete transcript of the proceedings had at the time they were filed and ruled upon, constitute part of the record on appeal, so that the question of the propriety of the trial court's adverse rulings on said application and motion are now before us on appeal for determination. In that state of the record it cannot be successfully maintained that the refusal of the trial court to make the order for substitution of attorneys prior to the pronouncement of sentence operated to defendant's prejudice, even though it be conceded that he was entitled to have the substitution made at that particular time.

Turning then to the question of the propriety of the trial court's adverse rulings on the application for disqualification and the motion to vacate the finding of conviction, we are of the opinion that the situation presented falls clearly within and is controlled by the decision in People v. Hooper (Cal.App.) 61 P.(2d) 370. There, as here, the defendant waived a jury trial and after all the evidence was in Mr. Ewell was substituted as the defendant's attorney and obtained a continuance for some two weeks for the purpose of offering additional testimony. At the end of that time, instead of presenting further testimony, he moved to set aside the waiver of the jury trial and to grant a trial by jury. The motion was denied and the defendant was found guilty. Thereupon he filed an application to disqualify the trial judge, and his application was likewise denied, following which a motion for new trial was then denied, and sentence was imposed. On appeal, the trial court's rulings were sustained. In upholding the order denying the motion to set aside the waiver of a jury trial, the reviewing court went on to say that it would seriously interfere with the orderly conduct of trial court business if an accused could waive a jury trial and near the close of the trial before the court could demand without good and sufficient cause that such waiver be set aside. And in approving the denial of the application for disqualification it was held in effect that where the application appears to be based on frivolous grounds, and sets forth no fact or facts as required by section 170 of the Code of Civil Procedure (as amended by St.1933, p. 1828) constituting legal grounds for disqualification, but on the contrary presents only an issue of law, the trial judge himself may properly rule upon and deny the application.

[2, 3] In the present case the application was obviously frivolous, the only ground assigned for disqualification being that some six years prior to the commission of the offense charged in the information the trial judge occupied the position of deputy district attorney in said county; and in this connection defendant went on to aver that for that reason the trial judge entertained "a very high and personal regard for the district attorney and each of the deputy district attorneys * * * and has and will continue to resist any reflection upon the district attorney's said office; that in ruling on questions of law and on admission of evidence affiant believes and avers that it is probable that the affiant cannot have a fair and unbiased trial of the issues of law in said trial by said judge. * * *" As stated, however, not a single ruling made by the trial court during the course of the trial is assigned as error; nor is it anywhere intimated that the evidence is legally insufficient to sustain the trial court's finding as to defendant's guilt; furthermore, it is well established that before bias or prejudice can disqualify a judge it must be shown to exist against the particular party moving for the substitution of the judge, 14 Cal.Jur. 821; 33 Cor.Jur. 1000, and no such claim is here made.

[4] It may be stated also, in support of the trial court's ruling, that section 170 of the Code of Civil Procedure relating to the disqualification of judges declares: "The statement of a party objecting to the judge, on the ground of his disqualification, shall be presented at the earliest practicable opportunity, after his appearance and discovery of the facts constituting the ground of the judge's disqualification, and in any event before the commencement of the hearing of any issue of fact in the action or proceeding before such judge;" and in the case of People v. Berman, 117 Cal.App. 334, 4 P.(2d) 226, the trial court's ruling denying an application for disqualification was sustained upon the ground that the application was not seasonably made. Here, as will be noted, the application was not made until after all issues of fact in the case had been heard and determined.

The judgment of conviction and the order denying the motion for new trial are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

19 Cal.App.2d 553

WARD et ux. v. ALLING et al.

Civ. 11369.

District Court of Appeal, Second District, Division 2, California.

March 15, 1937.

1. **Mortgages** ⚿413

Superior Court did not abuse its discretion in vacating and setting aside its order staying foreclosure of trust deed on certain conditions for noncompliance with such conditions even within additional time given for compliance (St.1935, p. 1208).

2. **Appeal and error** ⚿931(1)

District Court of Appeal must view evidence on appeal in light most favorable to party successful in trial court and accept such court's findings supported by substantial evidence.

3. **Appeal and error** ⚿761

Appellants, not developing points relied on for reversal of judgment appealed from by argument or citation of authorities, are deemed to have abandoned them.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceeding by John D. Ward and wife against Charles A. Alling and another to stay foreclosure of a trust deed on realty. From an order vacating and setting aside an order staying foreclosure on certain conditions and a judgment dismissing the proceeding, petitioners appeal.

Affirmed.

Bernard G. Hiss, of Los Angeles, for appellants.

S. E. Lambert, of Pasadena, for respondents.

CRAIL, Presiding Justice.

The plaintiffs filed their petition in the superior court under the Moratorium Act of 1935 (St. 1935, p. 1208) asking the court to enter such orders as it deemed just and equitable staying the foreclosure of a trust deed on real property. After a trial was duly had, the court made an order staying foreclosure under the conditions, however, that the plaintiffs restore to use the well, on the ranch, known as the "six-inch" well within a certain date and that they restore to use the well known as the "twelve-inch" well within a later date, or show good cause for failure to do so, and upon the further condition that the petitioners keep the premises in good order and repair, and pay the taxes. Petitioners failed to comply with the conditions of the order and a motion to vacate the order and set aside the stay was presented to the court. Plaintiffs asked for additional time and thereupon the motion was continued for an additional three months in which they might have complied with the conditions. Upon the hearing the court found and held that the conditions had not been complied with and no good cause had been shown for failure to do so and vacated and set aside the stay order and rendered judgment against the plaintiffs, dismissing the proceedings. It is from this order and judgment that the appeal is taken.

The plaintiffs present four points upon which they claim the judgment should be reversed, which are stated in the language of the plaintiffs as follows: "1. Was the order vacating the stay of trustee's sale under the Moratorium Act of 1935 an abuse of discretion? 2. Did the evidence support the findings * * * of the court? 3. Do the findings of the court support the conclusions of law * * *? 4. What is meant by 'Restored to Use'?"

[1] Obviously it was not an abuse of discretion for the court, after granting an order for an extraordinary remedy which for that very reason was made upon certain conditions, to vacate and set aside the order when the conditions were not complied with even though additional time had been given for compliance.

[2] As to the second point, it is our duty on appeal to view the evidence in the light most favorable to the party who was successful in the trial court, and, if there is any substantial evidence to support the findings, then the findings must remain as the facts in the case. The plaintiffs seem unfamiliar with this rule, for they content themselves with setting out their own evidence in the light most favorable to themselves, and they do not set out at all the evidence of the defendants, the evidence upon which the findings of the court were based. The defendants on their part contend that "all the findings of fact are supported by the preponderance of all the evidence" and set forth the evidence and argue it upon this basis, as if this were necessary. This court on its part will not permit itself to be relegated to the status of

a trial court jury—for the reasons usually given and for the additional reason that to do so would allow its efficiency in the dispatch of business to be impaired. It is a sufficient answer to plaintiffs' contention to say that there is substantial evidence to sustain the findings of the trial court.

[3] The plaintiffs do not develop points 3 and 4, either by argument or citation of authorities, and for that reason are deemed to have abandoned them. 2 Cal.Jur. 732. We are left in the dark on "what is meant by 'restored to use.'"

Judgment and order affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

---

19 Cal.App.2d 463

WILSON v. MARYLAND CASUALTY CO. OF BALTIMORE.

Civ. 5656.

District Court of Appeal, Third District, California.

March 9, 1937.

1. Insurance ⚷378(3)

Where soliciting insurance agent had no authority to waive conditions of policy or to consummate contract and issue policy, but only authority to take application, transmit it to insurer, and deliver policy to insured, notification to him that insured's answers had been incorrectly given in application made part of policy was not notification to the insurance company, and it was immaterial that the soliciting agent countersigned the policy to authenticate it.

2. Insurance ⚷301

Misrepresentation by applicant for accident insurance as to existence of other and similar insurance was material (St.1935, p. 505, § 331).

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by Minnie May Wilson against Maryland Casualty Company of Baltimore. From a judgment for plaintiff, defendant appeals.

Reversed.

Edmund Davies, Gerald R. Johnson, and Hinsdale, Otis & Johnson, all of Sacramento, for appellant.

M. Z. Lowell, of Auburn, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

Plaintiff had judgment, based upon an accident policy of insurance, from which judgment the defendant appeals.

The answer of the defendant admits the execution and delivery of the policy, and then sets up an affirmative defense of certain untruthful statements contained in the application for the policy, to wit:

1. That at the time of making the application the plaintiff represented and warranted that she had no other accident or health policy.
2. That plaintiff's application for insurance had never been declined.
3. That the defendant had not within five years had medical or surgical advice or treatment, etc.

It is further alleged that those answers were false; that the answers as contained in the application constituted representations and warranties which induced the appellant to enter into and issue its contract of insurance. The questions and answers are as follows:

"No. 10. Q. What accident or health insurance have you in other companies or associations? A. None."

"No. 12. Q. Have you ever been declined, postponed or rated up for life or health insurance? A. No."

"No. 22. Q. Have you, within the past five years, had medical or surgical advice or treatment or any departures from good health? A. No."

The plaintiff testified that she answered the three questions truthfully and correctly, stating that she had accident and health insurance in another company; that a second company had declined to issue insurance to her; and that she had, within five years, had surgical and medical advice, etc. The agent who solicited the insurance testified that he wrote down the answers just as they were given to him. The court, however, found that the answers were correctly given by the plaintiff, but that the soliciting agent, named "Parker," incorrectly transcribed the same. The record shows, however, that after the answers were all transcribed or written into the application the plaintiff signed the same, even though she told the soliciting agent that the answers as written, were not correct. In due time the policy came back from the company, having attached thereto a copy of the application containing the questions and answers just as written in the original application. The plaintiff read the same, testified that the answers were not correct, but kept the policy upon the statement, as she testified, that the soliciting agent Parker, told her that the incorrectness of the answers were immaterial.

The policy contains, among other things, the following: "No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the Company and such approval be endorsed hereon." Also, the following: "Provision No. 24: Do you agree that the falsity of any answer in this application for a policy shall bar the right to recovery thereunder, if such answer is made with intent to deceive or materially affect either the acceptance of the risk or the hazard assumed by the Company?" To which the answer "yes" is appended. This provision is in the application signed by the plaintiff.

The court found that there was no intent to deceive; but the question of materiality of the misrepresentations contained in the application was not passed upon by the trial court. However, the testimony shows that such matters are always considered by an insurance company before issuing a policy, and therefore that the same constitute material facts in determining whether a policy should or should not be issued to the applicant.

As we have stated, the plaintiff signed the application after reading the same and calling the attention of Parker, the soliciting agent, to the incorrectness of the answers, and that upon the delivery of the policy of insurance plaintiff again read the same, notified Parker of the incorrectness of the answers, but kept the policy upon his statement that they were immaterial. The court found, among other things, that the plaintiff notified the defendant of the incorrectness of the answers.

The appellant contends: First, that there is no evidence that Parker had the authority of the defendant to make any waiver of the conditions of the policy, or to represent to plaintiff that any part of said policy, application or answers was immaterial; second, that there is no evidence that the answers set down by Parker did not deceive the defendant company; third, that there is no evidence that plaintiff notified the defendant company of the errors in the answers to any of the questions set down in the policy, and signed by the plaintiff; fourth, that there is no evidence that plaintiff was assured by the defendant company that said answers, as so set down and so signed by her were immaterial, or the plaintiff might safely keep said policy or rely thereon; fifth, that there is no evidence that defendant company had any knowledge of the falsity of the answers as so signed by plaintiff, or that the defendant waived the erroneous answers to any of said questions, or agreed to be bound by said policy, notwithstanding the erroneous answers; sixth, that the evidence shows affirmatively that plaintiff was guilty of implied complicity in the action of Parker in writing false answers, and such showing negatives the truth of the finding that plaintiff acted in good faith, without any intent to deceive the defendant.

The respondent's reply to the appellant's contention relates only to one answer, to wit, that relating to the securing of medical or surgical advice within the period of time limited in the answer. No answer is made to the appellant's contention as to the misrepresentation concerning the fact of the plaintiff having other accident and health insurance, and also having had an application therefor refused by another company.

[1] The finding of the court that the plaintiff notified the defendant insurance company of the incorrectness of the answers as transcribed by the soliciting agent, is squarely answered to the contrary in the case of Sharman v. Continental Insurance Company, 167 Cal. 117, 138 P. 708, 711, 52 L.R.A.(N.S.) 670, in which case the court, in its opinion, used the following language: "It is not claimed here that the representations or statements of Wade were communicated to the general agent of the defendant, or that he had any knowledge in fact of the existence of the conditional contract of sale between plaintiff and Cochran, or that the statement in the policy that plaintiff was the sole and unconditional owner of the property insured was not true. The contention solely is that, be-

cause Wade was agent of the company—the ostensible agent at least—his knowledge bound the defendant. But Wade was merely a soliciting agent of the defendant. He had no authority, actual or ostensible, to waive conditions in the policy. This was not within the scope of any apparent authority he possessed, and his knowledge of the true condition of the title of plaintiff, not communicated to the general agent of the company, was not the knowledge of the latter. The extent of his duties was merely to solicit insurance, and send in applications therefor to the general agent of the defendant. He had no authority to consummate the contract of insurance, and issue the policy, and it is only an agent of this character who could waive conditions notwithstanding the apparent limitations of the power of all agents to waive the conditions or stipulations of a policy. A soliciting agent could not. Iverson v. Metropolitan Life Ins. Co., 151 Cal. 746, 91 P. 609, 13 L.R.A.(N.S.) 866; Fidelity, etc., Co. v. Fresno Flume Co., 161 Cal. 466, 119 P. 646, 37 L.R.A.(N.S.) 322; Mackintosh v. Agricultural Fire Ins. Co., 150 Cal. 440, 89 P. 102, 119 Am.St.Rep. 234; Raulet v. Northwestern Ins. Co., 157 Cal. 213, 107 P. 292."

In the instant case, Parker was simply a soliciting agent and had no authority, actual or ostensible, to waive any of the conditions of the policy; he had no authority to consummate the contract and issue a policy of insurance. All the authority he possesssed was to take the application, transmit it to the defendant, and when it was returned, deliver it to the plaintiff.

In the case of Porter v. General Accident & Assurance Corporation, 30 Cal.App. 198, 157 P. 825, 827, the court had before it a similar question, and held as follows: "One who has authority to take applications, receive, and receipt for premiums, forward them, receive policies from the company, and deliver them after countersigning them, has no power to bind the company by a contract of insurance in any other way than by delivery of a policy issued by the company." The court then goes on to define the powers of a general agent.

In the case of Hargett v. Gulf Insurance Co. (Firemen's Insurance Co., etc., and Monarch Fire Insurance Co., etc.), 12 Cal. App.(2d) 449, 55 P.(2d) 1258, 1260, the court had before it the question of waiver, where the policy contained a paragraph similar to the paragraph which we have quoted from the policy issued to the plaintiff, and there held as follows: "Even though it had been established that Rose was a general agent, the evidence would still be insufficient to show that the companies waived compliance with the conditions of the policies. By the terms of the policies no officer or agent had authority to waive any provision or condition of the policies except by writing indorsed thereon or attached thereto. These provisions may not be ignored. They are valid and must be given effect the same as any other provisions." (Citing a number of cases.)

In the recent case of Taylor et al. v. American Liability Co., 48 F.(2d) 592, 593, the Circuit Court of Appeals of the Sixth District had before it a policy where the questions in the application for insurance did not contain truthful answers, and held as follows: "The defense is that the soliciting agent made no inquiries whatever with reference to this subject-matter, but himself inserted the answers knowing them to be false, and that the insured did not read the policy nor know of the representations which he was apparently charged with making. This defense cannot prevail. The case is, we think, controlled by our decisions in Columbian Nat. Life Ins. Co. v. Harrison (C.C.A.) 12 F.(2d) 986, and Maryland Casualty Co. v. Eddy (C.C.A.) 239 F. 477. The policyholder is held strictly to knowledge of the contents of his policy (New York Life Ins. Co. v. Fletcher, 117 U.S. 519, 534, 6 S.Ct. 837, 29 L. Ed. 934; Lumber Underwriters v. Rife, 237 U.S. 605, 609, 35 S.Ct. 717, 59 L.Ed. 1140; Wyss-Thalman v. Maryland Casualty Co., 193 F. 55 (C.C.Pa.); Conner v. Manchester Assur. Co. (C.C.A.9) 130 F. 743, 70 L.R.A. 106; Louis P. Hyman & Co. v. U. S. Cast Iron P. & F. Co., 225 Ky. 510, 9 S.W.(2d) 226; Metropolitan Life Ins. Co. v. Freedman, Exec., 159 Mich. 114, 123 N.W. 547, 32 L.R.A.(N.S.) 298; the cases already cited from this circuit and many others), and retention of it constitutes an adoption of the application and of the representations upon which such policy was issued. Nor is knowledge of the soliciting agent of the falsity of the answers to be imputed to the principal. By so falsifying the application or schedule of warranties, if such was the fact, the agent would make himself a party to a fraud upon the company, and his knowledge is not then to be imputed to the principal, although under the statutes of some states, not applicable here, the defense may not be available to the insurer. See New York Life Ins. Co. v. Goerlich, 11 F.(2d) 838 (C.C.A.6); Mutual Life Ins. Co. v. Hilton-Green, 241 U.S. 613, 36 S.Ct. 676, 60 L.Ed. 1202; and compare: Thomson-Houston Elec. Co. v. Capitol Elec. Co., 65 F. 341 (C.C.A.6), and Kean v. National City Bank, 294 F. 214, 219 et seq. (C.C. A.6)." This case also holds that knowledge conveyed to the soliciting agent is not knowledge to the company.

In the case of Layton v. New York Life Ins. Co., 55 Cal.App. 202, 202 P. 958, 960, after a statement to the effect that whether the agent of the company is a general agent or soliciting agent, or merely a medical examiner, incorrectly transcribes answers, the company is estopped to assert their falsity, goes on then to show that if the insured has knowledge of the falsity and accepts the policy under such conditions, the insured becomes a participant therein and no recovery can be had upon the policy. We quote therefrom as follows: "Notwithstanding the justice of this rule, it is the statement of only a part of the law of the case, and is subject to the limitation that there must be no complicity on the part of the insured, actual or implied. The element of continued good faith enters into such transactions. The policy of insurance in this case was almost immediately delivered to Layton. It was his duty to read it, and we may assume that he did so. He knew, therefore, that the application and the certificate of the medical examiner, each of which was an integral part of the policy and the consideration therefor, contained two very material and vital statements that were false. His legal and moral duty was then to notify the company of the fraud that had been perpetrated. By his silence he virtually approved of the act of the medical examiner and became responsible for it. By his conduct he made Dr. Cleland his agent as well as the agent of the company, and the forfeiture of the policy is the result. Goldstone v. Columbia Life, etc., Co., 33 Cal.App. 119, 123, 164 P. 416. To the same effect is the decision of our Supreme Court in Madsen v. Maryland Casualty Co., 168 Cal. 204, 142 P. 51, and the opinion of Mr. Justice Field in New York Life Ins. Co. v. Fletcher, 117 U.S. 519, 6 S.Ct. 837, 29 L.Ed. 934, which seems to be the leading case on the subject, and which was affirmed in Mutual Life Ins. Co. v. Hilton-Green, 241 U.S. 613, 623, 624, 36 S.Ct. 676, 60 L.Ed. 1202 [see, also, Rose's U. S. Notes]. Where one holds a policy, referring in apt terms to the warranties and representations contained in the application annexed, for a reasonable time, he is conclusively presumed to know the contents of the contract, and the untruthful answers plainly written in the application. He is thereby estopped to assert that he had no knowledge on the subject. Modern Woodmen v. Angle, 127 Mo. App. 94, 116, 104 S.W. 297, 304. Even though the false answers were written by the examiners of the company without the knowledge of the assured, but the latter has the means at hand to discover the falsehood, and negligently omits to use them, he will be regarded as an instrument in the perpetration of the fraud, and no recovery can be had on the policy. Forwood v. Prudential Ins. Co., 117 Md. 254, 259, 83 A. 169 [171] 172; Providence Life Assur. Soc. v. Reutlinger, 58 Ark. 528, 543, 25 S.W. 835, 840."

In the case of New York Life Ins. Co. v. Fletcher, 117 U.S. 519, 6 S.Ct. 837, 29 L.Ed. 934, the court held that where false answers were written in the application by the agent, and the applicant signed the application without reading the same, the policy was void. This case is relied upon and approved in the Taylor Case, supra.

In the case of Maggini v. West Coast Life Ins. Co., 136 Cal.App. 472, 29 P.(2d) 263, 265, where the court instructed the jury that it was incumbent upon insured to prove that the concealment was made with intent to deceive the insurance company, it was held that such an instruction was erroneous where the insured had knowledge of the falsity of the statements contained in the application. The language of the court in that case is as follows: "One other assignment of error requires but brief consideration. At the request of the respondent, the jury was instructed that it was incumbent upon the defendant to prove by the preponderance of evidence *not only* that the answers of the insured were untrue *but also* that they were made with the intention of concealing his true state of health so that he might deceive the insurance company. Upon the same issue the jury was instructed that a presumption of intent to deceive is only made when statements are made with knowledge of their falsity, and that the burden was upon the insurer to show that the misrepresentations were willfully made, and that, if the jury found that the insured 'did not make wilfully false statements to the questions asked of him by the medical examiner for the defendant insurance company, then you are instructed that said defendant has no right to cancel or rescind the policies sued upon.' The rule in this respect is statutory. Section 2562, Civil Code, reads: *'Effect of concealment.* A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance.' Under this section an intent to deceive on the part of the insured is immaterial, and such intent is presumed when the insured had knowledge of the falsity of the statements. Whitney v. West Coast Life Ins. Co., 177 Cal. 74, 80, 169 P. 997."

In McEwen v. New York Life Ins. Co., 23 Cal.App. 694, 139 P. 242, it was held that the materiality of the representations was a question for the court and not for the jury. In that case the representations were in writing, and under such circumstances it was held that the interpretation of the writing was for the court, and when so interpreted, its materiality was to be determined by the court, and whether the insurance company was, by reason thereof, influenced in forming its estimate of the advantages or disadvantages of the proposed contract. See, also, McEwen v. New York Life Ins. Co., 42 Cal.App. 133, 183 P. 373, and O'Connor v. Grand Lodge, 146 Cal. 484, 80 P. 688. In the case at bar the court made no finding as to the materiality of the misrepresentations.

Our attention has been called to the case of Weiss v. Policy Holders' Life Insurance Ass'n, 132 Cal.App. 532, 23 P.(2d) 38. In that case, however, the appellant was unable to read the application, and of course under such circumstances could not be accused of complicity in their misrepresentations, and in that particular, distinguished the case from that of Layton v. New York Life Ins. Co., supra. The fact that the soliciting agent, Parker, countersigned the contract is of no moment. It only authenticated the policy as delivered to the appellant, and in no wise modified any of its provisions or indicated any authority on his part to modify any of its conditions.

[2] Section 331 of the Insurance Code (St.1935, p. 505) reads as follows: "Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance."

A number of other cases have been cited by the respective parties, but what we have said we think conclusive, and that the judgment must be reversed, even though the answer relating to whether the plaintiff had or had not had medical and surgical advice within the time limit, in the manner of the questions set forth herein, be held material. It cannot be questioned that the fact of other and similar insurance was and is a material consideration in issuing a subsequent or additional policy of like force and effect, as it raises the question of overinsurance.

The judgment is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

19 Cal.App.2d 387

BELLESFIELD v. LE FAVOR et al.

Civ. S. C. 9.

District Court of Appeal, Second District, Division 1, California.

March 1, 1937.

Hearing Denied by Supreme Court April 29, 1937.

1. Sales 🔑391(1)

Where buyer of interest in printing business defaulted in payment of installments, whereupon seller noted upon contract that "no default will be made by nonpayment of principal or interest" and that the equity of the buyer would stand as a liability against the business, notice by seller whereby he revoked any waiver of payment or extension of time of payment was properly treated by buyer as a repudiation of agreement and entitled her immediately thereafter to sue for money paid to seller.

2. Limitation of actions 🔑15, 24(1)
Sales 🔑394

Where buyer purchased interest in printing business and seller agreed after default in payment of installments that no default would be made by nonpayment of principal or interest and that buyer's equity would stand as liability against the business, agreement of seller was a waiver of limitations, and, on repudiation thereof, action by buyer to recover money paid, which was filed within five months thereafter, was not barred by laches or by statute of limitations (Code Civ. Proc. § 956a; Const. art. 6, § 4¾).

Appeal from Superior Court, Los Angeles County; J. J. Trabucco, Judge.

Action by Ethel L. A. Bellesfield against Walter L. Le Favor and others, who filed a counterclaim. Judgment for plaintiff, and Walter L. Le Favor appeals.

Affirmed.

Roy C. Kaiser, of Los Angeles, for appellant.

Powers & Martin, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

This is an appeal by the defendant from a judgment whereby, in an action for declaratory relief, the trial court awarded to the plaintiff the sum of $2,350. It is contended that the judgment is contrary to the law and the evidence, the further point being made that the failure of the trial court to find on the plea that the action was barred by the statute of limitations renders the findings insufficient to support the judgment.

On May 1, 1928, the respondent undertook to purchase from the appellant a one-half interest in the printing business conducted by him in the city of Los Angeles. The agreed purchase price was $5,340, payments to be made at the rate of $50 per month or more, at the option of the respondent. The sum of $1,500 was paid down, and thereafter monthly payments were made until a total of $2,350 was paid upon the purchase price. On October 22, 1929, the appellant indorsed upon the formal contract which had been signed by the parties the following notation:

"October 22, 1929.

"The equity of $2350 at the above date will stand as a liability against the business and no default will be made by non-payment of principal or interest.

"W. L. LeFavor."

On November 21, 1933, four years and one month after the above-quoted memorandum was signed by appellant, he made a written demand upon respondent requiring the payment to him within ten days of the sum of $3,640 "with interest thereon at 6% from September 22, 1928," claiming that that amount was due him under the terms of the contract of May 1, 1928. By this demand, the appellant undertook to revoke and rescind any waiver of payment or extension of time of payment under the contract, and declared the contract in default. Notice was given in the demand that the appellant was at all times, and at the present time, ready, willing, and able to perform his obligations under the contract, and to deliver to the respondent a bill of sale of a one-half interest in the printing business, closing with a statement to the effect that unless the amount mentioned were paid within the ten day period, "the said contract will be deemed discharged and all obligations thereunder released and all moneys paid thereunder shall be deemed forfeited as liquidated damages for the breach of said contract."

Since the full purchase price for the one-half interest in the printing business was fixed at $5,340, and by the very terms of the demand it appeared that respondent had paid on account thereof the sum of $2,350, it is not clear why a demand was made for $3,640, or $650 more than the amount agreed upon. The respondent has not paid any portion of the amount demanded by appellant; her reaction to the demand appears in the complaint filed in this case on March 15, 1934, approximately four years and five months following the date of the notation entered by appellant on the contract of purchase.

The complaint set up the contract and the notation, alleging that the latter instrument constituted a waiver and abandonment of all sums due or to become due over and above the sum of $2,350. The prayer of the complaint asked that the rights and obligations of the parties be determined; that the amount due from the defendant to the plaintiff be fixed; and that "the equity be determined as a valid and subsisting undivided interest in and to the entire printing establishment, free and clear of any setoffs or counterclaims. And for such further relief as the Court may deem meet in the premises." Respondent's answer pleaded no consideration for the agreement of October 22, 1929, alleged that appellant was at that time in default, and set up the bar of four years created by the statute of limitations. The answer also pleaded laches and included a counterclaim for $3,640 for breach of contract. The trial court made no specific finding upon the plea of laches or of the statute of limitations, but found in favor of respondent on the other defenses urged by appellant, as well as upon the counterclaim.

By the judgment no lien or other charge was imposed upon the printing establishment, the only order established by the judgment reading: "the plaintiff to have and recover of and from Walter L. Le Favor the sum of $2,350.00, without cost."

[1] Not knowing what testimony was produced at the trial, the record on this appeal consisting merely of the clerk's transcript, we must decide from the facts above related and a study of the documents before us in the pleadings whether the judgment can be and should be sustained. One of the first things to attract our attention is the date of the notation, October 22, 1929. This was the time when the stock markets of the country crashed, business everywhere collapsed, and no one could foresee or anticipate what the future held or when material prosperity might return. In endeavoring to determine what appellant meant when he wrote upon the original contract this notation couched in indefinite language, the court was justified in considering the time and the conditions then prevailing. It is not a strained construction to say that under the circumstances existing at that time this notation was intended to operate as a suspension for an indefinite period of the requirement of monthly payments under the contract, for it is expressly stated that "no default *will be made* by nonpayment of principal or interest" and the writing was also assurance to the respondent that the money theretofore invested would not be lost for "the equity of $2350 at the above date *will stand* as a liability against the business." Support is given to this construction of the agreement by the fact that, so far as appears from the record, no default was claimed during the four-year period following the date of the notation, but almost immediately thereafter, on November 21, 1933, respondent gave written notice that he "hereby revokes and rescinds any waiver of payment or extension of time of payment which may have heretofore been made and declares said contract in default and demands that all sums past due and unpaid under said contract with interest be paid." We think this attempted revocation or rescission of "any waiver of payment or extension of time of payment which may have heretofore been made," is couched in language that is significant; in fact, it is practically an admission that the time requirement as to payments theretofore due under the contract had been waived. In this same notice appellant offered to perform and to deliver a bill of sale to a one-half interest in the business upon receipt of all moneys due, but "unless said contract is performed and all moneys due and unpaid are paid according to said contract and this demand within ten (10) days from the date hereof * * * the said contract will be deemed discharged and all obligations thereunder released, and all moneys paid thereunder shall be deemed forfeited as liquidated damages for the breach of said contract." This notice was a threat of very summary action. It threw overboard the agreement under which the parties had been operating (no default having been claimed prior to the date of the notice), and proposed to appropriate the money already invested by respondent (which we have noted was to stand as a liability against the business), unless the respondent should produce in a lump sum within a few days an amount of money, exceeding by $650, the balance of the price agreed upon for the half interest in the business. Naturally the respondent treated this as a repudiation of the agreement between herself and the appellant and, in our judgment, was entitled immediately thereafter to sue for the money which she had paid to appellant and which very likely he had used in his business in the years of deep economic depression.

[2] The agreement that "the equity of $2350 at the above date *will stand* as a liability against the business" was not limited to a specified time and, in our opinion, therefore, was continuous, as a waiver of the statute of limitations was held to be in State Trust Co. v. Sheldon, 68 Vt. 259, 35 A. 177. See, also, Brownrigg v. DeFrees, 196 Cal. 534, 238 P. 714. By this agreement the status quo was to be maintained indefinitely, an object that would fail of accomplishment if the statute of limitations were to operate meanwhile. That the trial court took this view is evident from the judgment that was signed. It may be that we could infer, as ultimate facts inevitably flowing from the facts found (Emmal v. Webb, 36 Cal. 197, 204), that this action is not barred by laches or by the statute of limitations, but we prefer to make a definite finding to that effect. Since the evidence clearly shows that the promise of the appellant not to declare a default, and further, to maintain respondent's interest in the business, was broken on November 21, 1933, we resort to the provisions of section 4¾ of article 6 of the Constitution, and section 956a of the Code of Civil Procedure, and hereby make and enter our

finding (additionally to the findings of the trial court) that this suit filed within five months after November 21, 1933, is not barred by laches or by the statute of limitations.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.

19 Cal.App.2d 401

AURENZ v. LOS ANGELES RY. CORPORATION et al.

Civ. 11280.

District Court of Appeal, Second District, Division 2, California.
March 2, 1937.

Rehearing Denied March 24, 1937.

Hearing Denied by Supreme Court April 29, 1937.

1. Appeal and error 🔑1064(1)
Street railroads 🔑118(13)

Instructions, in action for injuries to driver of automobile struck by defendant's street car, that common prudence required plaintiff to come to full stop before attempting to cross street car track, if there was any obstruction to her view, *held* prejudicially erroneous.

2. Street railroads 🔑98(6)

Traveler is required to exercise only degree of care and prudence used by men possessing such qualities in ordinary or average degree before attempting to cross street car track.

3. Street railroads 🔑118(13)

Instruction, in action for injuries to driver of automobile struck by defendant's street car, that common prudence required plaintiff to come to full stop before attempting to cross street car track and allow car to move out of her field of vision, if there was any obstruction to her view, *held* erroneous, in absence of evidence that any car obstructed her vision.

4. Trial 🔑252(1)

Giving of instruction without any support in evidence is improper.

5. Trial 🔑296(13)

Error in giving instruction *held* not cured by trial judge's statements during discussion with defendant's counsel that it was all right with judge to take out portion of instruction to which counsel objected and that he would take it all out, in absence of showing that he withdrew instruction from jury or directed them to disregard it.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Carrie Aurenz against the Los Angeles Railway Corporation and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Joseph Anderson, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles (E. H. Chapman, of Los Angeles, of counsel), for respondents.

McCOMB, Justice pro tem.

Plaintiff appeals from a judgment in favor of defendants after a trial before a jury.

Viewing the evidence most favorable to defendant (Ah Gett v. Carr, 3 Cal.App. 47, 48, 84 P. 458), the facts in the instant case are:

Cypress avenue runs in a northerly and southerly direction in the city of Los Angeles where it intercepts Future street, which lies in an easterly and westerly direction. On February 28, 1936, plaintiff while driving westerly on Future street was struck at the intersection by defendant's street car traveling in a southerly direction. As the result of the accident plaintiff suffered serious injuries.

The questions presented for determination are these:

First: Was it prejudicially erroneous for the trial court at defendant's request to instruct the jury as follows:

"It was the duty of Carrie Aurenz to look and listen in approaching the railroad crossing and to look at such point where such looking would be effective. If there was any obstruction to her view, then common prudence under such circumstances would require that she come to a full stop before attempting to cross the track and allow said south-bound car to move out of her field of vision or that she look immediately upon being able to look past such obstruction and that she see and heed that which might be approaching on the railroad tracks within

her range of vision, and if she failed in these respects, she was guilty of negligence and if such negligence contributed proximately in any degree to the cause of the accident, then the plaintiff cannot recover and your verdict must be against her and in favor of the defendant."

Second: If the foregoing instruction was erroneous, did the trial court correct this error by withdrawing the instruction from the consideration of the jury?

The first question must be answered in the affirmative. This instruction was prejudicially erroneous for two reasons:

[1, 2] (1) The jury was misinstructed as to the law, in that the instruction required the plaintiff to come to a full stop before attempting to cross defendant's street car track. This is not the law in California. The correct rule is that the traveler is required to exercise only that degree of care and prudence, which men who possess those qualities in an ordinary or average degree use. Clark v. Bennett, 123 Cal. 275, 279, 55 P. 908; Dawson v. San Diego Electric Ry. Co., 82 Cal.App. 141, 147, 255 P. 215.

[3, 4] (2) It was conceded by defendant that there was no evidence of any car obstructing plaintiff's vision. Therefore it was erroneous to instruct the jury that, if there was any obstruction to plaintiff's view, then she should come to a full stop before attempting to cross the street car track "and allow said southbound car to move out of her field of vision." The giving of an instruction which finds no support in the evidence is improper. Scandalis v. Jenny, 132 Cal.App. 307, 313, 22 P.(2d) 545; Buttrick v. Pacific Elec. Ry. Co., 86 Cal.App. 136, 139, 260 P. 588.

[5] The second question must be answered in the negative. After the instruction set forth above had been read to the jury, the record discloses the following occurred:

"Mr. Chapman: Pardon me, Your Honor: I don't like to interrupt, but I would like permission to withdraw part of that last instruction before the last instruction, which contained reference to a southbound car. It is apparently a typographical error in our office. I think that was taken from another case in which there was a car that obstructed the vision of the driver. I don't want the jury to be confused on that. There is not evidence of any car obstructing the vision. I didn't notice it before.

"The Court: I don't see anything about a car in here.

"Mr. Chapman: I think the one just before, where it says, 'if there was any obstruction to her vision.'

"The Court: Well, that is all right. It didn't say anything about a car.

"Mr. Chapman: Maybe I was wrong.

"The Court: I will read it again for your benefit. * * *

"Mr. Chapman: Thank you.

"The Court: 'It was the duty of Carrie Aurenz to look and listen in approaching the railroad crossing and to look at such point where such looking would be effective. If there was any obstruction to her view,'—that comes within the evidence,—'then common prudence under such circumstances would require that she come to a full stop before attempting to cross the tracks and allow said southbound car to move out of her field of vision or that——'

"Mr. Chapman: That is the part I wish to withdraw.

"The Court: This was a southbound car.

"Mr. Chapman: Yes, but I think the instruction as it is written implies that car was in her field of vision at the time of——

"The Court: I did not draw the instruction. If you want to take it out, we will take it out.

"Mr. Chapman: I would like to, your Honor.

"The Court: O. K. All right with me.

"Mr. Chapman: That particular portion was all I wanted, that southbound car.

"The Court: I will take it all out. There is no argument. I can't split it up now.

"Mr. Chapman: Thank you, Your Honor."

It is clear from a reading of the foregoing colloquy that it was nothing more nor less than a discussion between the judge and counsel for the defendant, and it does not appear in the record that after the jury had been misinstructed as set forth supra, the court withdrew the instruction from the jury or in any appropriate manner directed them to disregard it.

For the foregoing reasons the judgment is reversed.

We concur: CRAIL, P. J.; WOOD, J.

19 Cal.App.2d 405

JOHNSON v. TAFT SCHOOL DIST. et al.

Civ. 1733.

District Court of Appeal, Fourth District, California.

March 2, 1937.

Hearing Denied by Supreme Court April 29, 1937.

1. Judgment ⚷703

Findings and order of State Board of Education in proceedings to revoke or suspend permanent teacher's credentials and life diploma *held* not a complete adjudication of charges involved in suit by teacher to be reinstated in her position after dismissal for unprofessional conduct by school district board, and did not constitute an estoppel against matters pleaded therein (School Code, § 5.382).

2. Appeal and error ⚷1052(5)

In proceedings to be reinstated as permanent teacher, error, if any, of trial court in receiving evidence of misconduct of teacher which was barred by limitations *held* cured where trial court did not base judgment on those specifications of misconduct barred by School Code (School Code, § 5.657, as added by St.1931, p. 1396).

3. Appeal and error ⚷1010(1)

In proceedings by teacher to be reinstated as permanent teacher, evidence as to whether teacher was guilty of misconduct justifying dismissal *held* for trial court, where it could be found that there had been a course of conduct on part of teacher that produced serious friction in school, insubordination on her part, and a refusal to conform to instructions and requirements of her superiors.

4. Appeal and error ⚷1010(1)

Findings of trial court, when supported by substantial evidence, cannot be disturbed on appeal.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Proceedings by Stella Clough Johnson, formerly Stella Verne Clough, against the Taft School District, successor to the Board of Trustees of Conley School District, in the County of Kern, State of California, and others, to be reinstated as a permanent teacher in the school district. From an adverse judgment, the petitioner appeals.

Affirmed.

Swaffield & Swaffield, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for appellant.

Borton, Petrini & Conron, of Bakersfield, for respondents.

MARKS, Justice.

This is an appeal from a judgment in an action wherein petitioner sought to be reinstated as a permanent teacher in the Taft School District, formerly known as the Conley School District.

On October 26, 1931, petitioner had attained the status of a permanent teacher in the school district. On that day the principal of the school filed a complaint with the state board of education seeking revocation or suspension of petitioner's junior high school credentials and her elementary life diploma. The complaint was referred to the Kern county board of education, which took evidence and, although it found petitioner guilty of acts of insubordination and of maintaining an unprofessional attitude in her work, recommended against the revocation or suspension of her credentials and diploma as too severe a penalty to be inflicted upon her. The charges were thereupon dismissed by the state board of education. The only other order that the state board could have made was either to revoke or suspend the credentials and diploma. Section 5.382, School Code.

[1] About March 9, 1932, the principal filed with the board of trustees of the respondent district a complaint charging petitioner with unprofessional conduct and seeking her dismissal from the schools. A hearing was had and petitioner was dismissed. She brought this action seeking reinstatement. The trial court held against her and this appeal followed. The charges made in the instant case are virtually a copy of some of those filed with the state board of education. Petitioner first urges that the findings and order of the state board of education are a complete adjudication of the charges involved here and constitute an estoppel against the matters pleaded before the respondent board of education. This contention is without merit. Saxton v. State Board of Education, 137 Cal.App. 167, 29 P.(2d) 873; Bold v. Board of Medical Examiners, 135 Cal. App. 29, 26 P.(2d) 707.

[2] Petitioner next urges that the trial court erred in receiving evidence of misconduct which was barred by the statute

of limitations. This evidence was admitted in support of certain specifications of the complaint filed by the principal. The trial judge found that these specifications were barred by the provisions of section 5.657 of the School Code (as added by St.1931, p. 1396) and did not base his judgment upon them. This cured the error, if any.

[3, 4] Petitioner next urges that "the finding and judgment of dismissal are not supported by the evidence." It would serve no good purpose to detail the considerable evidence in the record. It should be sufficient to state that it shows a long drawn out course of conduct on the part of petitioner that produced serious friction in the school and showed insubordination on her part and a refusal to conform to the instructions and requirements of her superiors.

In Goldsmith v. Board of Education, 66 Cal.App. 157, at page 168, 225 P. 783, 787, et seq., it is said: "The teacher is intrusted with the custody of children and their high preparation for useful life. His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his unofficial utterances, his associations, all are involved. His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher's selection and retention. * * * The board of education is responsible for the proper conduct of our schools. They administer them through the teachers they employ. To enable them to discharge this obligation they must have such power over their teacher as is necessary to promote the efficiency of the schools and to prevent or to punish offenses against it. In occupations involving a high degree of personal, as distinguished from mechanical or technical service, specification of acts of unfitness are wholly impossible and have never been attempted. * * * Cannot the Legislature likewise provide for the dismissal of a teacher from a particular employment for such actions as in the sound discretion of the board of education amount to 'unprofessional conduct'? It would seem clear that it could. In both cases the dismissal has been only from a particular employment, leaving the person dismissed free to prosecute his professional employment elsewhere. There is an undeniable difference between the qualification of a man for the general practice of a profession and his fitness for some particular employment. Transient and local causes may render him undesirable in the latter case although his general fitness might be conceded. There is a vast difference between the right of a board to take away a man's right to practice a profession by revoking his license and subjecting him to dismissal from a single employment after he has become subject to a substantial objection of his employer."

A board of education is intrusted with the conduct of the schools under its jurisdiction, their standards of education, and the moral, mental, and physical welfare of the pupils during school hours. An important part of the education of any child is the instilling of a proper respect for authority and obedience to necessary discipline. Lessons are learned from example as well as from precept. The example of a teacher who is continually insubordinate and who refuses to recognize constituted authority may seriously affect the discipline in a school, impair its efficiency, and teach children lessons they should not learn. Such conduct may unfit a teacher for service in a school even though her other qualifications may be sufficient. "Book learning" is only a phase of the important lessons a child should learn in a school.

Primarily it should be the function of the board of education to determine the effect on a school of unprofessional conduct on the part of a teacher. It should hear evidence, make its findings, and draw its conclusions from them. If its findings and conclusions are supported by substantial evidence it would be a poor policy for a court to disturb them.

In the instant case the findings of the trial court agreed with the findings of the board of education, with the exception that the trial court found certain specifications of misconduct on the part of petitioner barred by the statute of limitations. The findings of the trial court are supported by substantial evidence. Under familiar rules governing us they cannot be disturbed on appeal.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

19 Cal.App.2d 356

KELLY et al. v. FRETZ et al. (two cases).

Civ. 10253.

District Court of Appeal, First District,
Division 2, California.

Feb. 26, 1937.

Rehearing Denied March 27, 1937.

Hearing Denied by Supreme Court
April 26, 1937.

1. Appeal and error ⚷1173(1)

Judgments against "the defendant," in actions against driver and persons for whom driver was alleged to have been driving automobile as their agent, would be reversed as to such persons, where no case was made against them and no dismissal as to them was made as required by statute, notwithstanding statement of counsel for plaintiff at close of evidence that he presumed that there might be a dismissal as to such persons (Code Civ. Proc. § 581, as amended by St.1933, p. 1868).

2. Appeal and error ⚷1064(1)
Automobiles ⚷246(58)

In actions for death of pedestrian who was struck by automobile while crossing street, and for nervous shock sustained by another pedestrian from sudden passing of such automobile, instructions that presumption that pedestrians exercised ordinary care for their own safety while crossing street constituted prima facie evidence that pedestrians were not contributorily negligent *held* prejudicial error, where there was ample testimony from plaintiffs' witnesses as to what pedestrians did or did not do at the crossing.

3. Damages ⚷52

Verdict for pedestrian, suing for injuries resulting from fright caused by automobile which hit pedestrian's mother-in-law and child, and was alleged to have passed close to pedestrian while they were all crossing street, could not rest on grief caused by injuries to mother-in-law and child.

4. Damages ⚷192

Evidence that pedestrian, suing for injuries allegedly resulting from fright caused by automobile which hit pedestrian's mother-in-law and child and was alleged to have passed close to pedestrian while they were all crossing the street, feared for her safety, *held* insufficient to support verdict for pedestrian.

Appeal fom Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Actions by Jean Kelly and another, and by Vera Lawrence, administratrix of the estate of Beatrice Kelly, deceased, against Madeline Fretz, Ellen Story Fretz, Paul Fretz, and Mrs. Paul Fretz. From the judgments, the defendants appeal.

Judgments reversed, with directions to enter judgments for Ellen Story Fretz, Paul Fretz, and Mrs. Paul Fretz, and to retry the issues as to Madeline Fretz.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellants.

Byron Coleman, of San Francisco, and Jensen & Holstein, of San Jose, for respondents.

NOURSE, Presiding Justice.

[1] These two cases were consolidated for trial and are appealed on the same transcript. Though separate briefs are filed in each case, the appellant has made the points argued in the Lawrence case applicable to the appeal in the Kelly case. The causes of action both arose out of the same occurrence. Jean Kelly and her mother-in-law, Beatrice Kelly, were crossing the main highway known as El Camino Real where it runs north and south through Redwood City at a point near its intersection with Jefferson avenue, at about 6:30 in the evening of December 1, 1934. Madeline Fretz was at that time driving an automobile northerly on El Camino Real. Jean Kelly passed from the westerly side of the highway leading a small child by the hand; Beatrice Kelly followed immediately behind her leading another child. The car struck Beatrice Kelly causing injuries resulting in her death. It also struck the child she was leading inflicting injuries upon him for which recovery was had in another action. The plaintiffs in the Lawrence case are the adult children of Beatrice Kelly. In the second case the plaintiffs are Jean Kelly and her husband. In both cases Paul Fretz, Mrs. Paul Fretz, and Ellen Story Fretz were joined as defendants upon allegations that Madeline Fretz was driving the car as their agent. These allegations were denied, and no proof was offered to support them. In the Kelly case the answer was filed in behalf of all the defendants; in the Lawrence case Madeline Fretz alone answered. In both cases the verdict was returned against "the defendant." In both cases the judgment was entered against "said defendant" without further designation. All defendants have appealed from the judgments and urge a reversal as to those other than Madeline Fretz for the

reasons just stated. Respondents reply that the verdicts were rendered only against Madeline Fretz, and that a dismissal as to the other defendants was stipulated to. Neither statement is supported by the record. At the close of the evidence, counsel for plaintiffs stated: "I presume that there may be a dismissal as to the other defendants, except Madeline Fretz." No order of dismissal was entered. The reporter's transcript shows a form of verdict handed the clerk by the foreman of the jury which named Madeline Fretz alone as "defendant" in each case. The clerk's transcript, certifying the verdict on file, does not contain that designation. Since no dismissal was made in accordance with the provisions of section 581 of the Code of Civil Procedure, as amended by St. 1933, p. 1868, we cannot treat these judgments as relieving these other defendants from liability. For this reason, and for the further reason that no case was made against any of them, the judgments are reversed as to Ellen Story Fretz, Paul Fretz, and Mrs. Paul Fretz. We will hereafter refer to Madeline Fretz as the defendant and appellant.

The evidence of the negligence of Madeline Fretz in the operation of the car is admittedly sufficient to sustain the verdict against her, and therefore does not need restatement. Her defense of the contributory negligence of both parties was the real issue in both cases. She testified that as she approached the intersection a large neon sign, stretched across the highway for advertising purposes, cast a shadow north of the intersection, that before she reached the middle of the intersection she saw the women running across the highway in this shadowed space and applied her brakes at the middle of the intersection. The undisputed evidence shows that Mrs. Beatrice Kelly was struck at a point twelve feet west of the easterly curb of the highway, and that the skidmarks caused by defendant's tires commenced at the middle of the intersection. Police officers who were almost immediately on the scene testified that the point of impact was twelve feet west of the easterly curb and from fifteen to seventeen feet north of the pedestrian lane. Jean Kelly denied that they were running across the highway, that they were north of the pedestrian lane, and that she had seen defendant's car or its lights at any time prior to the collision. Other witnesses who crossed the highway immediately in front of these parties, and who were called as witnesses by them, testified that they saw the lights of defendant's car two or three blocks down the highway.

[2] Upon this evidence the parties went to the jury on the issue of contributory negligence, and the first point raised by this appellant, which is common to both cases, is that the trial court improperly instructed the jury as follows: "In an action for death of a pedestrian struck by an automobile, the deceased is presumed to have exercised ordinary care for his or her own safety, and this presumption is sufficient to constitute prima facie evidence that the deceased at the time of the death was free from contributory negligence." And "It is not contributory negligence as a matter of law for a pedestrian to cross at a place other than an established crossing, the presumption being that while so doing he is exercising the requisite degree of care for his own safety."

The objection to the instructions is that, since there was full, ample, and complete evidence as to what the parties did or did not do, there was no room for the presumption that they were "free from contributory negligence"; that, since the evidence as to what the injured parties did or did not do was conflicting, it was the province of the jury to resolve that conflict in the light of the testimony offered; and that the court could not say that the jury might disregard all the direct evidence of contributory negligence and find the parties free from such negligence on the presumption alone. It might be added that, with a single exception, all the direct evidence showing what the parties did or did not do came from plaintiffs' witnesses. The single exception was the testimony of the defendant that she saw the woman running across the highway at a point north of the pedestrian lane, but, in respect to the point of crossing, this testimony was in harmony with that of witnesses called by the plaintiffs, but in conflict with that of Jean Kelly. It was the province of the jury to resolve this conflict under proper instructions. In such a case there is no room for an instruction that the party is presumed to have been free from contributory negligence. Paulsen v. McDuffie, 4 Cal.(2d) 111, 119, 47 P.(2d) 709; Rogers v. Interstate Transit Co., 212 Cal. 36, 38, 297 P. 884, 886; Butcher v. Thornhill, 14 Cal.App.(2d) 149, 58 P.(2d) 179, 184; Lewin v. Margolis, 14 Cal.App.(2d) 746, 59 P.(2d) 153, 155; Tuttle v. Crawford (Cal.Sup.) 63 P.(2d) 1128. It was said in the Rogers Case: "Whatever the rule may be when the evidence contrary to the presumption is produced by the adverse party, it is well established in this state that a presumption in favor of a party is entirely dispelled by the testimony of the party himself or of his witnesses. Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, 9, 210 P. 269."

Here, by the direct evidence of plaintiffs' witnesses, it was shown that the parties were crossing the highway at a point beyond the intersection, and the defendant testified that the large neon sign over the highway cast a shadow at that point. If the jury believed this testimony it might have had some weight on the question of contributory negligence. But it was the province of the jury to determine that issue in view of *all* the circumstances, and when it was instructed that the deceased should be presumed to have exercised the "requisite degree of care" in crossing the highway without regard for the circumstances and conditions of the particular crossing, the trial court, in effect, declared that as a matter of law the plaintiffs could be found free from contributory negligence on the presumption alone, and took from the jury the only defense upon which the case was tried. For these reasons it is impossible to say that the instructions were not prejudicial.

[3, 4] Mrs. Kelly sued for the "severe nervous shock to her entire nervous system" alleged to have resulted from the negligence of defendant in causing the automobile "so closely, swiftly and suddenly to pass said Jean Kelly as to frighten said Jean Kelly." This witness testified that she crossed the highway directly in front of her mother-in-law, that she did not run, that she did not see the defendant's car at anytime before the collision, that she did not see its lights which were admitted to have been burning at the time, and that after she reached the sidewalk she lifted herself up with her little boy and *then* heard the crash of the car striking her mother-in-law. The undisputed evidence is that the point of this "crash" was twelve feet west of this curb. If Jean Kelly was not running at that time, and if she did not see the car or its lights, it would, of course, have been impossible for her to have been struck, pushed or brushed by the car which crashed into her mother-in-law twelve feet from the curb after Jean Kelly had landed on the curb and had had time to arise from it with her child. During her examination, her counsel stipulated that she had not been struck by the car; she would not testify that she had been pushed or brushed by the car, statements of her counsel to the contrary notwithstanding. She testified that she felt "something" push or brush her, but that might have been her child or some other pedestrian, and, since she did not see the car or its lights, it is manifest that she was not pushed or brushed by it.

The issue in this case is clear. The plaintiffs sued for the injuries resulting from the fright caused Jean Kelly by the defendant's acts. She was not frightened by the approach of the automobile because she had no knowledge of it. After the crash, and while she was on the sidewalk, she had no fear for her own safety, but could have had fear for the safety of her son. She must have been shocked at the sight of her mother-in-law lying in the street, and at the sight of her son who was carried to her injured after the police had arrived on the scene and had placed her in their car. All these elements were thrown to the jury, and it is impossible to determine upon which the verdict was based. Manifestly the verdict could not rest upon grief caused by the injuries to others. Clough v. Steen, 3 Cal.App.(2d) 392, 39 P.(2d) 889; Kalleg v. Fassio, 125 Cal.App. 96, 13 P.(2d) 763. If it rested upon the element of fright produced by fear for the safety of her child, the authorities differ on the right of recovery. Lindley v. Knowlton, 179 Cal. 298, 302, 176 P. 440. If it rested on fear for her own safety, her evidence fails to support the verdict.

The judgments are reversed with directions to enter judgments for Ellen Story Fretz, Paul Fretz, and Mrs. Paul Fretz, and to retry the issues as to Madeline Fretz.

We concur: STURTEVANT, J.; SPENCE, J.

MURPHY v. DAVIS.

Civ. 11170.

District Court of Appeal, Second District,
Division 2, California.
Feb. 23, 1937.

Hearing Denied by Supreme Court
April 22, 1937.

1. Breach of marriage promise 🔑21

In action for breach of contract to marry, declarations of plaintiff made out of defendant's presence as to her contemplated marriage with defendant, though not admissible as evidence of agreement to marry, were admissible, after prima facie evidence of agreement to marry and of its breach, for purpose of showing humiliation of plaintiff by breach as element of damage to plaintiff's feelings.

2. Breach of marriage promise 🔑18

In action for breach of contract to marry, testimony that defendant promised to marry plaintiff when he got his "affairs straightened out" or when his "lawsuits were terminated" *held* not fatally variant from allegation that defendant promised to marry plaintiff within reasonable time, where many of promises testified to were made without including any statement of time for performance.

3. Breach of marriage promise 🔑8

Where promise to marry specifies no time for performance, law will imply that promise shall be performed within reasonable time under particular circumstances.

4. Appeal and error 🔑1010(1)

Court of Appeal will not disturb fact finding as to terms of oral contract if there is any substantial evidence to sustain finding.

5. Breach of marriage promise 🔑5, 7

In action for breach of contract to marry, defendant's promise to marry plaintiff *held* supported by consideration of plaintiff's promise to marry defendant, and not invalidated by fact that plaintiff had sexual relations with defendant in view of their engagement.

6. Breach of marriage promise 🔑2

Promise to marry plaintiff within reasonable time *held* sufficiently definite as to time of performance to support action for breach of contract to marry.

7. Appeal and error 🔑977(1)
New trial 🔑6

Rulings on motions for new trial are within trial court's sound discretion, and will not be reversed unless there is affirmative showing of abuse of discretion.

WOOD, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Anna Murphy against Mansell A. Davis. Judgment for plaintiff, and defendant appeals.

Affirmed.

S. Ward Sullivan and Marcus R. Brandler, both of Los Angeles, for appellant.

Rosalind Goodrich Bates, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff in an action for damages for breach of contract to marry.

Viewing the evidence in the light most favorable to the successful party in the trial court, the facts are as follows: Defendant asked plaintiff to marry him, and shortly thereafter plaintiff accepted said promise to marry defendant and gave her promise in return. In the fall of 1934 defendant renewed said promise to marry, but postponed the marriage from time to time without fixing a definite date. Plaintiff, in view of the fact that she was engaged to marry defendant was persuaded to enter into sexual relations with him. Defendant took plaintiff with him as his wife to New Mexico, Colorado, Utah, and Arizona, and induced plaintiff to pose as his wife during this trip. Defendant showed plaintiff various pieces of property and discussed buying a home with her in the state of Colorado and purchased a tax deed on said property, after the property had been approved by plaintiff. Plaintiff became pregnant by defendant. Defendant stated to mutual friends that she was carrying his child and that he wished her to give birth to the child. At this time he again promised plaintiff that he would marry her.

Appellant's first contention is that "the trial court committed prejudicial error in permitting respondent to introduce, over the objection of defendant (appellant), the hearsay and self-serving declarations" of two witnesses "as to her intention to marry respondent, not in the presence of the defendant, Mansell A. Davis." In this regard the record shows the following: Elsa Clomstad, an acquaintance of plaintiff, testified: "During '35 have you had any conversation with Mrs. Murphy as to whether or not Mr. Davis intended to marry her?

"Mr. Hess: I object to that as calling for hearsay.

"The Court: The objection is overruled.

"A. Yes. * * *

"Q. I mean did Mrs. Murphy discuss her contemplated marriage with you? A. Yes.

"Mr. Hess: I object to that and move to strike it out upon the ground it is irrelevant and immaterial and hearsay, a self-serving declaration of the plaintiff not in the presence of the defendant.

"The Court: The motion is denied. * * *

"Q. In the spring of '34. What if anything did she say to you? * * * A. I objected to Mr. Davis walking in her room without knocking on the door.

"Q. You were there when he walked in? A. Yes.

"Q. What happened then? A. When Ann returned, I sat alone in her room at the time, and when Ann returned I told her I did not like the idea. Then Ann told me, 'It is all right. We are going to get married.' * * *

"Q. Did you have any conversation about the trip then at all? A. Yes.

"Q. Anybody else besides you two? A. No.

"Q. What if anything was the conversation? A. She told me about the trip, the auto camps.

"Mr. Hess: The same objection.

"The Court: The same ruling.

"Mrs. Bates: May we understand that it goes to all this line of question?

"The Court: The same objection to all of this. All right, what did she say? A. She told me about the auto camp they were going to operate, and I was sure they were married. I asked her several times, 'Aren't you sure you are married?' and she said 'No.'"

Mrs. Clara Smart, a sister of plaintiff, testified as follows:

"Q. By Mrs. Bates: You then, following this, had a conversation with your sister some time later about Mr. Davis? A. Quite often. * * *

"Q. By Mrs. Bates: Was there anything said about marriage?

"Mr. Hess: I object on the ground it is not shown to be in the presence of the defendant, irrelevant and immaterial to any issues.

"The Court: The objection is overruled. I will give you an objection to all this line of questioning, the same objection.

"A. Not at that time.

"Q. By Mrs. Bates: At any time did she ever talk to you about her marriage to Mr. Davis? A. She did.

"Q. When was that; do you know? A. I don't recall the first time, but lately, the last six months she has quite often talked about marrying Mr. Davis.

"Q. In the fall of '35, then, is that what you mean by six months? A. I do.

"Q. What if anything did she tell you then? A. She said he wasn't very kind to her son Jack, and that he had promised to be nicer to Jack. If he kept his promise she would marry him. * * *

"Q. Did she at any time tell you he had asked her to marry him? A. Yes, sir.

"Q. When was that? A. A number of times. I have no dates, anything like that.

"Q. How frequently were you seeing her? A. On an average of once a week."

[1] The declarations of the plaintiff, made to third persons, as to her contemplated marriage with the defendant, though not admissible as evidence of the agreement to marry, were admissible, after prima facie evidence of the agreement to marry, and of its breach for the purpose of showing the humiliation of the plaintiff by the breach of promise as an element of damage to the plaintiff's feelings. Reed v. Clark, 47 Cal. 194; Liebrandt v. Sorg, 133 Cal. 571, 65 P. 1098.

[2-4] Appellant's second contention is that "there is a fatal variance between the alleged contract to marry in respondent's pleadings and the proof," and in this behalf he contends that the complaint alleged that "the defendant promised to marry the plaintiff within a reasonable time," whereas the proof was that defendant promised to marry plaintiff when he got his "affairs straightened out" or when his "lawsuits were terminated." A contract to marry is ordinarily evidenced by several expressions and many circumstances. The record shows that the above expressions

were merely two, among many, of defendant's intention to marry the plaintiff. Many of his promises were made without including any statement of the time for performance; and in the absence of such a statement the law will imply that it shall be performed within a reasonable time, depending, of course, upon the circumstances of each particular case. 4 Cal.Jur. 456; 4 R.C.L. 147. Under the above rule the record contains a plethora of substantial evidence that the defendant promised to marry the plaintiff within a reasonable time, including many circumstances from which an inference to the same effect may be fairly drawn. It is not the province of this court to disturb a finding of fact as to the terms of the oral contract if there be any substantial evidence to sustain the finding.

[5] Appellant's third contention is that "the alleged promise of marriage is against public policy and void because founded upon an illegal consideration." Defendant refers to the fact heretofore stated that plaintiff, in view of the fact that she was engaged to the defendant, was persuaded to enter into sexual relations with him, and cites the early case of Boigneres v. Boulon, 54 Cal. 146. In the instant case sexual intercourse was not the consideration for the promise, but was a privilege obtained after the contract had been entered into. There is substantial evidence at least that the consideration for the promise to marry was plaintiff's promise given in return. This, of course, was a legal and valid consideration. 4 R.C.L. 144, § 3.

[6] The defendant's next contention is that "the alleged contract of marriage was unenforceable because of indefiniteness and uncertainty as to the time of performance." The promise was that the defendant was to marry the plaintiff within a reasonable time. Such a promise is not indefinite and uncertain within the purview of the law on contracts.

[7] Finally, the defendant contends that the court erred in overruling defendant's motion for a new trial. Rulings of the trial court on such motions are within the sound discretion of the trial court and they will never be reversed unless there is an affirmative showing of an abuse of discretion. Bonner v. Los Angeles Examiner (Cal.App.) 62 P.(2d) 427. No such showing is made in this case.

Judgment affirmed.

I concur: McCOMB, Justice pro tem.

WOOD, Justice.

I dissent. In my opinion the record shows an abuse of discretion on the part of the trial court in denying the motion for a new trial. The pregnancy of plaintiff resulted in a miscarriage. Plaintiff testified that sexual relations commenced after mutual promises of marriage were made, but when she became pregnant she mailed a letter to defendant, which in part is as follows: "I shall put it plainly. I am in a familie way with you, as sure as anything. It just dawned on me a week ago. I started checking up on myselv, and you know how I feel. I can't sleep or rest. So please do not keep me waiting to hear from you. I was deply hurt when I found you had left the Hotel without telling me. I am not imaging thise thing. It is now 3 weeks overtime and you know what that means. I am terbely sorry to have to write you thise, for I see now how every little I mean to you, and I should gladly leave you to Mrs. R. but as the matter stands, I don't know what to do, as I allways have said, when we do something wrong, we will pay the prise. I am paying now. I am forced to beg you to come to me, but our sins have found us out, just when we were getting ready to quit each other." She signed and delivered to defendant a statement containing no reference to a marriage engagement, but containing this language: "In consideration of Ten Dollars and other good and valuable considerations hereby acknowledged I hereby release M. A. Davis from all liability on my being in the family way." Defendant denied that he promised to marry plaintiff. The judgment was entered May 12, 1936. On motion for a new trial defendant presented affidavits from which it appeared that plaintiff was married to one Theis on May 17, 1936. In her counteraffidavit plaintiff admitted this marriage. It was impossible for defendant to present this information during the trial. Plaintiff's prompt marriage to another man immediately following the entry of judgment had an important bearing upon the amount of damages she claims to have suffered. In view of her letter and release of defendant and other conduct of the parties shown in the record, the evidence proffered in the affidavit would have a material and important bearing upon the plaintiff's allegation and defendant's denial that there were mutual promises to marry.

19 Cal.App.2d 506

LILES v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 11329.

District Court of Appeal, Second District, Division 1, California.

March 12, 1937.

1. Divorce ⚷269(1)

Divorced husband's unexplained failure to comply with order in divorce decree to make payments, provided for in property settlement agreement, to former wife for her separate support and maintenance, *held* punishable as contempt.

2. Judgment ⚷603

Fact that court, dismissing citation of divorced husband for contempt in failing to pay former wife alimony provided for in divorce decree, previously made like order on former citation of same party under similar facts, *held* immaterial on question of court's want of jurisdiction to hear and determine matter, especially as respects failure to make payments accruing after dismissal of former citation.

◆

Proceeding by Julitta B. Liles for a writ of mandate to the Superior Court in and for Los Angeles County, Dudley S. Valentine, Judge, to show cause why respondent should not hear and determine questions offered in issue by a citation of petitioner's former husband for contempt of court in failing to pay alimony awarded petitioner by divorce decree.

Order dismissing the citation vacated, with direction to hear and determine the question presented in such proceeding on its merits.

Paul J. Fritz, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Douglas De Coster, Chief Deputy Co. Counsel, both of Los Angeles, for respondent.

HOUSER, Presiding Justice.

The essential facts herein are that on June 21, 1933, Julitta B. Liles, sued her then husband for a divorce; that theretofore the parties had entered into a property settlement and agreement, which included a provision that "the husband shall pay to the wife the sum of Twenty Dollars ($20.00) per week for her support and maintenance, for a period of twenty-five (25) weeks hereafter, and that commencing with the 19th day of December, 1933, the husband shall pay to the wife for her support and maintenance the sum of Twenty-five Dollars ($25.00) per week * * *"; that thereafter in said suit an interlocutory decree of divorce was granted to the wife, by the terms of which "the property settlement entered into between the plaintiff and defendant" was not only approved, but, as well, the decree contained the special provision "that the defendant make the payments to the plaintiff as provided in said property settlement agreement for her separate support and maintenance, particularly the sum of $20.00 per week up to the 19th day of December, 1933, and that commencing with the 19th day of December, 1933, that the defendant pay the sum of $25.00 per week to the plaintiff." Some time after the entry of said judgment, on the alleged failure of the former husband to pay the alimony to the former wife in accord with the provisions made therefor in the said decree, she caused her former husband to be cited as for contempt of court. When the matter came on for hearing, on the ground that the lower court was without jurisdiction therein, the citation was by said court dismissed. Thereupon, at the instance of the former wife, this court issued its alternative writ of mandate to said lower court, by which it was directed to show cause why it should not proceed to hear and determine the questions which were offered in issue by the aforesaid citation in the matter of the said alleged contempt.

On behalf of the respondent, other than some authorities which in their respective facts are clearly distinguishable from those that appear herein, no attempt is made to justify the order by the lower court of its dismissal of the contempt proceeding. Each of the authorities that are thus cited by respondent deal with a situation in which it is disclosed that, although a property settlement had been entered into between the respective parties in a divorce suit and that such settlement had been approved by the lower court as a part of an interlocutory decree of divorce, the decree contained no express order by which the husband was ordered to pay to the wife any sum of money as alimony for her support and maintenance.

[1, 2] In the instant proceeding, as hereinbefore has been set forth, by the

terms of the divorce decree not only was the property settlement approved, but, as well, the husband was directly ordered to make specific payments to the wife, "for her separate support and maintenance." No reason is suggested, and this court is unable to discern any, why the unexplained failure of the former husband to comply with that order is not punishable as a contempt. It stands in a position not differing in any material respect from any other legal order that might be made by a competent court. The fact that preceding the date of the order of dismissal here in question, on facts similar to those presented herein, a like order had been made by the lower court on a former citation of the same party, would have no bearing on a question as to whether the lower court was without jurisdiction to hear and determine the instant matter, especially as far as it concerned failures, if any, of the former husband to make payments under the alimony order that accrued after the former citation was dismissed.

It is ordered that the order of the respondent court by which the proceedings in question were dismissed be vacated by the said court; furthermore, that in due course the respondent court proceed to hear and determine on its merits the question presented to said court in said proceeding.

We concur: YORK, J.; DORAN, J.

---

19 Cal.App.2d 493

TRAYLOR v. LOS ANGELES MOUNTAIN PARK CO. et al.*

Civ. 10223.

District Court of Appeal, Second District, Division 1, California.

March 11, 1937.

Rehearing Denied April 7, 1937.

1. Appeal and error 🔑731(5)

On appeal from judgment for repudiation of contract, specification of error that evidence was insufficient to support finding that parties had treated contract as valid and subsisting after date of expiration fixed therein *held* sufficient within statute (Code Civ.Proc. § 648).

2. Contracts 🔑221(1)

Parties to contract for exploitation of limestone deposits which provided that agreement should terminate if necessary permits were not obtained prior to designated date *held* not liable for repudiation of contract subsequent to date designated where necessary permits had not been obtained prior thereto, in absence of evidence justifying finding that there had been representations or conduct amounting to waiver of provision for termination or sufficient to estop parties from asserting that provision had not been waived.

3. Torts 🔑12

Successor to rights and liabilities of individual party to contract *held* not liable for repudiation thereof where communications relied on to establish repudiation spoke for corporation rather than individual in absence of evidence that individual caused corporation to breach contract.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by S. W. Traylor against Los Angeles Mountain Park Company and another. Judgment for plaintiff, and defendants appeal.

Reversed.

Overton, Lyman & Plumb, Irving H. Prince, and Donald H. Ford, all of Los Angeles, for appellants.

Charles L. Nichols, Carleton B. Wood, Schell & Delamer, and William G. Bonelli, all of Los Angeles, for respondent.

BISHOP, Justice pro tem.

The plaintiff recovered damages in excess of $36,000, because of the repudiation by the defendants of a contract in which the parties to this action were mutually interested, and the defendants appealed. From the face of the contract it would appear that by its own terms it had expired before the repudiation took place. This defect, which obviously would have been fatal to the plaintiff's cause, was cured, according to the court's findings, by a course of conduct on the part of the defendants which estops them from claiming that the contract had expired, and which amounts to a waiver of the provision that it would expire on the date named. We have come to the conclusion that the finding of estoppel and waiver is not supported by the evidence, and further, that as to the defendant Bell, the finding that he repudiated or otherwise breached the contract was not warranted by the evidence. In reaching our conclusion we have taken advantage of findings which, with his wonted fairness, the trial judge made because he found the facts required them, although they were adverse to the winning party.

---

*Rehearing denied 66 P.(2d) 736.

The contract upon which our interest centers was the third of a succession of contracts having as an object the exploitation of a rich and extensive deposit of limestone lying within the boundaries of Los Angeles city. This third contract was attached to the complaint as Exhibit C, a designation made use of throughout the subsequent record. The territory where the deposit had been discovered was a part of a large tract of land owned by the defendant Los Angeles Mountain Park Company, a corporation, to which we shall hereafter refer as the "Mountain Company." The plaintiff and a Mr. Day were led by years of experience in the manufacture and erection of machinery for the crushing of rock in mining operations, to become interested in and to investigate the possibilities of this rich deposit of limestone. So favorable did they find conditions that an ambitious scheme for converting the stone into cement and the cement into riches was agreed upon.

A corporation, it was determined, should be formed under the laws of Delaware, and by the time Exhibit C was executed it had been formed, as the agency by which the project was to be carried out. To it the defendant Mountain Company agreed to convey 100 acres of the choicest parcel of its lime deposit land, and to it it gave an option for a 99-year lease on an additional 400 acres, to be exercised after the manufacture and sale of cement had been going on for a period of three years. The conveyance of the 100 acres was not to take place until bonds and preferred stock in the Delaware corporation had been sold to place $1,200,000 in the corporation's treasury. The consideration to be received by the defendant Mountain Company for the conveyance of its land was one-third of the common stock of the Delaware corporation. The remaining two-thirds of this common stock was to go to the individuals who were parties to the contract, that is, the plaintiff, Mr. Day and a Mr. Howell, to whose rights and burdens the defendant Bell became a successor in April, 1930.

Exhibit C was executed February 25, 1929, by which time it had become apparent that a permit to construct and operate a cement plant at the place planned was not to be readily obtained. In their contract the parties provided that the conveyance of the hundred acres was to be made "When all of the zoning permits herein contemplated shall have been obtained, and all the financing and plans of operation of the new corporation has been completed." The relative order of the permit and financing was indicated in paragraph 14 of the contract, where we also find the term of its life expressly set out: "The second parties must complete and fulfill all of the requirements above set forth in Article II, as to financing the new corporation and issuing stock, within three (3) months after the necessary zoning and other permits are obtained. If said permits are not obtained prior to June 15, 1930, this agreement will terminate."

The difficulties attendant upon the effort to surmount that which was thus set up as the first hurdle, the obtaining of zoning permits, we need not recount, for the plaintiff did not seek recovery on the theory that the defendants had been derelict in any duty to obtain, or to make every reasonable effort to obtain, the permits at least seemingly required. No permit had been obtained up to July 9, 1931, the date of the second of two communications which form the basis of plaintiff's cause of action, one for the anticipatory breach of a contract by repudiation.

It is obvious that in order to allege and prove a cause of action for the breach in July, 1931, of a contract which by its terms terminated in June, 1930, the plaintiff had to allege and prove an avoidance of those terms. This he attempted in his original complaint, by alleging that the provision that the contract should terminate in June, 1930, was expressly and mutually waived and that the defendants were estopped to assert that the provision was not waived. About half-way through the trial, an amendment to the complaint was filed to explain at greater length the theory on which the contract was claimed to have lived beyond June, 1930. The allegations of the amendment which we need to consider were carried over into the trial court's findings in these words: "* * * both before and after said 15th day of June, 1930, and at all times up to said breach of said agreement, all the parties to said agreement treated it as a valid and subsisting contractual obligation, and so conducted themselves by word and act with reference thereto, to the knowledge of plaintiff herein, and the defendants herein and each of them repeatedly represented to the plaintiff that they and each of them considered said agreement as such valid and subsisting contractual obligation and as not terminated by reason of any expiration date therein provided, or for any other reason whatever; that said conduct of said defendants and said representations of the said defendants were intended to be acted upon by the plaintiff herein, and were done and made under circumstances such that the plaintiff had the right to believe and did believe that said defendants so intended; that the plaintiff did in fact act upon said conduct and said representations of said defendants; that in reliance upon said conduct and said representations of said defendants, and solely because thereof, plaintiff was induced to and did devote a large amount of time and services and did expend large sums of money in furtherance of the project set forth in said agreement Exhibit C; that the plaintiff so devoted said time and services and so expended said sums of money with the knowledge and consent of the defendants and each of them; that the plaintiff would not so have devoted said time or said services or so expended said sums of money, or any of them, had it not been for said conduct and said representations on the part of said defendants; and said defendants knew that, had it not been for said conduct and representations on their part and on the part of each of them, the plaintiff would not have so devoted said time or services, or so expended said sums of money or any of them; that by reason of said conduct and representations, and of each and all of them, defendants and each of them have waived any right which otherwise they or any of them might have had to rely upon any provisions of said agreement, Exhibit C, terminating said agreement; that by reason of said conduct and said representations, and each and all of them, the defendants and each of them are estopped to deny that they and each of them waived any such provisions of said agreement; and that by reason of said conduct and said representations and of each and all of them, the defendants and each of them, are estopped to allege that said agreement terminated on the 15th day of June, 1930, or at any other time or in any other manner, except by virtue of their own breach thereof as herein found."

[1] The plaintiff opposes an examination of the evidence to see whether or not this finding is supported, because, he insists, "In not one instance is any particular pointed out in which the evidence is insufficient to support the finding referred to, nor is it specified that there was no evidence to support the particular finding." Without quoting at length the specification of insufficiency, itself claimed to be insufficient, we include enough to reveal its form and pertinent contents: "G. That the evidence is insufficient to support the finding that after the 14th day of April, 1931, all or any of the parties to said agreement, Exhibit C, treated it as a valid and subsisting contractual obligation or so conducted themselves by word or act with reference thereto, to the knowledge of the plaintiff herein or otherwise, or that the defendants or any of them repeatedly, or at any time subsequent to April 14th, 1931, represented to the plaintiff or any other person or at all, that they, or any of them, considered said agreement as a valid or subsisting contractual obligation or as not terminated by reason of any expiration date therein provided * * * or that the plaintiff devoted any time or services or expended any sums of money after April 14, 1931, in furtherance of the project set forth in said agreement, Exhibit C, with the knowledge or consent of the defendants, or any of them, or otherwise, or at all; * * *" This form of specification complies fully with the letter and purpose of section 648 of the Code of Civil Procedure. See cases in support of text. 2 Cal.Jur. 713 et seq. The record before us does not warrant the application of Nisbet v. Rhinehart (1935) 2 Cal.(2d) 477, 42 P.(2d) 71, or of its included cases, all cited by respondent. Nor is Rowland v. Columbia Mining, etc., Co. (1934) 2 Cal.App.(2d) 410, 38 P.(2d) 418, also cited, at all in point.

Rereading the finding we note that because of certain representations and conduct with reference to the continuous vitality of Exhibit C, the defendants have waived their right to rely upon the provisions of Exhibit C which terminated it, and are estopped to deny that they have waived such provisions, and are estopped to deny that Exhibit C had terminated June, 1930, or at any other time prior to their repudiation of it. The representations and the conduct, we discover, were to the effect that Exhibit C was a valid and subsisting contractual obligation, which had not terminated. There was no finding of statement or conduct inducing a belief that the effective days of Exhibit C had been or would be extended until a permit was granted or the last stone turned in an endeavor to obtain one; no finding that plaintiff was led to believe that a written extension would be granted or that one had been granted beyond July 9, 1931; only the finding that the parties "so conducted themselves by word and act with reference thereto * * * and * * * represented to the plaintiff that they and each of them considered" Exhibit C still alive.

We need not examine the conduct of the defendants by word or act prior to April 15, 1931, for by an additional finding the trial court determined: "That said agreement was extended to April 15, 1931, pursuant to the terms of a written agreement entered into between said Chapin A. Day and said defendant, Los Angeles Mountain Park Company. That there was no other written extension of said agreement." All the acts and representations which antedate April 15, 1931, therefore, were in accord with the actuality and not at all in conflict with the statement made to the plaintiff and to Mr. Day of a fact known to them, that the extension which had been granted had a time limit on it; that it was an extension which expired, as the trial court found, April 15, 1931.

[2] As appellants pointed out, the evidence is insufficient to support the finding that there was representation or conduct amounting to a waiver or estoppel, occurring after April 14, 1931. There was very little activity of any sort between that date and July 9, and none on the part of the defendants which can be said to give rise to estoppel or which can be interpreted as a waiver of the right to say no extension had been given other than the one which was in writing and which had expired.

A repudiation in July of a contract which had expired in April does not give rise to a cause of action. Nor is the failure to prove a case helped out by the error, contained in the letter of repudiation, consisting of the statement (in effect) that the contract had expired in August of the previous year. The single case cited by the plaintiff in support of his contention that the repudiation can only be justified on the reasons explicit in it, Morrison v. Sycamore Canyon Gravel Co. (1929) 102 Cal.App. 536, 283 P. 84, fails to fit the situation. A deceased contract is not breached by a statement that it died at a time earlier than the true date of death.

[3] We need do no more than note, further, that in any event the judgment against the defendant Bell could not stand, for the finding that he had breached by repudiation Exhibit C is without support in the evidence. As admitted by plaintiff's counsel at the time this appeal was orally argued, the communications relied upon, the telegram of June 20 and the letter of July 9, spoke for the Mountain Company, not for the individual defendant Bell. Nor is there in the complaint or findings any support for the suggestion that he might be held responsible for having caused the Mountain Company to have breached its contract.

The judgment appealed from is reversed.

We concur: YORK, Acting P. J.; DORAN, J.

VOTAW v. FARMERS AUTOMOBILE INTERINSURANCE EXCHANGE et al. *

Civ. 5611.

District Court of Appeal, Third District, California.

March 5, 1937.

Hearing Granted by Supreme Court May 3, 1937.

1. Insurance ⚷328(5)

Seller, retaining title to automobile sold until fully paid for and filing no certificate transferring title thereto or notice of sale with motor vehicles division, became liable as owner of automobile for damages resulting from negligence of conditional vendee, driving it with seller's express or implied consent before full payment of price, and hence was entitled to recover amount of damages paid by him from liability insurer as against contention that insured was not sole unconditional owner of automobile at time of accident, as required by policy sued on (Civ. Code, § 1714¼; St.1931, p. 2105, § 45¾).

2. Insurance ⚷328(1)

"Unconditional and sole ownership" of property for insurance purposes is in those on whom loss insured against would certainly fall, not as matter of mere contract obligation, but as result of real bona fide rights in property insured.

---

*For subsequent opinion see 85 P.2d 872.

[Ed. Note.—For other definitions of "Unconditional and Sole Ownership," see Words & Phrases.]

3. Insurance ⟾434

Automobile liability insurer's liability for damages resulting from negligence of any competent person driving insured automobile with insured's express or implied consent extends to damages caused by negligence of prospective purchaser, to whom it was delivered by insured under conditional sale contract; insurer's liability not being increased thereby (Civ.Code, § 1714¼).

◆

Appeal from Superior Court, Amador County; A. Caminetti, Judge.

Action by J. E. Votaw against the Farmers Automobile Interinsurance Exchange and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

James W. Hughes, of Los Angeles, for appellants.

Ralph McGee, of Jackson, and J. Calvert Snyder, of Stockton, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendants have appealed from a judgment which was rendered against them in a suit on an insurance policy to reimburse the plaintiff for the payment of a judgment which was recovered against him in a previous suit for damages resulting from an automobile casualty. It is asserted the findings and judgment are not supported by the evidence, since it appears that the plaintiff had sold his car under an oral conditional sales contract, and was therefore not the "sole and unconditional owner" thereof, which fact exempts the insurers from liability by the express terms of their policy.

The plaintiff is the owner of the automobile which was insured by the defendants against accidents occurring in the use thereof. By the terms of the policy the insurers are exempt from liability "(G) If the interest of the insured in the automobile described herein is at any time other than the sole and unconditional ownership." At the time of the accident the car was being operated by one Kin, who had agreed in an oral conditional contract to purchase it. The possession of the automobile was actually delivered to the vendee. The title to the machine was reserved in the vendor until it was fully paid for. The purchase price was never fully paid. The certificate of ownership was neither signed nor delivered to the vendee, nor had the certificate of ownership or the notice of sale been given to the division of motor vehicles as required by section 45¾ of the California Vehicle Act (St.1923, p. 517, as added by St.1931, p. 2105). The certificate of ownership was not transferred to the vendee until the fall of 1933, after the accident had occurred. In a previous suit judgment for damages for personal injuries received by strangers to this action as a result of a collision with plaintiff's automobile was rendered against this plaintiff in the sum of $4,341.27, which he was compelled to, and did, pay in full. The insurers participated in the defense to the former action with an express written agreement that all rights to defend against future litigation on the policy on the ground of exemption from liability under the "sole and unconditional ownership" clause referred to would be reserved to the insurers.

Upon demand the insurance companies refused to reimburse this plaintiff on the ground that they were exempt from liability under the provisions of that clause in the policy. This suit upon the policy was then instituted. The cause was tried before the court sitting without a jury. Findings were adopted favorable to the plaintiff. A judgment was accordingly rendered against the defendants for the sum of $4,341.27 and costs of suit. From that judgment, this appeal was perfected.

It has been squarely determined that the owner of an automobile is entitled to recover compensation upon a policy insuring the machine against loss by accident or fire, even though the policy contains an exemption clause relieving the insurer of liability except in the event of "sole and unconditional ownership" thereof, and when the car is subject to a conditional executory agreement of sale, and the vendee is in actual possession thereof, provided the title is retained in the vendor until the purchase price is fully paid. Wyman v. Security Insurance Company of California, 202 Cal. 743, 262 P. 329, 330. The facts of the case cited are exactly like those which are involved in this case except that the loss which was sustained in that case resulted from the burning of the machine, and in the present case damages accrued against the owner by virtue of an automobile collision. It is said in the Wyman Case:

"The policy provided that: It shall be void, 'If the interest of the assured in the subject of this insurance be other than unconditional and sole ownership.' Respondent relies upon this provision of the policy when applied to the finding of the court that at the time the policy was issued Wyman had agreed verbally to sell the machine to Davee, reserving title to the truck in himself, but delivering possession of the truck to Davee. It has been held in this state that, under such a contract and in case of the loss or destruction of the property involved, the loss falls upon the vendor. Potts Drug Co. v. Benedict, 156 Cal. 322, 334, 104 P. 432, 25 L.R.A.(N.S.) 609; Waltz v. Silveria, 25 Cal.App. 717, 719, 145 P. 169. 'The interest of the insured is sufficient when the whole loss will fall upon him in case of the destruction of the insured property.' 14 Cal.Jur. 499; Phenix Ins. Co. v. Hilliard, 59 Fla. 590, 52 So. 799, 138 Am.St. Rep. 171; Burson v. Fire Ass'n, 136 Pa. 267, 20 A. 401, 20 Am.St.Rep. 919.

"Under these authorities we are of the opinion that plaintiffs were not precluded from recovery upon the insurance policy merely by reason of the verbal agreement entered into by Wyman prior to the issuance of the policy to sell the truck to Davee upon the terms and conditions of such agreement."

[1] In the present case, for the reason that the plaintiff retained the title to the automobile until it was fully paid for, that the purchase price was not fully paid, and that no certificate transferring title or notice of sale had been made or filed with the division of motor vehicles as required by section 45¾ of the California Vehicle Act, the plaintiff was rendered liable under the provisions of section 1714¼ of the Civil Code, as the owner of the car, for damages resulting from the negligence of the conditional vendee who was driving the machine at the time of the accident with the owner's express or implied consent.

Upon the authority of the Wyman Case, under the circumstances of this cause, the defendants are liable under their policy to reimburse the plaintiff for damages which he was compelled to pay on account of the accident.

The case of Schmidt v. C. I. T. Corporation, 14 Cal.App.(2d) 92, 57 P.(2d) 1016, 1017, upon which the appellant relies, is not in conflict with the Wyman Case, supra. In the Schmidt Case judgments on appeal were affirmed in favor of the plaintiffs in two consolidated cases which resulted in the awarding of damages for personal injuries sustained by them on account of an automobile collision. The question of the liability of an insurer of the automobile was not involved in that case. It was held that the owner of the automobile was liable notwithstanding the fact that he had made a conditional agreement to sell the machine to a third party, and had actually delivered the machine to the conditional purchaser, but had not transferred the certificate of ownership, nor notified the department of motor vehicles of the sale pursuant to the provisions of section 45¾ of the California Vehicle Act. It appears in the Schmidt Case that the appellant previously bought the machine in question from one Paul Kunde, who signed, transferred, and delivered the certificate of ownership to the appellant, who failed to register it with the department of motor vehicles. The owner contended on appeal that he was therefore exempt from liability for damages under the provisions of section 1714¼ of the Civil Code, on the theory that Kunde, under such circumstances, would be deemed to be the present owner of the machine. The court properly decided in that regard that the appellant would not be permitted to "take advantage of its own wrong" and escape liability by pleading that he had failed to comply with the statute by filing with the department of motor vehicles the transferred certificate of title which he held, or by failing to notify the department of the purchase of the machine.

[2] There appears to be some conflict of authorities in other jurisdictions regarding the liability of an insurance company to indemnify the insurer of personal property for loss by fire or accident who has made a conditional contract to sell the property on installments, some of which have not been paid, where the vendor specifically reserves the title until the purchase price has been fully paid and the policy provides that it shall be in force only while the insured is the sole and un-

conditional owner thereof. The authorities define the term "sole and unconditional owner" of property to mean the person on whom the loss insured against would be certain to fall, not as a mere matter of contract obligation, but as the result of bona fide rights in the insured property. Phenix Ins. Co. v. Hilliard, 59 Fla. 590, 52 So. 799, 138 Am.St.Rep. 171; Houseman v. Home Ins. Co., 78 W.Va. 203, 88 S.E. 1048, 1052, L.R.A.1917A, 299; 26 C.J. 176, § 213; 14 R.C.L. 1059, § 234. In the authority last cited it is said:

"In the case of a conditonal sale in which title is reserved in the vendor until the purchase price has been fully paid, the vendee is usually considered not to be the sole and unconditional owner, though he would be liable for the (purchase) price in the event of the loss of the property, and the vendor is considered to be such owner. * * *"

The syllabus in the Houseman Case, supra, correctly states the purport of that decision in regard to the insurer's liability to the vendor of personal property under such circumstances pursuant to a conditional contract of sale which specifically reserved the title in him until the property is fully paid for, as follows:

"Neither an option nor an invalid or conditional contract of sale of personal property by an insured, with reservation of title until payment of the purchase money, although possession is transferred to the vendee, will constitute a breach of the condition of the policy requiring 'sole and unconditional ownership.'"

In 26 Corpus Juris 176, § 213, it is said in that regard:

"In respect to personal property, a contract of sale whereby the title is to remain in the seller until the purchase price is paid does not affect the seller's title as 'sole and unconditional owner', when possession of the property has not passed, nor even, according to some authorities, when possession has been transferred."

In upholding the doctrine last mentioned, it is said in the Hilliard Case, in 59 Fla. 590, 52 So. 799, 801, 138 Am.St.Rep. at page 175:

"By fair construction and intendment the 'unconditional and sole ownership' of property for the purposes of insurance is in those upon whom the loss insured against would certainly fall, not as a matter of mere contract obligation, but as the result of real bona fide rights in the property insured."

There appears to be no doubt regarding the soundness and justice of the declaration of the Hilliard Case quoted. The circumstances of the present case illustrate that principle perfectly. In contemplation of law and in fact the insured person was the sole owner of the car. It is not disputed that he specifically reserved the title in himself until the entire purchase price was fully paid. On the theory and in the belief that he remained the sole owner, he did not sign or transfer the certificate of ownership to the vendee, nor did he notify the division of motor vehicles, in accordance with the provisions of section 45¾ of the California Vehicle Act, now section 177 of the Vehicle Code (St.1935, p. 93). Under this section of the Vehicle Code the vendor is deemed to be the owner of the machine, and is unquestionably personally liable for damages resulting from the negligence of the vendee or of any other person who may be driving the car with his express or implied consent. That appears to be the very liability which this insurance company under the terms of its policy agreed to compensate him for. In truth a final judgment of a court has actually determined that the insured was liable for the damages which accrued in this case, and the owner of the machine was forced to pay that judgment.

[3] It is suggested the liability of the insurance company is increased by transferring the possession of the machine to the vendee on a conditional agreement to buy the automobile. But it is not controverted that the insurance company is liable on its policy for damages resulting from the negligence of any competent person to whom the machine has been intrusted by the owner with his express or implied consent. This liability for the negligence of a permissive driver is the same whether he is allowed to drive the automobile on one occasion, daily, frequently, or until he acquires title by paying an agreed purchase price therefor. Undoubtedly the clause in the policy which provides that it shall remain in force only while the insured is the "sole and unconditional owner" is to guard against fraud with respect to the title to property which is to be insured, and to prevent persons from fraudulently insuring and collecting compensation on property which they do

not own. While there may always be an increased liability of the insurance company when the insured owner of an automobile permits another person to drive the car, dependent upon the prudence and character of that individual, that permissive use of the machine is contemplated by the terms of the policy, the liability of the company is not increased merely because the machine was loaned to a prospective purchaser under a conditional contract to buy it, rather than to some other permissive driver of the vehicle.

On sound principle under the circumstances of this case we are of the opinion the insurance company may not be permitted to avoid its liability under the policy on the ground that the insured did not remain the sole and unconditional owner of the automobile.

On the authority of Wyman v. Security Insurance Company of California, supra, the judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

* * *

19 Cal.App.2d 424

FLEISHBEIN v. WESTERN AUTO SUPPLY AGENCY et al.

Civ. 11271.

District Court of Appeal, Second District, Division 2, California.

March 4, 1937.

Hearing Denied by Supreme Court May 3, 1937.

1. Judgment 🔑565

"Dismissal without prejudice" ordinarily indicates that judgment of dismissal affects no right or remedy of parties and that there has been no decision on the merits, or that nothing is adjudged, and that parties are as free to litigate issues as though action had not been commenced, and such dismissal cannot ordinarily be construed as debarring defendant of any defense on merits.

[Ed. Note.—For other definitions of "Dismissal Without Prejudice," see Words & Phrases.]

2. Judgment 🔑565

Defense of statute of limitations is one on the merits, as respects whether such defense is barred by dismissal without prejudice of former action involving same issues.

3. Estoppel 🔑52

"Equitable estoppel" is ordinarily applied to prevent injury which would follow from declarations, acts, or omissions of party were he permitted to gainsay their truth, and is invoked for prevention of fraud or that which is tantamount to fraud (Code Civ. Proc. § 1962, subd. 3).

[Ed. Note.—For other definitions of "Estoppel In Pais," see Words & Phrases.]

4. Estoppel 🔑107

Generally, party who has opportunity to plead an estoppel on which his cause of action depends must do so, and rule is particularly applicable where a plaintiff relies on estoppel to avail against a defense which would otherwise appear on the very face of the complaint.

5. Estoppel 🔑107

Party invoking estoppel must plead it with same particularity as is required in cases involving like subjects of inquiry in suits of equity, and facts showing all essential elements of estoppel must be alleged, and from such facts estoppel must be clearly deducible.

6. Estoppel 🔑53

One essential element of "equitable estoppel" is fraudulent intent, as shown by circumstances and conduct which would render it a fraud for party to deny what he had previously induced or suffered another to believe and take action on, but "negligence," that is, careless and culpable conduct, is equivalent to intent to deceive, if such neglect is in respect to some duty owing to party asserting it.

[Ed. Note.—For other definitions of "Negligence," see Words & Phrases.]

7. Estoppel 🔑55, 56

Person invoking an "estoppel" must have been induced to change his position, or must show that he would not have taken the step which he did but for statements or conduct of defendant.

[Ed. Note.—For other definitions of "Estoppel," see Words & Phrases.]

8. Limitation of actions 🔑179(1)

Complaint showing that action was brought after time limited by statute of limitations and alleging that defendant consented to dismissal of former action without prejudice and thereby became estopped to rely on statute of limitations *held* demurrable, as failing to set forth an "estoppel," in that fraudulent intent and inducement were not shown.

9. Limitation of actions ⚷179(1)

Complaint showing that action was brought after time limited by statute of limitations *held* demurrable, notwithstanding defendant had consented to dismissal of former action without prejudice, instead of insisting on dismissal with prejudice, or on trial, since defendant was under no duty to object to dismissal without prejudice, and was not estopped to rely on bar of limitation because of his action.

10. Estoppel ⚷107, 119
Pleading ⚷192(1)

Question of estoppel is one of fact, but party seeking to show estoppel is not entitled to go to jury without alleging facts showing estoppel, and absence of such allegation may be raised by demurrer.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Henry Fleishbein, Jr., against the Western Auto Supply Agency and others. From a judgment for defendants on demurrer, plaintiff appeals.

Affirmed.

C. A. A. McGee and Robert Lee Collins, both of Los Angeles, for appellant.

Lasher B. Gallagher, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

The sole question necessary for a decision on this appeal is whether the plaintiff has successfully pleaded an estoppel. If he has, the judgment should be reversed. If he has not, it should be affirmed.

The plaintiff originally brought his action in the superior court of the state of California. That action was removed to the federal court. After the period of the statute of limitations had fully run, he dismissed the action without prejudice.

The plaintiff thereafter commenced a new action in the superior court and, because it otherwise would have appeared upon the face of the complaint that the action was barred by the statute of limitations, undertook in his complaint to allege an equitable estoppel. In this regard the complaint alleges that when the former action came on for trial counsel for the defendant stipulated with counsel for plaintiff that the said cause should be dismissed without prejudice; that the stipulation is attached to the complaint and made a part thereof. (The so-called stipulation which supersedes the pleader's use of the word "stipulated" turns out to be the minutes of the court.) It reads as follows: "This cause coming before the court for trial, attorney for plaintiff moves for dismissal as to the defendant without prejudice, and, attorney for defendant stating that he has no objection, it is so ordered by the Court." The complaint continues (boiled down): "That by consenting to the dismissal without prejudice of the said cause of action as to the defendant, the defendant represented to the plaintiff that plaintiff could sue again; that plaintiff relied upon this consent to the dismissal and was led to believe that the defendant would not set up the statute of limitations as a bar to another action arising out of these facts brought by the plaintiff against the defendant; that by consenting to the said dismissal without prejudice the defendant waived the defense of the statute of limitations and is now estopped from setting up the same." The defendant presented a general demurrer against this complaint. The demurrer was sustained without leave to amend, and judgment was entered accordingly. The appeal is from this judgment. The plaintiff makes no claim that he could have done better if he had been given leave to amend.

[1, 2] The phrase "without prejudice" is often used but is seldom defined. Dismissals of actions without prejudice ordinarily indicate that such judgments of dismissal affect no right or remedy of the parties and that there has been no decision of the case upon the merits. 69 Cor.Jur. 1318, notes 62 and 63. The only adjudication by a judgment of dismissal "without prejudice" is that nothing is adjudged and that the parties are as free to litigate the issue as though the action had not been commenced. Harrison v. Remington Paper Co. (C.C.A.) 140 F. 385, 3 L.R.A.(N.S.) 954, 5 Ann.Cas. 314; 9 R.C.L. 214. Such a dismissal cannot ordinarily be construed as debarring the defendant of any defense upon the merits of the case to which he is entitled by law. 17 R.C.L. 871, note 13; Nevitt v. Bacon, 32 Miss. 212, 66 Am.Dec. 609. The defense of the statute of limitations is one upon the merits. Foley Co. v. State, 119 Cal.App. 300, 6 P.(2d) 283;

People v. Honey Lake Valley Irr. Dist., 77 Cal.App. 367, 246 P. 819.

[3] Equitable estoppels are ordinarily applied to prevent injury which would follow from the declarations, acts, or omissions of a party were he permitted to gainsay the truth of such declarations, acts, or omissions and are invoked for the prevention of fraud or that which is tantamount to fraud. Davis v. Davis, 26 Cal. 23, 39, 85 Am.Dec. 157; Code Civ.Proc. § 1962, subd. 3.

[4] As a general rule, a party who has an opportunity to plead an estoppel upon which his cause of action depends must do so. See cases collected under note 20, 10 Cal.Jur. 654. And this rule is particularly applicable where a plaintiff relies upon estoppel to avail against a defense which would otherwise appear upon the very face of the complaint. 21 Cal.Jur. 63.

[5, 6] The party invoking such estoppel must plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry in suits of equity. Davis v. Davis, supra. "All essential elements of estoppel must be alleged * * * and from such facts estoppel must be clearly deducible therefrom." Arp v. Blake, 63 Cal.App. 362, 369, 218 P. 773, 776. There are four essential elements of equitable estoppel. 10 Cal.Jur. 626. One of them is fraudulent intent, "that is, there must be circumstances and conduct which would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon. * * * It is well settled that negligence, that is, careless and culpable conduct, is as matter of law equivalent to an intent to deceive and will satisfy the element of fraud necessary to an estoppel. * * * Of course, the neglect to operate as an estoppel must be in respect to some duty owing to the party asserting it." Parke v. Franciscus, 194 Cal. 284, 297, 228 P. 435, 441.

[7, 8] Measured by these rules the complaint does not set forth an estoppel. There is no allegation that when the defendant made the statement attributed to him (that he did not object to a dismissal without prejudice) that he made it with the intent to deceive or defraud the plaintiff or that he made it with such carelessness and culpable negligence as to amount to a constructive fraud, or that the plaintiff was without knowledge of the result which would follow from the order and was without the means of readily acquiring such knowledge. Davis v. Davis, 26 Cal. 23, 39, 85 Am.Dec. 157. Furthermore, the person invoking an estoppel must have been induced to change his position. It is necessary in order to create an estoppel that he would not have taken the step which he did but for the statements or conduct of the defendant. Arp v. Blake, 63 Cal.App. 362, 369, 218 P. 773. There are no such allegations in the complaint.

[9] The facts as alleged by the complaint are, that the defendant made no act or declaration whatsoever prior to the step taken by the plaintiff and that all the defendant then did was to state that he did not object. The plaintiff contends "that this defendant should have insisted upon a dismissal with prejudice or should have insisted that the said cause of action alleged go to the jury in the federal court case." But obviously it was not the duty of the defendant to object to a dismissal of the action or to insist upon a trial, at a time when the plaintiff was moving for a dismissal. Neither was it the duty of defendant to explain to plaintiff's counsel the legal effect of his voluntary action, and the failure to do any or all of these things does not raise an equitable estoppel against the defendant.

[10] The plaintiff also contends "the existence of an estoppel is a question of fact which cannot be determined upon general demurrer to the complaint," citing Parke v. Franciscus, 194 Cal. 284, 228 P. 435. It is true that the question is one of fact. Assuming the facts are sufficiently alleged, then the sufficiency of the evidence and the weight thereof cannot be determined by general demurrer, but this does not mean that the facts upon which a party relies need not be alleged.

The defendant on his part in an extensive brief contends for other and additional theories upon which the judgment should be affirmed. It is not necessary for us to comment upon them.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

19 Cal.App.2d 452

HARRINGTON v. HOFFMEYER et al.

Civ. 1755.

District Court of Appeal, Fourth District, California.

March 5, 1937.

1. Sales ⚿261(6), 284(1), 287(4)

Seller of automobile engine bought by buyer to operate pumping plant *held* not to have breached warranty that engine would operate on fuel oil, where there was evidence that seller bought engine as it was before it was installed, that nothing was said by seller with respect to engine operating on fuel oil, that engine did run on fuel oil when it was installed, but later would not operate on another cheaper grade, and that buyer coupled his offer to return engine with condition that seller should pay for installing engine, notwithstanding seller had nothing to do with contract between buyer and person who installed engine.

2. Work and labor ⚿29(1)

Workman who was employed by buyer of automobile engine to install engine to operate a pumping plant *held* not entitled to recover amount expended by him as costs in action in justice's court to recover for his services in another action in which he filed a cross-complaint against his employer for same services in absence of evidence that such amount had been actually expended.

3. Costs ⚿220

Employer by failing to move to tax costs in action against employee for damages to his crops wherein employee filed a cross-complaint seeking recovery for his services *held* not to have waived objection of lack of evidence to justify award of costs incurred by employee in another action for same services (Code Civ.Proc. § 1033, subd. 2, as amended by St.1933, p. 1902).

◆

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by J. J. Harrington against Clarence Hoffmeyer, P. S. Dotts, and others, wherein the named defendants filed cross-complaints. From an adverse judgment, the plaintiff appeals, abandoning the appeal thereafter except as to the amount awarded to P. S. Dotts and as to an item included in the judgment in favor of Clarence Hoffmeyer.

That part of the judgment which was in favor of respondent Hoffmeyer modified by deducting a certain sum therefrom and, as so modified, judgment affirmed.

Halbert & Stone, of Porterville, for appellant.

John Preston King, of Lindsay, for respondents.

BARNARD, Presiding Justice.

The plaintiff purchased from the defendant Dotts a secondhand automobile engine and employed the defendant Hoffmeyer to install the same on his ranch for the purpose of operating a pumping plant. Hoffmeyer brought an action in a justice's court to recover for his services in installing the engine. Thereupon the plaintiff brought this action, claiming damage to certain crops alleged to have been caused by a breach of warranty with respect to the engine. To prevent a multiplicity of actions, the trial court issued an order restraining the justice court from proceeding in that action. The defendant Hoffmeyer filed a cross-complaint asking for the value of his services in installing the engine, and the defendant Dotts filed a cross-complaint for the purchase price of the engine. In answering the cross-complaints, the plaintiff alleged that he had agreed to purchase the engine subject to its being installed on his ranch in such a way that it would operate upon "fuel oil" in a manner satisfactory to him, and that he had agreed to pay Hoffmeyer when the engine was successfully installed so that it would operate upon fuel oil. The court found in favor of the defendants and cross-complainants on all issues and entered judgment against plaintiff on his complaint and in favor of the two defendants on their cross-complaints. The plaintiff appealed from the entire judgment, but has abandoned the appeal except as to the $125 awarded to Dotts for the purchase price of the engine and as to an item of $6.50 which was included in the judgment in favor of Hoffmeyer.

[1] It is first contended that the evidence does not support the findings and judgment in favor of Dotts covering the purchase price of the engine. It is argued that the engine was warranted to operate upon fuel oil, but would not do so, that the appellant had the right to try the engine, and that he notified the vendor within thirty days that the engine was unsatisfactory. The respondent Dotts admitted that he had told the appellant that he might "try" the engine. While the evidence is conflicting upon every

point, there is evidence justifying the inference that the appellant bought the engine as it was before it was installed, and that nothing was said by the respondent Dotts about its operating upon fuel oil. There is also evidence that when installed the engine did operate on fuel oil, but later would not operate on another cheaper grade of fuel oil. While there is evidence that within thirty days the appellant offered to return the engine to Dotts, this offer was coupled with the condition that Dotts pay Hoffmeyer for installing the engine. Dotts had nothing to do with the contract between the appellant and Hoffmeyer for the installation of the engine and refused the offer as made, although at that time he offered to take the engine back and "call it quits." The evidence justifies the inference that no other offer to return the engine was made and that the appellant kept the engine for months thereafter and until these actions were brought. No more than a conflict appears, and the evidence supports the findings and judgment in this regard.

[2, 3] The only other point raised is that there is no evidence to support the inclusion of a certain $6.50 in the judgment awarded Hoffmeyer. In his cross-complaint Hoffmeyer alleged that he had incurred costs in this amount in the justice court action, above referred to, and asked judgment for that amount in addition to the $75 claimed for his services. The court found that Hoffmeyer had incurred $6.50 as costs in the justice court action and awarded him $81.50, together with costs in this action. If it could be assumed that such costs in another action might have been recovered in this action, we find no evidence in the record to sustain the finding that such an amount had been expended. The respondent argues that objection to this item was waived because the appellant failed to make a motion to tax the costs in this action in accordance with section 1033, subd. 2, of the Code of Civil Procedure (as amended by St.1933, p. 1902). The matter in question had no connection with the costs in this action and no waiver appears.

For the reasons given, that part of the judgment which was in favor of the respondent Hoffmeyer is modified by deducting therefrom the sum of $6.50 and, as so modified, the judgment appealed from is affirmed. The respondents to recover their costs.

We concur: MARKS, J.; JENNINGS, J.

---

19 Cal.App.2d 523

PARRISH v. THURMAN et al.

Civ. 11184.

District Court of Appeal, Second District, Division 1, California.

March 12, 1937.

1. Trial ⚷51

Where defendants' counsel, in action by driver of automobile which side-swiped defendants' disabled lighted truck at 9 o'clock on rainless night, were permitted to introduce evidence that on afternoon and late evening on previous day driver had been intoxicated and that attempt was made to dissuade her from starting out at 3 o'clock on day of accident because of intoxicated condition, objection that condition before and at 3 o'clock was too remote *held* properly overruled on counsel's promise to bridge gap between hour of departure and hour of accident.

2. Appeal and error ⚷237(2)

Court of Appeal *held* not entitled to consider objection to testimony where no motion had been made to strike testimony.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Rose Parrish against Albert Thurman and others. From a judgment for defendants and an order denying her motion for new trial, plaintiff appeals.

Affirmed.

Newby & Newby, of Los Angeles, for appellant.

C. F. Jorz, of Los Angeles, for respondents.

BISHOP, Justice pro tem.

At 9 o'clock on a rainless night in November, the plaintiff side-swiped from the rear the disabled fruit truck of the defendants as it stood some 2 feet to its right of the center line on the desert highway between Yuma and Holtville. The road stretched straight away in each direction from the truck, and as the plaintiff approached there was no other vehicle in sight upon the highway in either direction. On the rear of the truck there were two green lights, three red lights, and two large reflectors. Why the plaintiff failed to see the truck until too late to avoid striking it does not appear. The evidence, which warranted the jury in finding the facts to be as above indicated, supports the implied finding that the plaintiff was negligent, and that her negligence contributed to the accident.

[1, 2] Defendants' counsel was permitted to introduce evidence that on the afternoon and late into the evening of the day previous to the day of the accident, the plaintiff was drinking and was drunk, and that again on the day of the accident she was drinking and was so far intoxicated that an attempt was made to dissuade her from starting out at 3 p. m. on the three highways she laughingly said she saw, where one had been constructed. The objection that her intoxicated condition before and at 3 o'clock was too remote was properly overruled on counsel's promise to bridge the gap between the hour of her departure and the hour of the accident. The objection that the plaintiff now makes that the bridge, which was built of medical testimony upon the persistence of alcohol in the brain and its effect upon nerve reflexes, was too weak for the jury's consideration, we cannot consider, for there was no motion to strike the testimony. Ballos v. Natural (1928) 93 Cal.App. 601, at page 608, 269 P. 972, and cases there cited.

We find no error in the making of the order denying a new trial. The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

---

19 Cal.App.2d 349

STEWART v. CLAUDIUS.

Civ. 10119.

District Court of Appeal, First District,
Division 1, California.
Feb. 26, 1937.

1. Limitation of actions ⊂⇒24(1)

Recovery of balance due on first installment of tuition for term at military academy, which became due under written contract when defendant's son was dismissed therefrom, *held* barred by limitations, where proprietor of academy began action more than four years after having demanded payment, since right of action accrued at time of dismissal, or, at the latest, at time of demand.

2. Limitation of actions ⊂⇒51(2)

Where action is brought to recover installments due under a written contract, provisions of contract are controlling as to running of statute of limitations, and even though plaintiff keeps a memorandum book in which he charges accounts accruing under contract and credits therein several payments made, such entries do not fix a new date for running of statute.

3. Limitation of actions ⊂⇒53(2)

Proprietor of military academy *held* not entitled to recover balance due on first installment of tuition for term at academy on cause of action declaring on open book account as not being barred by limitations, where proprietor had abandoned cause at trial, contract provided when installments became due, and book account showed on its face that balance was outlawed.

4. Limitation of actions ⊂⇒53(6)

Where book account showed on its face that items making up balance due on first installment of tuition for term at military academy were outlawed, adding entry for board and tuition to account within statutory period did not re-establish a later date for running of statute.

5. Contracts ⊂⇒262

Acceleration clauses in contracts are not self-operative, and creditor will not be deemed to have exercised his right to declare a forfeiture unless he has taken some affirmative action to that end, such as notifying debtor by suit or otherwise that on account of breach he elects to treat entire indebtedness as due.

6. Contracts ⊂⇒316(1)
Limitation of actions ⊂⇒46(6)

Acceleration of contract may be waived by mere passive acquiescence, and unless it is shown that creditor has taken some affirmative action to invoke benefit of clause, statute of limitations begins to run not from date of breach of obligation, but from date on which future payment falls due.

7. Appeal and error ⊂⇒1011(1)

Whether proprietor of military academy had attempted to accelerate payment of tuition for second half of term at academy by demanding payment at time of dismissal of defendant's son during first half of term so that action to recover tuition for second half was barred by limitations *held* for trial court, sitting without a jury, where testimony on question was conflicting.

8. Damages ⚷79(1)

In actions for breach of contract wherein liquidated damages are sought to be recovered as compensation for breach, it is necessary to plead and prove that from the nature of the case it was impracticable or extremely difficult to fix actual damage (Civ. Code, §§ 1670, 1671).

9. Schools and school districts ⚷8

School rules and provisions contained in school catalogue, advertisement, or application blank become part of contract for tuition and other school charges, where notice thereof has been given to parents or guardians, or their attention called thereto, and contract for complete course of instruction or for specified period of time is entire, and school proprietor may recover whole sum agreed on or nothing.

10. Appeal and error ⚷882(3)

In action by proprietor of military academy to recover tuition, under contract, from defendant whose son had been dismissed, contention that contract was void because application for enrollment provided for recovery of tuition as liquidated damages in case of withdrawal or dismissal *held* not available to defendant, even if contract was void to that extent and defendant could have attacked contract for first time on appeal, where only contested issue was as to applicability of statute of limitations (Civ.Code, §§ 1670, 1671).

◆

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by A. L. Stewart against Charles W. Claudius. From a judgment for plaintiff, defendant appeals.

Modified and, as modified, affirmed.

Thomas C. Nelson, of San Francisco, for appellant.

Carlos R. Freitas, Jerome A. Duffy, and Thomas F. Keating, all of San Rafael, for respondent.

KNIGHT, Justice.

The complaint herein set up four causes of action for the recovery of the sum of $857.79 and interest. The first and second causes of action were based respectively on an open book account and an account stated, for services rendered; the third was for the reasonable value of services; and the fourth declared on a written contract for the payment of tuition for defendant's son in a military academy operated by plaintiff. The answer denied generally the allegations of the complaint and pleaded the statute of limitations. The cause was tried before the court sitting without a jury, and at the opening of the trial counsel for plaintiff stated that plaintiff would depend entirely on the fourth cause of action. Thereupon, after the parties stipulated to certain facts, the evidence was narrowed to the issue of the statute of limitations; and judgment was entered in plaintiff's favor for the principal sum sued for, together with interest which amounted to $349.37. Defendant appealed, and the main question to be determined is whether the entire indebtedness alleged to be due, or any portion thereof, was outlawed at the time of the commencement of the action.

The written application for the enrollment of defendant's son, which defendant signed on September 5, 1929, and the school catalogue containing the rules and regulations subject to which said application was made and accepted, constituted the contract sued upon. It appears therefrom that defendant enrolled his son for the term of nine months beginning September 9, 1929, and ending June 6, 1930. The tuition for the term was $1,200, payable in two installments, one-half thereof falling due on or before September 10, 1929, and the balance on or before January 10, 1930, with interest at 7 per cent. per annum on or before January 10, 1930, with interest at 7 per cent. per annum on accounts overdue. The contract further provided, however, that boys were admitted only upon the express condition that they would remain at the academy until the end of the session, unless suspended or dismissed for misconduct or breach of school discipline; and in the event of such suspension or dismissal, or in case of voluntary withdrawal, no part of the fee for tuition for the school year would be refunded or remitted, and any unpaid balance on account of such tuition for the school year would become immediately due and payable to the academy.

Approximately two months after the opening of the school term, and on November 7, 1929, defendant's son was dismissed from the academy by plaintiff for continually absenting himself from school without permission. Defendant sought to have the boy reinstated, but plaintiff refused. Up to the time of the dismissal defendant had paid $420 on the first installment of the tuition, leaving a balance due thereon of $180; and defendant was charged also with certain incidentals amounting to $77.79, making a total indebtedness of $257.79 which had accrued and was payable at the time of dismissal. On December 14, 1929, plaintiff wrote defendant demanding payment thereof, adding: "Since the tuition for the second half year will be due on January 1st, we hope the present balance will be taken care of before that time." Defendant, believing he had been unjustly treated in the matter, ignored the demand. Plaintiff then waited more than four years from the date of said written demand, to wit, until December 30, 1933, before filing suit; and in each cause of action of his complaint he sued for the entire sum of $857.79, which represented the items aggregating $257.79 which fell due and were payable on November 7, 1929, at the time of the dismissal, and the second installment of tuition amounting to $600 which under the terms of the contract became due and payable on January 10, 1930.

[1] It is evident from the foregoing facts as well as from the provisions of the contract that the sum of $257.79 constituted a separate, distinct demand; that the same fell due and was payable, as stated, on November 7, 1929, at the time of the dismissal of defendant's son; that plaintiff's right of action to collect the same accrued at that time, or at the latest on December 14, 1929, when plaintiff made written demand for the payment thereof; and that therefore, since the action was filed more than four years thereafter, to wit, on December 30, 1933, that portion of the indebtedness was barred by the statute.

[2-4] Plaintiff contends that the first cause of action declaring on an open book account, was not barred by the statute, and therefore he was entitled to recover thereunder the items aggregating $257.79. There is no merit in the contention, first, because the record shows that at the commencement of the trial there was a complete abandonment by him of the first three causes of action, and that thereafter the cause was tried and decided pursuant to such understanding; secondly, where as here, the action is one to recover installments due under a written contract, the provisions of the contract are controlling as to the running of the statute; and even though the plaintiff keeps a memorandum book in which he charges the accounts accruing under the contract and credits therein the several payments made, the entries in the book account do not fix a new date for the running of the statute (People v. California Safe Deposit & Trust Co., 41 Cal.App. 727, 183 P. 289); thirdly, the book account itself, which plaintiff introduced in evidence, shows upon its face that the items aggregating $257.79 were outlawed; and the fact that on January 25, 1930, plaintiff added to said account the entry "Board and Tuition, $550," did not have the effect of reestablishing a later date for the running of the statute.

[5-7] As to whether the second installment of the tuition, amounting to $600, was also barred by the statute, depends upon the question of whether at any time between the date of the dismissal of defendant's son and the due date of the second installment of the tuition, plaintiff attempted to invoke his rights under the acceleration clause of the contract. In this regard the law is well settled that acceleration clauses are not self-operative; that being in their nature a penalty and inserted for the benefit of the creditor with the right to declare a forfeiture, he may or may not exercise such right; and he will not be deemed to have done so unless he has taken some affirmative action to that end, such as notifying the debtor by suit or otherwise that on account of the breach he elects to treat the entire indebtedness as due; that waiver may be evidenced by mere passive acquiescence; and that therefore, unless it is shown that the creditor has taken some affirmative action to invoke the benefit of the acceleration clause, the statute begins to run not from the date of the breach of the obligation, but from the date on which the future payment falls due. Belloc v. Davis, 38 Cal. 242; Andrews v. Zook, 125 Cal.App. 19, 13 P.(2d) 518; Congregational Church Building Society v. Osborn, 153 Cal. 197, 94 P. 881; California Savings & Loan Society v. Culver, 127 Cal. 107, 59 P. 292; Mason v. Luce, 116 Cal. 232, 48 P. 72; Richards v. Daley, 116 Cal. 336, 48 P. 220; 16 Cal.Jur. 518.

In the present case there is a conflict of testimony on this point. Defendant testified that at the time of the dismissal of his son plaintiff demanded payment not only of the balance due on the first half of the tuition, but also the full amount of the second half of the tuition. However, defendant was unable to produce any letter plaintiff had written to that effect, and plaintiff denied having made any such demand for the payment of the second installment of the tuition. In this regard he testified that the only demand for payment he ever made prior to January 1, 1930, was the letter of December 14, 1929, which as will be observed makes no request for payment of the second installment of tuition, attention being called merely to the fact that it would fall due the following month. Therefore, in view of the foregoing conflict it must be held on this appeal, in accordance with the plaintiff's testimony, that since he made no attempt to accelerate the payment of the second installment of tuition prior to the due date thereof, the action to recover that portion of the indebtedness sued upon was not barred.

Defendant contends that the acceleration rule above mentioned applies only in cases of promissory notes; but he has cited no case so holding, and the decision in the case of Congregational Church Building Society v. Osborn, supra, would seem to serve as a negative answer to defendant's contention.

[8-10] Defendant makes the further point that the contract sued upon is void because the application for enrollment (which in this respect is different from the provision in the catalogue) provided that in case of withdrawal or dismissal of the cadet the unpaid portion of the tuition for the entire school year may be recovered "as liquidated damages." The case was evidently tried upon the assumption that the contract was valid, the only contested issue being, as stated, as to the application of the statute of limitations; and plaintiff contends, therefore, and cites cases to the effect, that defendant may not attack the validity of the contract for the first time on appeal.

Assuming, however, that the point is available to defendant, we find no merit therein. It is doubtless the law, as defendant contends, that a contract by which the amount of damages to be paid for a breach of the obligation is determined in anticipation thereof is to that extent void (Civ. Code, § 1670), unless from the nature of the case it would be impracticable or extremely difficult to fix the actual damage (Civ.Code, § 1671); furthermore, the rule is that in actions for breach of the contract wherein liquidated damages are sought to be recovered as compensation for the breach, it is necessary to plead and prove that the contract is one coming within the exception above noted. Dyer Bros. Golden West Iron Works v. Central Iron Works, 182 Cal. 588, 189 P. 445; Kelly v. McDonald, 98 Cal.App. 121, 276 P. 404. But here the cause of action set forth in the fourth count of the complaint is not one wherein plaintiff is seeking to recover damages, liquidated or actual, for breach of the contract. It is one to enforce the terms of the contract wherein defendant agreed to pay the tuition for the entire school year regardless of whether his son was dismissed from the academy during the school year. The cause of action thus declared upon is the same therefore, as those sued upon in the cases of Hitchcock Military Academy v. Myers, 76 Cal.App. 473, 245 P. 219, and Hoadley v. Allen, 108 Cal.App. 468, 291 P. 601, 603, wherein, in quoting approvingly from 35 Cyc. at page 816, it is held: "School rules and provisions contained in a school catalogue, advertisement, or application blank become part of the contract for tuition and other school charges, where notice thereof has been given to parents or guardians, or their attention called thereto. A contract for a complete course of instruction or for a specified period of time is entire, and the school proprietor is entitled to recover the whole sum agreed upon or nothing."

It is true as pointed out by defendant, in neither of those cases did the contract refer to the future installments of tuition as liquidated damages. But even though it be conceded, for the purposes of this discussion, that the presence in the application for enrollment of the words "as liquidated damages" rendered the contract in the present case to that extent void, it is of little or no consequence so far as this action is concerned, because as stated the question of damages, liquidated or actual, is not here involved.

In conformity with the views expressed, it is ordered that the judgment appealed from be modified by reducing the amount thereof to $845, such being the amount of the second installment of tuition with interest thereon at 7 per cent. per annum from January 10, 1930, the due date of such second installment, to November 7, 1935, the date of the entry of judgment; and as so modified the judgment will stand affirmed. Appellant will recover his costs of appeal.

We concur: TYLER, P. J.; CASHIN, J.

RETAILERS' CREDIT ASS'N OF SACRAMENTO v. SUPERIOR COURT IN AND FOR GLENN COUNTY.

Civ. 5802.

District Court of Appeal, Third District, California.

March 8, 1937.

Rehearing Denied April 7, 1937.

Hearing Denied by Supreme Court May 3, 1937.

1. Attachment 🔑294

Title to attached property claimed by strangers to the litigation may be ascertained by interpleading in the suit, by a separate action under the statute in the nature of a creditor's bill in equity, or under the statutory provision for summary relief (Code Civ.Proc. § 549, as amended by St. 1933, p. 1865; § 689, as amended by St. 1935, p. 1958; § 720, as amended by St. 1933, p. 1892).

2. Venue 🔑78

Where claims of third persons to attached property were filed under statute providing for summary proceedings for determination of title to the property, the summary means provided by the statute were incident to and part of the main action and properly transferable with the action on change of venue (Code Civ.Proc. § 537, as amended by St.1933, p. 583; § 549, as amended by St.1933, p. 1865; § 689, as amended by St.1935, p. 1958).

3. Attachment 🔑303

Under statute, court from which writ of attachment issued and court in which action is pending as on change of venue have concurrent jurisdiction of statutory summary proceeding to determine title to the property when claimed by a stranger to the litigation (Code Civ.Proc. § 549, as amended by St.1933, p. 1865; § 689, as amended by St.1935, p. 1958).

4. Venue 🔑80

Where third party claims to attached property were entitled in the action in which the attachment was issued, and, on objection to the hearing of the claims in the court in which the action was brought because of the pendency of a motion for change of venue, the court continued the hearing, transferred the cause, and directed that all papers filed in the action be sent to the court to which the venue was changed, the proceeding to determine title to the property was transferred and the court to which the venue was changed had jurisdiction to determine the title (Code Civ.Proc. § 549, as amended by St.1933, p. 1865; § 689, as amended by St.1935, p. 1958).

◆

Original petition by the Retailers' Credit Association of Sacramento for a writ of mandamus directed to the Superior Court in and for Glenn County.

Writ granted.

John A. McGilvray, of Sacramento (Kenneth G. McGilvray, of Sacramento, of counsel), for petitioner.

Pugh & Pugh, of Red Bluff, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The Retailers' Credit Association of Sacramento, a corporation, has petitioned this court for a writ of mandamus to require the superior court of Glenn county to determine the title to personal property which was attached in a suit in assumpsit pending in that superior court between this petitioner, as plaintiff and Charles A. Nock et al., as defendants. The suit in assumpsit was originally filed in Sacramento county. The property was delivered to the defendants pursuant to separate third party claims to the personal property which were filed as authorized by section 549 of the Code of Civil Procedure, as amended by St.1933, p. 1865, and section 689, as amended by St.1935, p. 1958. Upon motion therefor the cause was subsequently transferred on September 11, 1936, to Glenn county. Prior to the order for the change of the place of trial this petitioner filed with the superior court of Sacramento county its petition under the provisions of section 689 of the Code of Civil Procedure to determine the title to the personal property. The hearing upon the third parties' claims was set for September 4th, but it was subsequently continued to September 11th. On the last-mentioned date, the third parties appeared before the Sacramento court and objected to the hearing of the proceeding to determine the title to their claims on the ground that the Sacramento court was without jurisdiction to do so on account of the pending motion for a change of venue. The objection was sustained. The petition to determine title to the personal property was then continued to October 5, 1936, and the cause was transferred to Glenn county. The order transferring the cause "directed that all papers filed in the above mentioned action be forthwith sent to the Superior Court * * in and for the County of Glenn," which was done. On September 20th the documents and proceedings were filed in Glenn county. On September 29th, by consent of all parties, the proceeding to determine title to the personal property was continued to October 23d. On the last-mentioned date the petition to determine the title to the personal property was fully heard. Oral and documentary evidence was adduced by respective parties, and the matter was submitted to the court for decision. November 16, 1936, the court determined that it was without jurisdiction to pass upon the merits of the third parties' claims, and it declined to do so. This petition for a writ of mandamus was then filed seeking for an order to require the Superior Court of Glenn county to determine that issue. The facts are not disputed.

The respondent contends that the petition to determine title to property under attachment which is claimed by strangers to the suit under the provisions of section 549 of the Code of Civil Procedure is a proceeding in the nature of a creditor's bill such as is referred to in section 720 of the Code of Civil Procedure as amended by St. 1933, p. 1892, separate and distinct from the suit in assumpsit in which the original attachment was issued and that the Sacramento court had no authority to transfer the proceeding to determine title to any other court according to the provisions of section 689 of the Code of Civil Procedure and that the Glenn county court therefore had no jurisdiction to hear or determine that matter. It is claimed that the nature of the proceedings to determine the title to property claimed by strangers to an action as provided by the terms of sections 689 and 720 of the Code of Civil Procedure are exactly the same.

[1] At least three methods of ascertaining the title to property which has been attached are recognized in behalf of strangers to the litigation who have third party claims thereto. One is by interpleading in the suit. Another is by instituting a separate action in the nature of what has been termed a creditor's bill in equity. Section 720, Code Civ.Proc.; Frankel v. Boyd, 106 Cal. 608, 611, 39 P. 939. The third is by statutory provision for summary relief. Sections 549 and 689, Code Civ.Proc. These various methods are suggested in 6 Corpus Juris 386, § 864, in the following language: "As has been shown, a person claiming property seized under an attachment against another has usually the option of instituting an independent action to protect or enforce his rights or of interpleading or intervening in the attachment suit for that purpose. And in some jurisdictions the claimant may proceed by rule, if the rights of the parties will not be prejudiced, or may have his rights determined on a motion to discharge the attachment or in summary proceedings provided for by statute."

We are of the opionion the method provided for by section 720 of the Code of Civil Procedure is not the same as that which is authorized by sections 549 and 689 of the same Code. Section 720 specifically provides that: "If it appears that a person * * * claims an interest in the property adverse to him [the judgment debtor], * * * the judgment creditor may maintain an action against such person."

[2] This section appears to contemplate the maintenance of a separate action to determine the title to the property on the part of a judgment creditor. Sections 549 and 689, supra, provide for summary proceedings incident to the main action, by means of which a stranger to the suit may require the determination of the title to the property which he claims. This summary method is afforded by statute to save the one who claims title to the attached property expense and delay in removing the cloud upon his title which he contends is imposed by a wrongful and invalid attachment. We are of the opinion the summary means provided by sections 549 and 689 are incident to and a part of the main action, and that it is therefore properly transferable on motion for a change of venue. It is true that this proceeding may be separately heard by the court having jurisdiction of the main action, but it is nevertheless incident thereto. The attachment in this case was properly issued under section 537 of the Code of Civil Procedure, as amended by St. 1933, p. 583. The third parties' claims were filed pursuant to section 549 of the same Code. The procedure for determining the disputed title to the property under such circumstances is governed by the provisions of section 689 of the Code of Civil Procedure. That section provides in part: "* * * Whenever a verified third party claim is delivered to the officer as herein provided, upon levy of execution or attach-

ment (whether any undertaking hereinabove mentioned be given or not), the plaintiff, or the person in whose favor the writ runs, the third party claimant, or any one or more joint third party claimants, shall be entitled to a hearing in the court in which the action is pending or from which the writ issued for the purpose of determining title to the property in question."

[3] From the preceding quotation from the statute in question it appears that concurrent jurisdiction of the proceeding to determine title to property claimed by a stranger to the litigation has been conferred upon both the court "in which the action is pending" and upon the court "from which the writ issued." The proceeding to determine title under the circumstances of this case may therefore be lawfully transferred so as to entitle it to be heard and determined by the court where the main action is pending. It is apparent that a court to which an action has been regularly transferred may acquire jurisdiction to hear and determine title to property under section 689 when the third party claim is filed after the transfer is made. The statute merely provides that the hearing may be had in "the court in which the action is pending, or from which the writ issued." We therefore conclude that either court may acquire jurisdiction to hear the matter.

The statute provides that the title must be determined within twenty days from the filing of the petition, but that, for good cause, it may be continued to a later date for determination. The section further discloses that, if the plaintiff who procured the attachment fails to furnish the bond provided by law authorizing the officer to retain custody of the property against a third party claim, and judgment is rendered against the claimant, the custody of the property shall be retaken by the officer and held subject to the final determination of the main action. The statute provides in that regard: "If the property shall have been released by the officer for want of an undertaking, and final judgment shall go for the plaintiff or other person in whose favor the writ runs, the officer shall retake the property on such writ, if the writ is still in his hands, or if the writ shall have been returned, another writ may be issued on which the officer may take such property."

This procedure seems to indicate that the proceeding to determine the title to property which has been attached in an action is incident to and a part of the main suit. These summary proceedings are all entitled the same and filed in the main action. It has been held that this summary statutory proceeding to determine title to property upon application of a stranger to the litigation "may be removed [to another court] with the attachment proceeding, as an incident thereto." 6 C.J. 389, § 872; Hochstadter Bros. v. Harrison, 71 Ga. 21. In the case last cited it is said in that regard:

> "A claim to property, levied on under final process of a state court, is not removable. The claim is but an incident of the main proceeding, and cannot be detached from it."

[4] In the present case the several third party claims to title in different items of the personal property which was attached were properly entitled the same and filed in the main action in the superior court of Sacramento county. These third parties actually objected to that court hearing or determining their claims on the ground that it was disqualified because a motion for change of venue of the main cause was pending. The trial court took that view of the matter and transferred to Glenn county the entire litigation, including the petition to determine title to the property. In transferring the cause, the proceeding to try the title to the property was not specifically mentioned, but we are of the opinion it was necessarily included in the order. The court granted the motion to change the place of trial, and continued the time previously set for hearing the proceeding to determine the title to the property and specifically directed that "all papers filed in the above mentioned action be forthwith sent to the Superior Court * * in and for the County of Glenn."

Under the circumstances of this case, the superior court of Glenn county acquired jurisdiction to try and determine the title to the personal property under attachment which is involved in the issues raised by the third party claims.

The writ of mandamus should issue as prayed for, and the judge of the superior court of Glenn county is directed to proceed to hear and determine title to the property.

We concur: PULLEN, P. J.; PLUMMER, J.

19 Cal.App.2d 556

PEOPLE v. WOODS.

Cr. 2955.

District Court of Appeal, Second District,
Division 2, California.

March 15, 1937.

Hearing Denied by Supreme Court
April 12, 1937.

1. Criminal law 🔑1111(1)

Refusal to permit voir dire examination of jury on sanity issue, in rape prosecution wherein defendant had pleaded not guilty and not guilty by reason of insanity, *held* not error, where record showed that jury was duly impaneled and sworn prior to trial of either issue, notwithstanding that issues were tried consecutively and that jury was sworn three times, since reviewing court was required to assume that jurors were fully examined on voir dire and were acceptable to defendant in absence of showing of objection in record, and since there was but one trial on both issues and question whether both issues should be tried to same jury was within discretion of trial court (Pen.Code, § 1026, as amended by St. 1935, p. 1075).

2. Criminal law 🔑633(1)

Examination by alienists who are appointed by court of defendant pleading not guilty by reason of insanity is not jurisdictional and may be waived (Penal Code, § 1027, as amended by St.1933, p. 2347).

3. Criminal law 🔑1035(3)

Objection of defendant, who had pleaded not guilty by reason of insanity, that it did not appear that alienists appointed by court were from staffs of state hospitals as required by statute, cannot be made for first time on appeal (Pen.Code, § 1027, as amended by St.1933, p. 2347).

4. Criminal law 🔑1144(10)

Reviewing court *held* required to assume, on appeal from conviction wherein defendant had pleaded not guilty by reason of insanity, compliance with provisions of statute requiring one of three alienists appointed by court to be from medical staff of state hospital, where record failed to disclose that any of alienists were or were not from staffs of state hospitals (Pen.Code, § 1027, as amended by St.1933, p. 2347).

5. Criminal law 🔑1144(12)

On appeal from conviction after plea of not guilty by reason of insanity, reviewing court *held* required to assume that reports of two of three alienists appointed by court were in agreement so as to justify excusing of filing of report by third alienist, where reports were not included in record on appeal (Pen.Code, § 1027, as amended by St. 1933, p. 2347).

6. Criminal law 🔑1036(6)

In rape prosecution wherein defendant pleaded not guilty by reason of insanity, question whether court committed prejudicial error in admitting testimony of alienist as to result of examination of defendant 40 days subsequent to time of commission of crime could not be raised for first time on appeal, where record showed that no objection was made in trial court.

7. Criminal law 🔑470

In rape prosecution wherein defendant pleaded not guilty by reason of insanity, permitting alienists to give, over objections, opinions concerning defendant's ability to determine between right and wrong *held* not error as against contention that such evidence invaded province of jury, in view of varying definitions of legal insanity and statutory provision contemplating that expert give basis for opinion, especially where statutory instruction that jury was not bound by expert opinion evidence was given (Pen.Code, §§ 1127b, 1368; Pol.Code, § 2168).

◆

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Lee Arnic Woods was convicted of rape, and he appeals.

Affirmed.

Anna Zacsek, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

The defendant was convicted of the crime of rape and sentenced to the state prison. The issues under his pleas of "not guilty" and "not guilty by reason of insanity" were separately tried in one trial, the jury returning successive verdicts of "guilty" and "sane." This appeal is taken from an order denying defendant's motion for a new trial and from the judgment.

[1] It is first contended by defendant that the court committed prejudicial error in refusing to permit a voir dire examination of the jury when the issue of

sanity was reached. The same jury tried the issue as to defendant's guilt and the issue as to his sanity. The record shows that the jury was "duly impaneled and sworn to try the case" prior to the trial of either issue. We must assume that the jurors were fully examined on voir dire at the beginning of the trial and, since no objection appears in the record, the jury was acceptable to the defendant. The fact that two separate issues were tried consecutively does not alter the situation—there was but one trial. People v. Leong Fook, 206 Cal. 64, 273 P. 779. It was within the discretion of the trial court to determine whether the issue of sanity should be tried before the same jury or a different one (Pen.Code, § 1026 as amended by St.1935, p. 1075), and no abuse of such discretion has been shown. Further examination, if desired by defendant, should have been asked for and made during the selection of the jury at the beginning of the trial. People v. Davis, 94 Cal.App. 192, 270 P. 715; People v. Foster, 3 Cal.App.(2d) 35, 39 P.(2d) 271.

[2-4] The defendant makes the above his first and primary contention for reversal and in this behalf he sets forth at great length the record and references thereto which indicate that before the issue of guilty or not guilty was tried, only the defendant's plea of "not guilty" was stated by the clerk to the jury "although defendant had already pleaded not guilty and not guilty by reason of insanity," and that at this time the jury was to try only the issues raised by the plea of not guilty, and that three days later the jury was again sworn and the defendant's plea of "not guilty by reason of insanity" was stated to the jury. After presenting this record the defendant proceeds: "As we have [thus] shown, it affirmatively appears in the record herein that the jurors were not examined fully or otherwise on voir dire at the beginning of the trial." We fail to follow the defendant in the reasoning by which he reaches this conclusion. It is true the record shows that the jurors were sworn three times, the judge stating at the third time the jurors were sworn, "It may not be necessary, but, as a precautionary measure, I will ask you to swear the jury again." We fail to see how swearing the jury three times, even though unnecessary, was prejudicial to the defendant, and we fail to see how this proves the defendant's contention that "it affirmatively appears in the record herein that the jurors were not examined fully or otherwise on voir dire at the beginning of the trial." The record says that before the jurors were first sworn they were duly impaneled and there is nothing in the record to the contrary.

The trial court appointed three alienists for the purpose of determining and making a report on the question of defendant's sanity, it being stipulated that if two agreed, the third need make no report. Section 1027 of the Penal Code, as amended by St.1933, p. 2347, provides that the court must appoint two alienists and may appoint three and that in making the appointments at least one must be from the medical staffs of the state hospitals. Defendant now urges, as a ground for reversal, that it does not appear that any of the alienists appointed by the court were from the staffs of the state hospitals. The examination of an accused by alienists who are appointed by the court is not a jurisdictional proceeding and may be waived. People v. Wiley, 111 Cal.App. 622, 295 P. 1075. Nowhere does it appear that any objection was made to the alienists who were appointed, either during the trial, or on motion for a new trial. This would indicate that the requirements of the section had been met or had been waived. People v. Norton, 138 Cal.App. 70, 31 P.(2d) 809. This objection cannot be made for the first time on appeal. Furthermore, in view of the fact that the record fails to disclose, either affirmatively or negatively, that any of the alienists were or were not from the staffs of the state hospitals, we must assume on appeal that the provisions of the section were complied with.

[5] We are asked to decide whether or not the reports filed by the alienists are in agreement and, if not, whether or not it was error for the court to excuse the filing of a report by the third alienist. Inasmuch as the reports in question were not included in the record on appeal, we must assume that they were in agreement.

[6] It is next contended by defendant that the court committed prejudicial error in admitting the testimony of one alienist, over objection, as to the result of his examination of defendant, which was made about forty days subsequent to the time when the crime was committed. The objection on appeal is that the evidence was too remote. The record shows that

no objection was made in the trial court, but merely the following: "If the Court please, his mental condition, I submit, on July 28, 1936, and what the evidence is of his mental condition on June 21 or 22, 1936, forty days or more prior to that time * * *." The question cannot be raised for the first time on appeal. People v. Smith, 121 Cal. 355, 53 P. 802; People v. Manning, 48 Cal. 335.

[7] Finally the defendant contends that by permitting the two alienists to give, over his objections, their opinions concerning the defendant's ability to determine between right and wrong, the trial court committed prejudicial error. In this behalf the defendant relies almost wholly upon People v. Jacobs (Cal.App.), 51 P.(2d) 128. Unfortunately for the defendant, but fortunately for the People of California, the opinion in that case is resting in a judicial morgue, having succumbed to a painless lethal gas in the form of an inoffensive order by the Supreme Court transferring the case to a higher sphere. The opinion did not get further than the advance sheets and does not appear in the permanent volumes of the reports. It is not the law in California.

The contention of the defendant is that such evidence from the experts invades the province of the jury. There has been some confusion in the cases with regard to this matter and we feel that in deciding defendant's contention we must give our reasons at some length. The question has not been directly discussed in California, except in the Jacobs Case, supra. There are, however, cases in which experts have been permitted to give their opinions on the issues to be decided by the court. Lemley v. Doak Gas Engine Co., 40 Cal.App. 146, 152, 180 P. 671; In re Estate of Russell, 189 Cal. 759, 774, 210 P. 249. In the Jacobs Case and in the cases from other jurisdictions in which it has been decided that it is reversible error to admit such evidence, the decision is always based upon the theory that to do so is an unlawful invasion of the province of the jury.

A sufficient and all-controlling answer against defendant's contention is found in the fact that in California whenever such questions are answered by an expert, it is the duty of the court to give the following instruction (Pen.Code, § 1127b): "Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion *with the reasons stated therefor,* if any, by the expert who gives the opinion. *The jury is not bound to accept the opinion of any expert as conclusive,* but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable." Thus in such instances the trial court does not empower the expert witness to decide any fact, nor is the jury bound to accept the expert's assertions, and the province of the jury is not invaded. Pen.Code, § 1127b; and also see 10 Cal.Jur. 962, note 6; 10 Cal.Jur. 972, notes 11 and 12. The trial court gave the above instruction in the instant case.

There are additional reasons why this should be the rule in California. In this state there are several distinct, legal tests for determining when a person is sane or insane. In a criminal case where the plea of insanity is entered, the test is whether the defendant knows the nature and quality of his act at the time of its commission *and the wrongfulness of the act.* People v. Keaton, 211 Cal. 722, 296 P. 609. Under the provisions of section 1368 of the Penal Code, where during the course of the trial, doubts arise as to the sanity of the accused, the test is "whether he understands and appreciates the nature of the proceedings had against him." Under the provisions of section 2168 of the Political Code providing for the commitment of insane persons to the state hospital, the test is whether the individual is so far deranged in mind as to be a danger to himself or others. Another test arises upon the question of the capacity of a testator to make a will. If the expert is limited to giving his opinion that the person is insane, the jury will never know what test the expert took into consideration as his basic test of insanity. In a criminal case, if the expert cannot be asked his opinion as to whether the accused knew right from wrong, then the jury is left absolutely in the dark as to whether or not the expert is applying in his mind the correct test of insanity. The expert may be applying a wholly different test and still be technically correct in saying that the accused is sane or insane, and be wholly incorrect for the purposes of the case if he is not applying the "right and wrong" test. Judges with experience in the trial of insanity cases know that medical experts have many and different definitions of and tests for insanity. They speak of insanity in a medical sense and in a legal sense. In Re Estate of Sexton, 199 Cal. 759, at page 765, 251 P. 778, 780, it is said: "'Insanity' is a broad, comprehensive, and generic term of ambiguous import. In a medical sense, it is used to denote any unsound and deranged conditions of the mind and every degree of mental unsoundness, whatever may be its source or cause." How often have trial judges heard a medical expert give his opinion that a person is insane, and discover thereafter that in the sense in which he uses the word, "any disease or defect of the brain regardless of the extent of the effect of that disease on the brain is insanity," or "any person is insane who has the slightest destruction of cell tissue of the brain or who has syphilis of the central nervous system." Sound reason demands that the jury be not kept in the dark as to the true basis upon which the expert renders his opinion.

In a large sense also the answers of an expert to such questions constitute "a statement of the reasons for his opinion" as to the sanity or insanity of the accused, which the law contemplates.

It is no more an invasion of the province of the jury for an expert to give his opinion that an accused is insane including the correct legal test than for him to give his opinion merely that the accused is insane, and none of the cases hold that it is an invasion of the province of the jury for the expert to give his opinion that the witness is insane. It cannot fairly be argued that any prejudice is caused the accused by allowing the jury to know the basis upon which the expert has reached his conclusions and the grounds therefor. On the one hand, if the jury does not believe the expert's opinion that the accused is insane merely, it will disregard the opinion. On the other hand, if the jury does not believe the expert's opinion that the accused knew the difference between right and wrong, it will likewise disregard the opinion; for the jurors are instructed that the question is for them to decide and that they are not bound to accept the opinion of any expert as conclusive, and that they may disregard any such opinion if it shall be found by them to be unreasonable. For citations which tend to support our conclusion, see 11 Ruling Case Law, 584; People v. Keaton, 211 Cal. 722, 296 P. 609; People v. Willard, 150 Cal. 543, 89 P. 124; People v. Sloper, 198 Cal. 238, 244 P. 362.

The defendant relies also upon the case of People v. O'Brien, 122 Cal.App. 147, 9 P.(2d) 902, 904. But that case involved nonexpert witnesses solely and the question as to what expert witnesses might testify to in insanity cases was not involved. The question before us was not directly discussed. Nevertheless, the O'Brien Case quotes the following from In re Estate of Schulmeyer, 171 Cal. 340, 153 P. 233: "Expert witnesses may give their opinions concerning the mental condition of a person. They are not restricted to the mere declaration of an opinion that the person is or is not of sound mind, but may state the nature and extent of the deficiencies, if any, which they believe to exist." In the early and so-called leading case of Estate of Taylor, 92 Cal. 564, 28 P. 603, 604, the question was whether an expert witness might properly testify *as to the capacity of a person to make a will.* The Supreme Court said that, "in allowing this witness to answer the question referred to, not only was the province of the jury invaded, but that of the court also, and the whole issue of law and fact was determined by the mere opinion of the witness." The trial courts have attempted to follow the precedent there set, on numerous occasions, but it should be observed and remembered that the question presented in the Taylor Case actually did involve the issue of ultimate fact in the case and actually did involve the whole issue of law. It was as if a witness were asked in the instant case: "Is the defendant guilty?" The question propounded to the witness in the instant case does not involve any issue of law, and while it involves a question of fact, the fact is only one of the elements necessary in order to determine the defendant's legal sanity or insanity, an element upon which it is well for the jury to have some evidence in order to reach its own conclusion.

Judgment and order affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

19 Cal.App.2d 508

WILLIS v. PAGE.

Civ. S. C. 10.

District Court of Appeal, Second District, Division 1, California.

March 12, 1937.

Hearing Denied by Supreme Court May 10, 1937.

1. Pleading ⚷34(1)

Several paragraphs of complaint must be read together and each clear and unequivocal statement therein given equal effect with others.

2. Pleading ⚷34(2)

General allegations of complaint in action to recover interest in realty as agreed broker's commission for negotiating loan thereon that plaintiff performed all conditions of agreement on his part *held* statement of conclusion, controlled by conflicting specific allegations, though specifically authorized by statute (Code Civ.Proc. § 457).

3. Brokers ⚷54

To earn commission for negotiating loan on realty, broker must procure person not only ready, able, and willing to loan agreed sum thereon, but willing to make loan on terms stated in agreement between broker and owner.

4. Brokers ⚷82(1)

Complaint *held* insufficient to state cause of action for recovery of interest in realty as broker's commission for negotiating loan thereon because of failure to show that plaintiff procured person ready, able, and willing to make loan on agreed terms or that owner was unwilling or unable to accept loan and give required security on such terms.

> The complaint showed that proposed lender insisted that title be cleared as against lien of trust deed under outstanding contract for sale of property before obligating himself to lend money and that owner merely refused to place title in condition satisfactory to lender when money was borrowed, not after six months allowed him by agreement to furnish clear title.

5. Brokers ⚷54

Broker's commission for negotiating loan on realty was not earned, where loan was never consummated and could have been consummated only on terms differing materially from those agreed on when he was employed to negotiate loan.

6. Brokers ⚷54

Broker, failing to procure person ready, able, and willing to make loan on realty on conditions stipulated by owner thereof, *held* not entitled to commission for procuring purchaser of realty pursuant to agreement providing that it should not become effective unless such loan was made.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Richard C. Willis against Edward H. Page, as executor of the will of William C. Doak, deceased. Judgment for defendant, and plaintiff appeals.

Affirmed.

Dana R. Weller and C. F. Culver, both of Los Angeles, for appellant.

Ivan Miller, of Los Angeles, for respondent.

SHINN, Justice pro tem.

The complaint is in two counts. There was no demurrer. When the case was called for trial the complaint was amended in certain respects and defendant, having answered, objected to the introduction of any evidence as to either cause of action, upon the ground that no cause of action was stated therein. This objection was sustained and judgment was entered that plaintiff take nothing by the action and that defendant recover his costs. From this judgment plaintiff appeals. The action is against the executor of William C. Doak, deceased.

The first cause of action is for the recovery of an interest in real property as an agreed broker's commission for negotiating a loan on said real property, plaintiff claiming to have procured a person ready, able, and willing to make the loan upon the terms stated in decedent's written authorization. This agreement, executed on December 29, 1932, by decedent, William C. Doak, and plaintiff, authorized plaintiff to procure a person who would make a loan of $7,000, to be secured by note of Doak and his trust deed upon certain patented mining claims and a townsite block. The agreement (referred to in the record as Exhibit A), in so far as it related to the loan and the commission, provided as follows: "Re the Loan: The party making the loan shall agree to deposit, irrevocably for a period of six months, with Pioneer Title Insurance & Trust Company, El Centro, California, on or before January 5th, 1933, the sum of Seven Thousand ($7,000.00) Dollars. Of this sum Forty-five Hundred ($4,500.00) Dollars shall be made available to me Promptly upon delivery into escrow of, (1) Satisfaction of Ridgway heirs claim of $4074.00; (2) Duly Executed Deed from Trustee of Ridgeway Estate, also (3) Duly executed deed from various heirs of Ridgeway Est.; (4) Any other documentary evidence available regarding title. Balance of said Seven Thousand ($7,000.00) Dollars shall be made available to me when clear title, ready for issuance of customary policy of Title Insurance, by Pioneer T. I. & T. Company, can be shown in my name. As security for said loan, I will give my personal promissory note in the sum of Seven Thousand ($7,000.00) Dollars, due two years from date of escrow, bearing interest of seven (7%) percent, payable annually, and evidence same by the execution and delivery of a first lien trust deed on customary Title Company form, covering said property, or any interest I may have therein. Also as a further consideration, for your various services and as a partial consideration for procuring said loan, I agree to deed to you, or nominee, in the said escrow, a Twenty-five (25%) percent interest in the fee title to the hereinabove described property; providing, however, that in the same escrow, there shall be deposited an agreement for the sale of aforesaid property, acknowledging me as sole manager, and agreeing to promptly approve any sale calling for an excess of Fifty Thousand ($50,000.00) Dollars purchase price; provided, such sale be bona fide and that no benefits shall accrue therefrom to me or any of my beneficiaries other than through the actual sales price."

The complaint read in part as follows: "V. That pursuant to the terms of said written contract plaintiff did procure a person ready, able and willing to make said loan of $7,000.00, in accordance with the terms of said agreement, and on the 4th day of January, 1933, introduced said party to the said William C. Doak at the office of the Pioneer Title Insurance Company at El Centro, California, and said party then and there offered to deposit with said Pioneer Title Insurance Company at El Centro, California, the said sum of $7,000.00 cash. VI. That the said Pioneer Title Insurance Company was designated by the said William C. Doak, as agent to file the escrow pertaining to said loan, and at said time and place informed the party offering to deposit the sum of $7,000.00 that a title insurance policy could not be issued to the party offering to make said loan in accordance with the terms of said agreement of December 29th, 1932, attached hereto as Exhibit A, for the reason that said William C. Doak had executed an option to purchase said property to Treadwell Yukon Co., Ltd., a corporation, said corporation being the Bradley Interests referred to in said Exhibit A. VII. That plaintiff had not been informed of the terms of said contract prior to the said 4th day of January, 1933, and upon learning of said option plaintiff demanded of the said William C. Doak that he procure from the optionee an agreement subordinating its rights in said premises to the rights of the proposed lender of the said sum of $7,000.00; that notwithstanding such demand the said William C. Doak neglected to procure such subordination agreement. VIII. That on the 20th day of January, 1933, plaintiff notified the said William C. Doak in writing that he had procured a party ready, able and willing to make a loan of $7,000.00 under the terms and conditions set forth in said Exhibit A, and demanded of the said William C. Doak that he comply with the terms of said agreement on his part, but the said William C. Doak refused and neglected to comply with said demand; that said party referred to was the same party heretofore mentioned in paragraph V, and was on said January 20th, 1933, and at all times between the 4th day of January, 1933, and the said 20th day of January, 1933, ready, able and willing to make said loan of $7,000.00 under the terms and conditions set forth in said Exhibit A; that on said 20th day of January, 1933, the said William C. Doak had not sold said property to the Bradley Interests or associates or anyone else, and the said Bradley Interests never agreed to purchase said property and never did purchase said property. IX. That plaintiff has fully performed all of the conditions of said contract on his part, and that the completion of said loan was prevented by the refusal of said William C. Doak to perform said agreement on his part, without just cause or reason." The complaint alleged presentation to defendant executor of plaintiff's claim to a 25 per cent. interest in the real property, the failure of the executor to act upon said claim within ten days, and plaintiff's election to treat the claim as having been rejected.

[1, 2] The pleading of the conclusion that plaintiff had fully performed all of the

conditions of said agreement on his part was allowable under section 457 of the Code of Civil Procedure. The complaint alleged specifically the acts of plaintiff which, according to the pleader, constituted performance on plaintiff's part which would have earned for him a commission. The allegation that plaintiff procured a person ready, able, and willing to make the loan in accordance with the terms of the agreement was qualified by the further allegations of paragraphs VI and VII, wherein it was alleged that when the proposed lender was informed that the property was subject to a previous contract of sale plaintiff thereupon demanded that the rights of the holders of that contract be subordinated to the rights of the proposed lender, and that Doak neglected to obtain an agreement which would accomplish that purpose. The several paragraphs of the complaint must be read together and each clear and unequivocal statement should be given equal effect with the others. The general allegation that plaintiff had performed all of the conditions of the agreement on his part, while specifically authorized by the Code, is none the less the statement of a conclusion and as such it is controlled by the specific allegations which are in conflict therewith. This principle is stated in Little v. Union Oil Co., 73 Cal.App. 612, at page 619, 238 P. 1066, 1068, as follows: "It is a general rule that where a conclusion is alleged and also the special facts from which the conclusion is drawn, if the special facts are inconsistent with and do not support the conclusion, the former control, and the sufficiency of the complaint is to be determined from the special facts pleaded." Numerous authorities are cited supporting this text.

[3-5] In order to earn a commission it was not enough that plaintiff should procure a person ready, able, and willing to loan $7,000 on the property; the proposed lender must have been willing to make the loan upon the terms stated in the agreement between plaintiff and defendant. Under that agreement the lender was required to place $7,000 in escrow, $4,500 of which was to be made available promptly to the borrower when certain deeds and releases were placed in the escrow. No guaranty of title was to be written at that time nor was there any stipulation in the agreement that title must then have been clear and complete. Upon the contrary, the agreement of the borrower was to give his note secured by "a first lien trust deed on customary Title Company form, covering said property, or *any interest I may have therein.*" (Italics added.) The trust deed, which was to be given when the sum borrowed should be placed in escrow, was to convey not the entire interest, but only such interest as the grantor might then have. After the withdrawal of $4,500, the balance of $2,500 was not to be made available to the borrower until his title had been made clear, and a period of six months was allowed him in which to perfect his title. If he failed to complete it within that limited time he would not become entitled to receive the $2,500, and the lender would then have a first lien secured by trust deed upon such interest in the property as the borrower might have had on the date the trust deed was given, as security for the $4,500 which the borrower had received. The complaint failed to show that plaintiff procured a person who was ready, able and willing to make a loan on the agreed terms. Upon the contrary, it showed definitely that the proposed lender was insisting that the title should be cleared as against the lien of the trust deed of an outstanding contract relating to a sale of the property before he obligated himself to lend the money. Furthermore, it did not appear from the complaint that Mr. Doak was unwilling or that he was unable to accept the loan and give the security upon the terms stated in the agreement; it appears only that he refused to place the title in a condition satisfactory to the lender at the time the money was borrowed, which he was not obliged to do. He was not required to waive the provision of the agreement under which he was allowed six months within which to furnish a clear title, and consequently was not in default in failing to waive that right. Manifestly Mr. Doak was fully justified in refusing the loan upon terms which imposed new, unwarranted and burdensome conditions. The allegation that the plaintiff notified decedent, on January 20, 1933, that he had procured a person ready, able, and willing to make the loan adds nothing to the sufficiency of the complaint. The party referred to in this notice was the same one who had made the conditional offer on January 4. It was not alleged that he had withdrawn the condition attached to his offer at any time between January 4 and January 20, nor that he had made a new and different offer. Furthermore, any offer which came after January 5 would have been too late. It was of the essence of the agreement that the loan was to be procured on or before January 5, 1933. As the loan was never consummated and could

have been consummated only upon terms differing materially from those agreed upon at the time plaintiff was employed to negotiate the loan, plaintiff's commission was not earned, and the first cause of action stated insufficient facts to warrant a judgment in plaintiff's favor.

[6] We consider now the sufficiency of the facts alleged in the second cause of action. In the same writing which authorized plaintiff to procure a loan of $7,000 were certain other provisions which gave plaintiff the right, first, to purchase the real property for $135,000, upon certain specified terms, and, second, to find a purchaser for the property for $150,000, payable in installments over a period of years. The agreement provided that in the event plaintiff procured a purchaser he should receive a commission of 10 per cent. of the purchase price, payable if, as, and when payments on the purchase price should be made. There were numerous conditions attached to either a purchase or sale by plaintiff which are not material to this discussion and which need not be enumerated. The complaint alleged that plaintiff procured a purchaser for the property upon the terms and conditions set forth in the agreement between plaintiff and defendant; that he notified William C. Doak in writing that he had procured such purchaser and tendered to Doak $500 as the first installment of the purchase price, and that said Doak, without just cause or reason, refused to sell said property to such purchaser. It was alleged that the purchaser had ever since been ready, able, and willing to purchase said property upon the stipulated terms; that plaintiff's claim for a commission in the sum of $15,000 had been presented to the executor, but had not been acted upon within ten days thereafter, and plaintiff had not been notified of any action taken thereon by the executor. This cause of action was for the recovery of the sum of $15,000 as commission for procuring a purchaser of the property.

The agreement, in so far as it related to the authorization to find a purchaser, contained the following provision: "It is understood and agreed that in no case shall this agreement become effective in any particular unless said loan is made in accordance with this agreement." This direct and positive provision was unqualified. We have already pointed out that the loan was not made and that plaintiff did not procure a person ready, able, and willing to make the loan upon the conditions stipulated by the owner. It follows that the agreement, in so far as it purported to employ plaintiff to procure a purchaser for the property, never became effective. Plaintiff's agency was dependent upon a condition which was not fulfilled, and his acts in procuring a purchaser were therefore unauthorized, and placed Mr. Doak under no obligation to sell the property or to pay a commission.

Numerous other points are relied upon by respondent in support of the judgment, and these are discussed at length in the briefs. As the judgment must be affirmed, these points require no comment. The trial court ruled correctly in sustaining the objection to the introduction of evidence to prove either cause of action upon the ground that neither cause of action stated facts which, if proved, would have entitled plaintiff to recover.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

19 Cal.App.2d 481

HARPER et ux. v. BUCKLES et al.

Civ. 1980.

District Court of Appeal, Fourth District, California.

March 10, 1937.

1. Appeal and error 🔑909(2)

Where appellate court was unable to determine the dates of recordation of some of trust deeds in action to quiet title and no question was raised as to any right intervening between date any deed bore and date of its recordation, court would assume that each deed was promptly recorded.

2. Mortgages 🔑132

Water system placed on land subsequent to execution of first trust deed which did not mention subsequent improvements *held* to have become appurtenant to land and encumbered by first trust deed, so as to vest in defendant holding under purchaser on foreclosure sale, as against claim of plaintiff holding under second trust deed executed subsequent to installation of water system.

3. Appeal and error ⚷907(4)

In absence of evidence from the record as to description of property conveyed to defendant, appellate court was required to presume that missing evidence supported finding and judgment for defendant.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Wallace Scott Harper and wife against Dennie D. Buckles and others. From a judgment in favor of the named defendant, the plaintiffs appeal.

Affirmed.

For prior opinion, see 60 P.(2d) 180.

H. E. Gleason and John F. Poole, both of Los Angeles, for appellants.

William Guthrie and Jesse W. Curtis, Jr., both of San Bernardino, for respondent.

MARKS, Justice.

This is an action to quiet title to "all water, water rights, pipe lines, reservoir rights, and rights of way and pumping equipment appurtenant to Deer Lodge Park in the County of San Bernardino, State of California, a map of which Deer Lodge Park is recorded in Book 24, of Maps at Pages 50 to 53 inclusive, Records of said San Bernardino County." Judgment went in favor of certain of the defendants, and plaintiffs have appealed from a portion of it.

This case was before us at an earlier date. Harper v. Buckles, 60 P.(2d) 180. A rehearing was granted to permit examination of questions not considered at that time. While we are now satisfied that the conclusions reached in the first decision were correct, the opinion originally prepared by Mr. Justice Pro Tempore Turrentine may not here be used in its entirety as some amplification of it is deemed desirable.

At the commencement of the trial it was stipulated that G. F. Stickney was the common source of title of the parties to this action. On May 28, 1923, F. H. Krause and Dora Krause, his wife, acquired title from Stickney to the north half of section 8, township 2 north, range 3 west, San Bernardino Base and Meridian in San Bernardino county. The grant, among other things, included "also all rights, title and interest in and to a water appropriation of twenty-five thousandths cubic feet per second from January 1 to December 31 of each year, according to a Permit No. 1203 issued by the State Department of Public Works November 13, 1922." On the same day F. H. Krause and Dora Krause, his wife, executed a deed of trust upon this real property and water right, to the Pioneer Abstract & Title Company, as trustee, and F. G. Stickney and Mathilda S. Stickney, as beneficiaries, to secure the payment of three promissory notes in the total principal sum of $11,000. This deed of trust was regularly foreclosed, and on October 22, 1929, the Pioneer Abstract & Title Company executed a trustee's deed conveying to D. D. Buckles, as parcel No. 1, the real property and water right already described, saving and excepting two subdivisions known as Deer Lodge Park and Arrowhead Gardens, which had been carved out of the half section, and a parcel number II, which is described in the bill of exceptions as follows: "The following described lots in Deer Lodge Park Subdivision * * * (Here follows specific description of certain lots in said subdivision.)" The following was also included: "* * * Together with all appurtenances. To have and to hold the said property with the appurtenances, unto the said party of the second part, his heirs and assigns forever, but without covenant or covenants, expressed or implied, regarding the title to said property or incumbrances thereon."

Defendants Maxwell Krause and his wife asserted title to all of the unsubdivided portions of the half section already described and also a number of lots in Deer Lodge Park. Defendant Buckles asserted title to the water rights and the water, and a water distributing system that had been constructed to serve at least a portion of the lots in Deer Lodge Park and also to a number of lots in that subdivision and in Arrowhead Gardens. Other defendants asserted title to lots in both subdivisions. As the water rights and water distributing system are all that are in controversy here, and as that controversy is between plaintiffs and defendant Buckles, we need give no further consideration to those portions of the judgment which quiet title to parcels of land in defendants other than Buckles.

Plaintiffs deraign title through a deed of trust dated June 29, 1926, executed by F. H. Krause and Dora Krause, his wife, to Security Title Insurance & Guaranty Company, trustee, and Citrus Belt Building & Loan Association, beneficiary, to secure the payment of a note in the principal sum of

$5,900. As security, the deed of trust described sixty-four lots in Deer Lodge Park and "also all water and water rights, pipe lines, reservoir rights and rights of way and pumping equipment appurtenant to Deer Lodge Park, together with the appurtenances thereto. * * * All things now or hereafter in any manner affixed to said real estate or its improvements for any purpose, shall be deemed a part of the realty." This trust deed was foreclosed and under date of October 28, 1929, the Security Title Insurance & Guaranty Company executed its trustee's deed conveying the property just described to the Citrus Belt Building & Loan Association. Under date of March 15, 1932, the Citrus Belt Building & Loan Association conveyed this property to W. J. Harper and May V. Harper, his wife. By a deed dated October 17, 1933, W. J. Harper and May V. Harper conveyed this same property to Wallace Scott Harper and Virginia Harper, his wife, the plaintiffs in this action.

[1] We are not able to determine the dates of recordation of some of the instruments to which we have referred. No question is raised by counsel as to any right intervening between the date any instrument bears and the date of its recordation. We will, therefore, assume that each such instrument was promptly recorded.

There is attached to the bill of exceptions photographic copies of the three pages of the subdivision map of Deer Lodge Park. These copies are so small and indistinct that they were of little assistance to us. During the second argument plaintiffs produced larger copies of these maps and it was stipulated that these become part of the record on appeal.

We will hereafter refer to D. D. Buckles as the defendant in this action, and the deed of trust dated June 8, 1923, which is in his chain of title, as the first trust deed. We will refer to the trust deed dated June 29, 1926, which is in plaintiffs' chain of title, as the second trust deed.

The first question presented for our consideration is the interest in the water rights and the water system acquired by defendant under the first deed of trust and the trustee's deed to him. At the date of the first deed of trust no part of the water system had been constructed. A considerable portion of it was constructed between that time and the date of the second deed of trust. We cannot determine how much of it was constructed after the date of the second deed of trust. At the time of the trial the system served a considerable number, but not nearly all of the lots in Deer Lodge Park. While the use made of the water by the customers of the system is not at all clear from the record, we believe we are safe in assuming that it was furnished and used for domestic purposes.

The case of Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 P. 858, 861, 15 L.R.A.(N.S.) 359, is factually similar to the instant case. There the parties were asserting adverse interests to an irrigating water system claimed through foreclosures of first and second incumbrances. Much of the system was constructed after the execution of the first incumbrance. That an irrigating system was involved in that case, and a domestic water system in the instant case, should make no difference in the principles of law involved. In deciding the Stanislaus Water Company Case the Supreme Court said:

"The rights of Bachman under the agreement are the same as those of Threlfall.

"It is immaterial that the mortgages of Threlfall's land, under which Bachman acquired title, were executed before Threlfall obtained the water right. The water right, when acquired, became an easement appurtenant to the land (Farmer v. Ukiah Water Co., 56 Cal. [11] 13) and passed with it, upon the foreclosure sale in the same manner as any other appurtenance or fixture passes with the title and possession of land (Civ.Code, §§ 1084, 1104; Cave v. Crafts, 53 Cal. [135] 140; Farmer v. Ukiah Water Co. [56 Cal. [11] 13]; Cross v. Kitts, 69 Cal. [217] 221, 10 P. 409, 58 Am.Rep. 558; Smith v. Corbit, 116 Cal. [587] 591, 48 P. 725). It was an incident of the land, and would pass as such by a conveyance of the land, without express mention and without any reference thereto, such as by the use of the word 'appurtenances' or otherwise. A conveyance of land upon a foreclosure sale must of necessity, at least as between the parties to the mortgage, carry with it a water right appurtenant to the land acquired and used by the mortgagor for the benefit of the land, although obtained after the execution of the mortgage and before the sale or foreclosure. We are cited to no authority for or against this proposition, and have not succeeded in finding any relating to it, but from the nature of the case it must be correct. Fixtures subsequently attached to mortgaged land pass to the purchaser at foreclosure sale, although not mentioned or referred to in the mortgage. Merritt v. Judd, 14 Cal. [59] 72; 2 Jones on Mortgages, § 1657; 1 Am. & Eng. Ency. of Law, 255. The same rule applies to improvements made by the mortgagor on mortgaged land. 1 Jones on Mortgages, §§ 147, 681; Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. [620] 631; Tibbetts v. Moore, 23 Cal. [208] 215. We are unable to perceive any material difference in principle, in this respect, between fixtures and improvements attached to or erected upon land and a water right attached to land as an appurtenance, such as that here involved, and we hold that it is governed by the same rules.

"This principle probably applies also to the right of the Stanislaus Water Company to the lateral ditch built for the Stanislaus & San Joaquin Water Company from the main canal to Threlfall's land. It was used in connection with the canal for its benefit, and it was, therefore an appurtenance to the canal. Although not in existence at the time the canal and water system was mortgaged, it became a part of the system as soon as it was constructed. It is not necessary to this case to determine whether or not it passed to the plaintiff by the foreclosure sale under the prior mortgage. The two interested parties appear to have assumed that it did. It was included in the foreclosure sale and in the deed to the plaintiff, and the plaintiff took possession of it accordingly and used it to carry to the plaintiff's land the water for the rental of which it here claims compensation. Under these circumstances, it is immaterial, in this action, how it acquired title to the lateral."

[2] When we apply the principles thus announced to the facts of the instant case, the conclusion follows that the water system constructed between the dates of the first and second deeds of trust became appurtenant to the land and became incumbered by the first deed of trust. It follows that as an appurtenance to the land, title passed to defendant at the time of the trustee's sale, and the execution of the trustee's deed to him as the lien of the first trust deed was prior and superior to the lien of the second.

[3] Plaintiffs seek to escape the results of this conclusion by asserting that the trial court found that defendant owned but few lots in Deer Lodge Park at the time the complaint was filed. That statement is true, but plaintiffs can draw no comfort from it. The complaint was filed on February 21, 1934, and the case was tried on July 24, 1934. The deed to defendant was dated October 22, 1929. We cannot, without supporting evidence, and for the purpose of reversing the judgment, assume that the lots owned by defendant in 1934 were all that he acquired under his deed in 1929. As we have seen, the partial copy of the deed to defendant, found in the record, does not contain the description of the property conveyed to him. In lieu of a description of the property is inserted, "Here follows specific description of certain lots in said subdivision." In the absence of this evidence from the record we are required to presume that the missing evidence supported the findings and judgment. While the quoted sentence might imply that the trustee's deed to defendant did not convey to him every lot in Deer Lodge Park, if a single lot were omitted from the description in the conveyance the reasonable meaning of the quoted language would be satisfied. Therefore, in view of our duty to presume that the missing evidence supported the findings and judgment we must presume that the trustee's deed to defendant described all but one of the lots in Deer Lodge Park. There is nothing in the record to force the conclusion that the water system was appurtenant to every lot in Deer Lodge Park. Therefore, in performance of the same duty we must assume the water system was appurtenant only to those lots acquired by defendant through the trustee's deed to him.

The same situation exists as to those portions of the water system constructed between June 26, 1926, and 1934. It being once established that the first trust deed created a first lien on the water right and distributing system and that defendant acquired all but one of the lots in Deer Lodge Park and all of the lots to which the water system was appurtenant on June 22, 1929, that fact will be presumed to exist until the contrary is proven. There is no evidence in the record to force the conclusion that defendant conveyed away any interest in the water system or the land to which it was appurtenant prior to January 1, 1934, at which time it would appear that the water system was completed.

It is true that the trial court found that certain of the codefendants of Buckles owned some of the lots in Deer Lodge Park. No chain of title appears to the lots owned by any of them. If such assumption be necessary we may assume that if Buckles deeded lots to any of them he reserved the appurtenant part of the water system. As he acquired title to the water right and water system by foreclosure of a first lien, his title was superior to any claimed by plaintiffs.

On the record before us the judgment must be affirmed. It is so ordered.

We concur: BARNARD, P. J.; JENNINGS, J.

19 Cal.App.2d 487

DEL BOSQUE et al. v. KAKOO SINGH.

Civ. 1986.

District Court of Appeal, Fourth District, California.

March 10, 1937.

Rehearing Denied April 8, 1937.

Hearing Denied by Supreme Court May 3, 1937.

1. Evidence 🔑52

Judicial notice is a form of evidence which may be relied on to contradict other evidence and which furnishes ample support for findings and judgment based on it.

2. Appeal and error 🔑1008(1)

Question of willful misconduct of driver within automobile guest statute is usually one addressed to trier of fact (St.1931, p. 1693, § 141¾).

3. Appeal and error 🔑1011(1)

Where evidence is conflicting and will reasonably support opposite inferences or conclusions, trial judge's findings and judgment based on them cannot be disturbed on appeal.

4. Automobiles 🔑181(7)

Speed of about sixty miles an hour at which automobile was traveling on a clear, dry, unobstructed paved highway was in itself insufficient to constitute "willful misconduct" of driver, but was required to be combined with other circumstances to constitute such misconduct within guest statute (St. 1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

5. Appeal and error 🔑1011(1)

Where evidence is conflicting, judgment cannot be disturbed on appeal because a contrary judgment might have had evidentiary support.

6. Appeal and error 🔑1011(1)

Whether driver of defendant's automobile with defendant's express consent was guilty of willful misconduct in operating automobile which bounced about twice when it reached bottom of dip in state highway near bridge, careened to side of road and into cement post at end of bridge, resulting in death of three guests and injuries to two others, *held* for trial court in view of conflicting evidence as to nature of dip (St.1931, p. 1693, § 141¾).

7. Appeal and error 🔑1071(3)

Finding that driver of defendant's automobile was driving at approximately forty to forty-five miles per hour prior to accident at bottom of dip in highway, which resulted in death of and injuries to guests, would be treated as surplusage, even if finding was contrary to all the evidence, where there was substantial evidence to support finding that driver was not guilty of willful misconduct, even assuming that driver drove into dip at about sixty miles per hour as contended by plaintiffs.

8. Appeal and error 🔑1071(5)

Judgment cannot be reversed because of a mistaken finding on an immaterial fact.

◆

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by Jose Leon Del Bosque and others against Kakoo Singh. From a judgment for defendant, plaintiffs appeal.

Affirmed.

A. C. Finney, of El Centro, for appellants.

Harry W. Horton, of El Centro, for respondent.

MARKS, Justice.

Plaintiffs brought this action to recover judgment for damages caused in an automobile accident. The automobile was driven by Andres Mireles with the express consent of defendant. Plaintiffs Del Bosque and Antonia Aguirre were injured in the accident. The other plaintiffs are the heirs at law of three other persons who were riding in the automobile and who were killed, as was Mireles. Of the five persons who were riding with Mireles, it was stipulated four of them were his guests.

There is nothing in the evidence to show the status of Miss Aguirre, but the case was tried upon the theory that she, too was a guest.

This action was brought under the imputed negligence act (section 1714¼, Civ Code) and the guest law (section 141¾, California Vehicle Act, St.1923, p. 517, as added by St.1929, p. 1580, as amended by St.1931, p. 1693), both of which were in effect at the time of the accident on December 17, 1933. The trial court found that Mireles had not been guilty of willful misconduct and rendered judgment for defendant. The only question presented here is whether the evidence supports the findings and judgment.

From the view we take of the case, it is not necessary for us to consider the liability of an owner to respond in damages for injuries to or deaths of guests caused by the willful misconduct of a driver to whom the owner loaned his automobile. See Weber v. Pinyan (Cal.App.) 61 P.(2d) 954, now pending in the Supreme Court after hearing granted.

The party, with Mireles driving the car, was on its way from Brawley to Los Angeles over the state highway. The car was being driven in what is known as free wheeling. West of Cabazon there are a number of dips in the pavement, one of which is just east of what is known as the San Gorgonio bridge. This dip is described by witnesses for the plaintiffs as between 50 and 60 feet long and between 8 and 10 feet deep with a sharp slope downward from the eastern crest. About 300 feet east of the dip there was a road sign giving warning of it. The roadway ascends a grade to the west.

Plaintiffs' evidence shows that Mireles had been warned not to drive fast through the dips; that he approached the dip in question at a speed of between 55 and 60 miles an hour; that his attention was called to the road sign; that he was warned of this dangerous dip ahead; that he took his foot from the throttle but did not apply the brakes; that when the automobile reached the bottom of the dip it bounced about twice, careened to the southerly side of the road and into a cement post at the southeast end of the bridge.

Defendant introduced several photographs of the roadway east of the San Gorgonio bridge. One of them shows the dip in question very clearly. In the picture it looks neither formidable nor dangerous and certainly does not correspond with the character of the dip described by the witnesses for plaintiffs.

[1] It was stipulated at the trial that "the court is entitled to take judicial notice of the general character of the highway." Judicial notice is a form of evidence and may be relied upon to contradict other evidence. Such evidence furnishes ample support for findings and a judgment based upon it.

[2, 3] Willful misconduct has been clearly defined by the Supreme Court in the case of Meek v. Fowler, 3 Cal.(2d) 420, 45 P.(2d) 194. The question of the existence of willful misconduct is usually one addressed to the trier of fact. Where evidence is conflicting and will reasonably support opposite inferences or conclusions, the findings of the trial judge and the judgment based upon them cannot be disturbed on appeal.

[4-6] If we assume, without holding, that the evidence offered by the plaintiffs would have supported a finding of willful misconduct on the part of Mireles, that finding would have to depend, in part, on the nature of the dip into which he drove the automobile, for the speed at which an automobile is traveling, about 60 miles an hour, on a clear, dry, unobstructed paved highway, has been held in itself insufficient to constitute willful misconduct. Such speed must be combined with other circumstances to constitute that offense against the rules of safe driving. Here the only other circumstance proved was the nature of the dip into which Mireles drove. The evidence on this question is sharply conflicting. On the one side is the description of the dip given by the witnesses for the plaintiffs. On the other is the photograph of the dip. The photograph is substantial evidence strongly supporting the conclusions reached by the trial court. Further, if the trial judge had knowledge of this dip, he might have drawn upon this knowledge under the stipulation of counsel. This judicial knowledge might have supported his conclusion that there was no willful misconduct.

Where the evidence is conflicting, the judgment cannot be disturbed because a contrary judgment might have had evidentiary support. As the findings and judgment have substantial evidentiary support, the judgment must be affirmed.

[7, 8] The trial court found that Mireles drove from the city of Brawley to the San Gorgonio bridge "at a rate of speed of approximately forty to forty-five miles an hour." Plaintiffs attack this finding as contrary to all the evidence. That contention may be correct and still we cannot reverse the judgment. We have disregarded this finding and have assumed that Mireles drove into the dip at a speed of about 60 miles an hour and in so doing have adopted the theory of plaintiffs. After so doing, we have had no difficulty in arriving at the conclusion that the finding that Mireles was not guilty of willful misconduct is supported by substantial evidence and is controlling here. Under such circumstances, the challenged finding may be treated as surplusage and disregarded. A judgment cannot be reversed because of a mistaken finding on an immaterial fact.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

---

19 Cal.App.2d 515

BENNETT v. LANE MORTG. CO. et al.

Civ. 11167.

District Court of Appeal, Second District, Division 1, California.

March 12, 1937.

1. Mortgages 🔑239

Elderly woman *held* entitled to rescind purchase of certificates representing indebtedness evidenced by note, where defendants had fraudulently represented to her that they had purchased note with their own funds and that it was sufficiently secured, when note was in fact secured by trust deed on their own property.

2. Limitation of actions 🔑100(6)

Action to rescind purchase of certificates representing indebtedness evidenced by note after 20 years on ground of fraudulent representations *held* not barred by limitation, where action was begun within three years of discovery of fraud, and where late discovery was satisfactorily explained.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Emma M. Bennett against the Lane Mortgage Company and W. G. Lane. From a judgment for the plaintiff and from an order denying a motion for a new trial, the defendants appeal.

Judgment affirmed, and appeal from order dismissed.

Claud B. Andrews and John H. Alvord, both of Los Angeles, for appellants.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

Based upon the trial court's findings, which stand unchallenged, the events decisive of this appeal fall into a simple chronology. For some twenty years the plaintiff, now an elderly woman, had trusted the defendant Lane and his alter ego, the defendant corporation, with her investments. Early in 1928 the defendants had placed on property owned by them a trust deed to secure a note for $60,000, made payable to them. Knowingly, falsely representing to the plaintiff that they had purchased the $60,000 note with their own funds; that they had carefully investigated the property securing the note and were satisfied that it was sufficient security; that they were acting in good faith to obtain for her the highest and best type of security which would protect her—they induced her to purchase from them certificates which recited that she had obtained an undivided share in the $60,000 indebtedness evidenced by the note, which certificates they issued without a permit from the state commissioner of corporations. Interest payments under the certificates were made up until April, 1932, but no longer. The defendants, who, because of their long years of dealings with the plaintiff, enjoyed her confidence, told her repeatedly to rely on them; that she had only to wait; they would protect her interests; she need not investigate for herself. In April, 1935, the plaintiff employed an attorney to investigate her affairs, and then for the first time discovered that she had been defrauded. She promptly rescinded and, because the defendants refused to return the money she had invested with them, she sued.

[1, 2] Judgment in her favor was followed by an appeal, in support of which the defendants offer two contentions: The certificates were validly issued without a

permit; the statute of limitations had run. Even if the first contention were sound, the result would not be affected, for the fraudulent representations justified the rescission. Nor is the second contention to be upheld. The action was commenced within three years after the fraud was discovered, and its late discovery is satisfactorily explained.

The judgment is affirmed. The appeal from the order denying motion for new trial is dismissed.

We concur: YORK, Acting P. J.; DORAN, J.

---

19 Cal.App.2d 491

HALL et ux. v. ASSOCIATED OIL CO. et al.

Civ. 10208.

District Court of Appeal, First District, Division 1, California.

March 11, 1937.

1. Automobiles 🔑173(4, 5)

Owner of truck which was parked diagonally on highway at night without lights and with front wheels two or three feet off highway, resulting in collision and injuries to occupants of automobile, *held* guilty of negligence (St.1931, p. 2117, § 100(d); St. 1931, p. 2128, § 136(a).

2. Automobiles 🔑245(83)

Under evidence that unlighted truck was parked diagonally on highway at night with front wheels two or three feet off highway, resulting in collision and injuries to occupants of automobile, whether driver of automobile was contributorily negligent in failing to see truck in time to avoid collision *held* for jury (St.1931, p. 2117, § 100(d); St.1931, p. 2128, § 136(a).

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Action by Norman S. Hall and wife against the Associated Oil Company and another. From an order granting plaintiffs a new trial following return of a verdict for defendants, defendants appeal.

Affirmed.

James F. Hoey, of Martinez (F. G. Hamilton, of Oakland, of counsel), for appellants.

Tinning & DeLap, of Martinez (George T. Barkley, of Martinez, of counsel), for respondents.

PER CURIAM.

This action was brought by husband and wife to recover damages for injuries alleged to have been sustained by the wife through the negligence of the defendants. At the trial the jury returned a verdict for the defendants. Upon motion by the plaintiffs a new trial was granted on the ground of insufficiency of the evidence to sustain the verdict and newly discovered evidence. The defendants have appealed from the order.

The injuries complained of were caused by a collision between an automobile driven by plaintiff Hall, in which his wife was riding, with a truck owned by defendant company which its employee had parked diagonally on the highway. The front wheels of the truck were from two to three feet off the highway. The collision occurred in the nighttime, and there was evidence that there were no lights on the truck, and also that insufficient clearance was left for the passage of other vehicles.

The defendants claim that, considering the condition of the highway and the atmosphere and that of the car which Hall was driving, he should have seen the obstruction in time to have avoided the collision, and that his failure to do so was negligence on his part.

The California Vehicle Act provided that no vehicle, whether attended or unattended, could be parked or left standing on a highway unless a clear unobstructed width of fifteen feet upon the main traveled portion of the highway opposite the standing vehicle be left for the free passage of other vehicles, section 136 (a), St.1923 p. 561, amended by St.1931, p. 2128, and also that certain lights be carried on the front and rear of vehicles, section 100 (d), St.1923, p. 546, amended by St.1931, p. 2117.

[1, 2] There can be no reasonable doubt regarding the defendant's negligence; and, under the evidence taken most favorably to the plaintiff, we are satisfied that the ques-

tion of contributory negligence was one for the jury. Such was the view of the courts under similar circumstances as shown by the following cases: Sawdey v. Producers' Milk Co., 107 Cal.App. 467, 290 P. 684; Olden v. Babicora Dev. Co., 107 Cal.App. 399, 290 P. 1062; Gammon v. Wales, 115 Cal.App. 133, 300 P. 988; Hine v. Leppard, 5 Cal.App.(2d) 154, 42 P.(2d) 389, 43 P. (2d) 595; Anderson v. I. M. Jameson Corporation (Cal.Sup.) 59 P.(2d) 962; Schurman v. Los Angeles Creamery Co., 81 Cal. App. 758, 254 P. 681. We are convinced that the facts justified the granting of a new trial.

The order is accordingly affirmed.

19 Cal.App.2d 500

LIMPERT v. WALKER.

Civ. 10201.

District Court of Appeal, First District,
Division 1, California.

March 12, 1937.

Rehearing Denied April 10, 1937.

Hearing Denied by Supreme Court
May 10, 1937.

1. Bills and notes 🔑384

Holder in due course of negotiable note secured by trust deed, who had given the consideration for note and trust deed to abstract company with instructions to pay it over to indorser if trust deed was a first lien on realty, *held* entitled to recover from indorser the entire unpaid principal of note with interest on default, notwithstanding abstract company paid to holder the amount of prior liens where it appeared after company had paid indorser that there were prior liens on property, as against contention that amount so paid should be allowed on note (Civ.Code, §§ 3133, 3138, 3147, 3265).

2. Usury 🔑26

Transfer of negotiable note by indorsement at a discount *held* not to render transaction usurious, in absence of showing that there was a loan or forbearance of money, since a mere sale of note at a discount is not affected by usury laws.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by G. F. Limpert against Dave L. Walker. Judgment for the plaintiff for a lesser sum than that claimed, and the plaintiff appeals.

Reversed with directions that judgment be entered for plaintiff in accordance with opinion.

T. H. Limpert, of San Mateo, for appellant.

W. H. Morrissey, of Redwood City for respondent.

PER CURIAM.

On May 13, 1929, Bernard W. Perkins and wife executed to defendant their promissory note for $1,500 and secured the same by a deed of trust of real estate. The note was negotiable in form. On June 8, 1929, the defendant, in consideration of the payment of $1,125, indorsed the note to plaintiff and therewith assigned the deed of trust. The indorsement was without qualification, and demand, presentment, and notice of nonpayment were waived. The makers of the note paid thereon the sum of $662.38; they then defaulted, and the property described in the deed of trust was sold for $200, the expense of the sale being $121.30. The present action was brought to recover from the defendant, as the indorser of the note, the difference between the total amount paid thereon by Perkins, and $78.48, the net amount realized from the sale, and the unpaid principal of the note, namely, the sum of $759.14.

It appears that at the time of the transfer of the note and deed of trust the consideration therefor was placed in escrow with an abstract company, with instructions to pay the same to defendant if the deed of trust was shown to be a first lien on the real property described therein. The abstract company paid the amount so deposited to the defendant, but it subsequently appeared that there were prior liens against the property for street improvements, aggregating $162.10. This amount was then paid by the company to plaintiff.

As defenses to the action, defendant alleged that the latter sum should be credited on the note, and that the note having been sold for less than its face, plaintiff's recovery should be limited to the amount paid therefor. The trial court accordingly entered judgment in plaintiff's favor for $222.02, with interest, which was the difference between the sum of $1,125 and the net amount received from the sale, that paid by the abstract company and the sum paid thereon by Perkins, aggregating $902.98.

The plaintiff, who has appealed, contends that she was entitled to recover the face of the note less the amount paid by Perkins and the sum received from the sale, namely, $759.14, with interest.

[1] According to the escrow agreement, the deed of trust was to be a prior lien. When it later appeared to be subsequent to other liens, the security for which plaintiff had bargained was reduced to that extent. The abstract company, when it paid the amount in escrow to the defendant, did not become obligated to him on account of the mistake but to the plaintiff, and the sum paid was in satisfaction of her damage. It was not paid on the note but merely to make good her security. It is clear from these facts that the defendant has no claim to this sum, as plaintiff, who purchased the property, will be compelled to satisfy the prior liens in this amount. The plaintiff was the holder in due course of a negotiable instrument (Civ.Code, §§ 3133, 3265); and the defendant, by indorsing without qualification, engaged (presentment and demand and notice of nonpayment having been waived) that it should be paid according to its tenor, and that if it were not, he would pay it (Civ. Code, §§ 3138, 3147). Consequently, other things being equal, the plaintiff in the present case was entitled to recover the unpaid principal sum of the note with interest. Hurlbut v. Quigley, 180 Cal. 265, 180 P. 613; Stradley v. Tout, 65 Cal.App. 530, 224 P. 469; Anglo-California Trust Co. v. French American Bank, 108 Cal.App. 354, 291 P. 621.

[2] The defendant further urges that the discount made the transaction usurious. It is not suggested that anywhere in the transaction was there a loan or forbearance of money, or that the one which preceded it was tainted with usury. As held in the following cases, the mere sale of the note at a discount was not affected by the usury law. Verbeck v. Clymer, 202 Cal. 557, 563, 261 P. 1017; Baker v. Butcher, 106 Cal.App. 358, 367, 289 P. 236; O. A. Graybeal Co. v. Cook, 111 Cal.App. 518, 535, 295 P. 1088; Coast Finance Corporation v. Powers Furniture Co., 105 Or. 339, 209 P. 614, 24 A.L.R. 855; 11 Cal.Jur. (Supp.) § 15, p. 117.

We are satisfied that under the statutes and according to the authorities above cited, the plaintiff was entitled to recover the amount prayed.

Judgment is accordingly reversed, with directions to the trial court to enter judgment for plaintiff in the sum of $759.14, with interest thereon at the rate of 8 per cent. per annum from February 14, 1933, together with her costs.

MORRIS v. GIBSON, County Treasurer (RECLAMATION DIST. NO. 108 et al., Interveners). *

Civ. 5742.

District Court of Appeal, Third District, California.

March 3, 1937.

Rehearing Granted April 2, 1937.

1. Drains 🔑18
Levees and flood control 🔑34

In proceeding to determine right of bondholder of allegedly insolvent reclamation district, court was concerned merely with present economic condition of district and not with future possibility of district's paying unpaid and matured bonds by future profits from lands owned by such district.

2. Drains 🔑18
Levees and flood control 🔑34

In proceeding to determine rights of bondholders of allegedly insolvent reclamation district, realization of any moneys available for payment of bonds by reason of later supplemental proceedings depending on future conditions, and rights of landowner to contest such proceedings on ground that assessment would exceed benefits conferred, *held* no defense (Pol.Code, § 3480).

3. Drains 🔑18
Levees and flood control 🔑34

In proceeding to determine rights of bondholders of allegedly insolvent reclamation district, it was no defense to apportionment of rent moneys among bondholders that maturing bonds and coupons might outlaw, preceding date of full payment, so that other bondholders would be paid nothing or would be required to await payment until prior coupon or bondholders had been fully satisfied, since statute provides an adequate remedy for keeping alive all claims against the district (Pol.Code, §§ 3466a, 3480).

---

*For subsequent opinion see 87 P.2d 37.

4. **Drains** ⚷18
Levees and flood control ⚷34
Money received from leasing or operation of land, title to which has vested in reclamation district by sale for delinquent assessment installments called for to pay district bond interest coupons, should be first applied to payment of such coupons (Pol.Code, §§ 3466a, 3480).

5. **Drains** ⚷18
Levees and flood control ⚷34
"Insolvency" of reclamation district or of bond fund of such district *held* to mean inability to pay debts as they became due in ordinary course of business.

[Ed. Note.—For other definitions of "Insolvency; Insolvent," see Words & Phrases.]

6. **Drains** ⚷18
Levees and flood control ⚷34
Where taxing power of reclamation district is limited and there is no inexhaustible power of raising money and there is a particular fund for payment of bonds issued against it and amount available is insufficient to pay all of bonds in full, equitable principles demand pro rata distribution of such funds.

7. **Drains** ⚷18
Levees and flood control ⚷34
All moneys collected under special assessments of landowners in reclamation district and under reclamation laws of state constitute trust fund pledged as security for payment of bonded indebtedness incurred by reclamation district based on assessment.

◆

Original proceeding by Mary E. Morris, petitioner, against California Gibson, as County Treasurer of Colusa County, for a decree determining how moneys of the Reclamation District No. 108 should be applied, wherein the District and others intervened.

Writ granted.

Clark, Nichols & Eltse, of Berkeley, for petitioner.

Ralph W. Rutledge, of Colusa, and Arthur C. Huston, of Woodland, for respondents.

Horace B. Wulff, of Sacramento, Arthur C. Huston, of Woodland, and Thomas Rutledge, of Colusa, for interveners Reclamation Dist. No. 108 and others.

Athearn, Chandler & Farmer, Edward G. Chandler, and Milton T. Farmer, all of San Francisco, for interveners Frederick F. Cooper and others.

Mr. Justice PLUMMER delivered the opinion of the court.

This is an original proceeding, having for its purpose the obtaining of a decree of this court determining how rental moneys derived by the district from lands that have passed into the ownership of the district by reason of the failure of former landowners to pay installment calls based upon assessments theretofore levied for the improvement and protection of the lands lying within Reclamation District No. 108, should be applied. Stated in other language, on account of the alleged insolvency of the bond fund of the district, should the proceeds of such rentals be applied ratably toward the payment of all the bonds matured or unmatured, and upon matured coupons, ratably, rather than upon matured bonds and coupons, beginning with the earliest maturities.

At all the times mentioned in the proceedings in this cause, Reclamation District No. 108 was, and now is, a regularly organized and existing reclamation district under the laws of the State of California. The lands embraced within the exterior boundaries of the district aggregate approximately 60,000 acres.

On December 8, 1923, there was levied upon the lands lying within the exterior boundaries of said district an assessment in the sum of $3,407,800.69, known as "Assessment No. 5." Thereafter, proceedings were had under the provisions of section 3480 of the Political Code, providing for the issuance of bonds upon the unpaid portion of said assessment which amounted to the sum of $3,142,000. On January 1, 1925, bonds were issued in the sum of $2,542,000, and on January 1, 1927, a further issue of bonds was made in the sum of $600,000, making a total of the bonds issued by said district of the sum of $3,142,000. The bond issues were secured by assessment No. 5. The bonds so issued began to mature on January 1, 1935, and on the 1st of January thereafter, until and including January 1, 1943, each of said series of bonds being in the total sum of $350,000, save and except the last maturing series, which was in the sum of only

$342,000. Interest on said bonds was provided to be paid semiannually, to wit, on July 1st and January 1st of each year; the interest being represented by coupons in the sum of $30 each.

The petitioner alleges that she is the holder of bonds of said district based upon assessment No. 5, in the sum of over $300,000. The petitioner further alleges that she is the owner of unpaid matured coupons in the sum of $69,750. The petitioner further sets forth that under the provisions of section 3480 of the Political Code, bonds have been employed by landowners in the discharge of said assessment in the sum of $1,378,000, and in buying lands at delinquent sales in the sum of $225,000, leaving the amount of said bonds unpaid in the approximate sum of $1,539,000.

It further appears from the pleadings in this cause that under and by virtue of defaults in payment of installment calls based upon assessment No. 5, 20,020 acres have passed from the original owners into the ownership of the district; that approximately 20,000 acres have been eliminated from the burden of assessment No. 5 by reason of the employment of bonds, as heretofore stated, in the discharge of the assessment. That there now remains within the district lands paying assessment calls, an acreage of less than 20,000, estimated in some portions of the pleadings as being only 17,500 acres.

It further appears from the records in this cause that there are unpaid state and county taxes and other assessments, in a sum exceeding $200,000.

At the date of the submission of this cause it appears from the allegations of the petition that there were unpaid and matured bonds as follows, to wit:

January 1, 1935	$170,000
January 1, 1936	228,000
January 1, 1937	196,000

The pleadings submitted by the interveners differ from the figures just set forth in the sum of $4,000. Unpaid interest coupons on said bonds are alleged as follows:

January 1, 1935	$ 54,442
July 1, 1935	49,342
January 1, 1936	49,342
July 1, 1936	42,500

The amount of interest falling due January 1, 1937, does not appear. The total of the five installment calls made by the district is the sum of $932,088.55, upon which it is alleged only the sum of $29,613.18 has been paid. That thereafter total redemptions amounted to the sum of $87,875.97. The deficiency in the yield from the calls referred to is alleged by the petitioner to be the sum of $814,583.21. The accuracy of this calculation we have not verified, but the figures which we have set forth show that the deficiency is considerably in excess of half a million dollars.

It is further set forth that the rentals or profits of the lands that had passed into the ownership of the district for the crop years of 1935 and 1936, yielded the sum of $141,000. Whether this sum includes all of the yield of crops for the year 1936 does not definitely appear, but it does represent the amount of money that was in the hands of the respondent, California Gibson, available for payment upon the obligations of the district, including, also, bonds and coupons.

The complaints in intervention admit that the amount of money collected upon the respective calls of installments has been insufficient to pay the respective coupon and bond maturities, and likewise that the moneys received for redemption of lands that have gone delinquent; also, that the amount of moneys received on account of rentals of the lands owned by the district added to the amount received upon the calls does not create a fund sufficient to discharge maturing bonds and coupons; and by way of defense it is further set forth that the moneys received from rentals should be applied to the payment of the earliest maturing coupons and bonds. The principal and interest of coupons maturing January 1, 1935, is fixed at the sum of $167,000, and total moneys received as rentals for the years 1935 and 1936, as heretofore stated herein, out of which sum it appears that the respondent, prior to the issuance of the alternative writ herein, had paid out on account of matured coupons and bonds a sum in excess of $100,000.

Based upon what we have heretofore said, the petitioner contends that the bond fund of Reclamation District No. 108 is hopelessly insolvent. As against the position taken by the petitioner, it is insisted by the interveners that the value of the lands in the district is adequate to discharge all of the indebtedness heretofore mentioned; that approximately 50 per cent. of the original issue of bonds has been retired, as herein set forth, in the use thereof by landowners in discharging the assessment.

It is further argued that the provisions of the reclamation law of this state provide for supplemental assessments in the event that the original assessment upon which the lands are issued proved insufficient to fully discharge the same; that the installment calls are being paid on practically one-third of the indebtedness; and that other liens are being discharged by the use of bonds of the district, greatly to the advantage of the district.

[1] It is also further stated by the intervening district that by the profits realized from the leasing of the lands belonging to the district, and the eventual sale thereof, it is hoped and believed that the indebtedness of the district will eventually be fully paid. Whatever the hopes and beliefs of the intervener district may be, we are compelled to deal only with the present economic condition of the district and the unquestioned inability of the district to meet either its past, present, or future obligations within any definite period of time. That the bond fund of the district is at the present time hopelessly insolvent, and that there is no immediate prospect of any change therein, clearly appears from what we have hereinbefore stated, and proceeding along equitable principles, we are compelled to deal with the present financial condition of the district in determining the rights of bondholders, irrespective of the possibilities of better conditions anticipated by the officers of the district.

That the reclamation law of the state of California differs somewhat from other states, the decisions of whose courts we shall hereafter refer to, is probably true, as we find nothing in the decisions which corresponds to the provision found in section 3480 of the Political Code setting forth that "the lien of any unpaid assessment upon which bonds shall have been issued shall continue until all said bonds, and any refunding bonds which may be issued, shall have been paid in full, and if for any reason any part of such principal or interest of said bonds, or of refunding bonds shall remain unpaid after enforcement of said assessment as in this article provided, the board of supervisors of the main county shall order an additional or supplemental assessment," etc. This provision is relied upon as differentiating this cause from the cases which we shall hereinafter cite.

In the case of Rohwer v. Gibson, 126 Cal.App. 707, 14 P.(2d) 1051, this court had occasion to refer to this portion of section 3480, supra, and call attention to the fact that the supplemental assessment can only be made after all of the bonds have matured, and also that such supplemental assessment cannot exceed the value of the benefits accruing to the district by reason of the original assessment, citing in support thereof Kadow v. Paul, 274 U.S. 175, 47 S.Ct. 561, 71 L.Ed. 982.

[2] The realization of any moneys available for the payment of bonds by reason of supplemental proceedings depending upon conditions not now ascertainable, and the rights of landowners to contest the same on the ground that such an assessment would exceed the benefits conferred, is such as not to interpose any reasonable defense to the application of equitable principles in determining the question presented in this cause for our determination.

[3] We may here appropriately state that the argument of the respondent that if any apportionment is made of rent moneys, earlier maturing bonds and coupons may outlaw preceding the date of full payment, hardly appeals to us as any reason why other bondholders should be paid nothing, or await payment until prior coupon and bondholders have been fully satisfied. The law provides an adequate remedy for keeping alive all claims against the district.

Section 3466a of the Political Code, so far as material here, relating to the management and control of lands which have come into the ownership of the district, is as follows: "All rentals collected or moneys received by the trustees of the district from such lease of land or for the use or occupation of such land may be applied by them to the payment of the incidental expenses of holding and leasing said lands and to the payment of any other incidental expenses of, or legal charge against the district; provided, however, that all rentals collected or moneys received from lease of land sold to the county treasurer as trustee of the district pursuant to the provisions of sections 3480 or 3480a of this code or for the use or occupation of such land, less the incidental expenses of leasing or holding the same, shall, in the event said district shall be in default for interest or principal payments on any of said bonds issued by said district, be deposited in said county treasury of the main county, to the credit of the bond fund of the district. An amount equal to the revenues derived from each tract by reason of the leasing, use or occupation thereof, less the incidental expenses of leasing and holding same, shall be credited by the county treasurer on the assessment lists against the delinquent charges on said tract."

The last sentence which we have quoted is practically of no force or effect. It does not pertain to, or attempt to fix the pecuniary rights of any person whomsoever. Its only purpose, as we perceive, is to enable the trustees of the district to have some basis for fixing the value of the lands in the event an attempted sale is made thereof. The portion of the section which is involved herein is that part which directs the payment of surplus funds into the county treasury of the main county, to the credit of the bond fund of the district.

Section 3466a, supra, was added by the Legislature in 1931 (St.1931, p. 773), at a date several years after all the bonds involved in this action were issued and sold, and therefore any change or disposition as to the funds there mentioned would not come within the principles which this court considered in the case of Hershey v. Cole, 130 Cal.App. 683, 20 P.(2d) 972, where a thorough consideration is given of constitutional principles and the authorities cited holding that bonds issued by a reclamation district constitute a contract which cannot be altered or changed by subsequent legislation. The law as it existed at the time of the issuance of the bonds is there shown to be entered into and become a part of the contract, and of course excludes the idea of legislation which does not alter or impair the obligations at the time of the issuance of the bonds, or lessen the fund from which the bond is to be paid. As no such provision, as is contained in section 3466a, supra, existed at the time of the issuance of the bonds, the benefit sought to be conferred by that section could not, of course, have entered into the contemplation of either the Legislature or the bondholder or the trustees of the district at the time of the issuance and sale of the bonds.

This leaves rentals and profits subject, first, to the intentions contemplated by the Legislature at the time of the enactment of the section, subject to the changes in the economic conditions of the district, calling for the interposition of equitable principles.

The interveners likewise rely upon the following portion of section 3480, supra, which reads as follows: "At least ninety days before any interest date of the bonds, including refunding bonds, the county treasurer of the main county shall estimate the amount of money necessary to pay interest and principal maturing on such interest date after crediting thereon the funds in the treasury applicable to the payment thereof, and shall add thereto fifteen per cent. of such aggregate sum to cover possible delinquencies," etc.

In Cooper v. Gibson, 133 Cal.App. 532, 24 P.(2d) 952, 956, and again in Kimball v. Hastings Tract Reclamation Dist., 137 Cal.App. 687, 31 P.(2d) 417, it was held that installment calls are earmarked, and the moneys received can only be applied for a particular purpose, to wit, the purpose for which the installment is called, and the payment upon the maturing bonds and coupons upon which the installment call is based. With the holding had in those cases we are still agreed, but the moneys derived from rentals and profits on crops is not so earmarked, and the equitable principle to be applied to the latter does not in any wise affect the legal principle by which the moneys derived through installment calls should be disbursed.

In the opinion in Cooper v. Gibson, supra, there appears the following: "As to the appropriation of the moneys received from the leasing or operation of lands, the titles to which have become vested in the district, it would appear that the money so received should be first applied to the payment of the interest due coincident with the period when the installment intended for the payment of such interest became delinquent. This would seem to be the intention of the Legislature by the language used in section 3480, supra, wherein the treasurer, in making his estimate of the amount necessary to pay interest and principal maturing on any date, is directed to credit such funds in the treasury to the payment of such interest and principal. In other words, the amount on hand so received is to be applied to the payment of the interest and principal falling due, to pay which the installment call is made and becomes a part of the fund available for such purpose."

[4] Without the interposition of any equitable principles arising from the insolvency of the bond fund, we are still of the opinion that the foregoing language is a correct statement of how the moneys should be disbursed. It is probable that the Legislature, at the time of the enactment of section 3480, supra, had no thought of the insolvency of the bond fund, or of the fact that any district would become so heavily in arrears as is shown to be the condition of Reclamation District No. 108. With the interposition of equitable principles the fund derived from rentals may be properly said not to be applicable to the payment of any particular portion of either the bonds or coupons issued by the district, but should be held properly applicable to distribution ratably, as hereinafter set forth.

[5] As to what constitutes insolvency of a reclamation district or of the bond fund of such a district, we have not been cited to, and have not been able to discover any direct adjudication, other than inability of the bond fund to meet accruing obligations. In 14 Ruling Case Law, p. 628, we find the following definitions of "insolvency," to wit: "It is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts, and this is the general and popular meaning and it is in this sense that the term is used in the present Bankruptcy Act (11 U.S.C.A.). But insolvency is also used in a more restricted sense to express the inability of a party to pay his debts as they become due in the ordinary course of business," etc. This latter interpretation appears to be the one followed by the cases hereinafter cited.

In the case of State ex rel. Buckwalter v. Lakeland, 112 Fla. 200, 150 So. 508, 516, 90 A.L.R. 704, Mr. Justice Brown, in an opinion dissenting in part, calls attention to the opinion of the same court in the case of State ex rel. Gillespie v. Carlton, 103 Fla. 810, 138 So. 612, as follows: "All that the bondholder has the real right to demand is that, if necessary to pay his bonds, the debtor taxing unit shall be compelled to so exercise the taxing power as to produce the maximum of cash returns. If, when this is done, the fund on hand and the funds which may reasonably be expected to be raised by taxation within a reasonable time in the future are and will be insufficient to pay within any reasonable time all having a claim against such funds in full, and the taxing unit is, in effect, insolvent, not being able to meet its current obligations as they fall due, then the equitable principle above discussed would become applicable, and hence a pro rata distribution of the fund on hand should in such cases be made, thus equally protecting all those who have claims against the fund." It is also further said: "Drainage districts organized under the General Drainage Law are not clothed with power to levy and collect taxes without limit to meet debts and other obligations incurred by them. Such tax levies are restricted by the amount of benefits shown from the plan of reclamation, and, when this amount is reached, the power to tax is cut off."

In Pomeroy's Equity Jurisprudence (4th Ed.) §§ 405–407, the principle is thus stated: "In other words, if the fund is not sufficient to discharge all claims upon it in full, or if the debtor is insolvent, equity will incline to regard all the demands as standing upon an equal footing, and will decree a full rate of distribution or payment."

[6] The rule followed by the majority of cases, and we think supporting the more equitable and just rule, is that where the taxing power is limited, and there is no inexhaustible power of raising money, and there is a particular fund for the payment of the bonds issued against it, and the amount available is insufficient to pay all of the bonds in full, equitable principles demand a pro rata distribution of such fund. See elaborate annotation, 90 A.L.R. 717.

In Meyers v. Idaho Falls, 52 Idaho, 81, 11 P.(2d) 626, the court had before it a writ of mandate praying that the city treasurer be required to pay certain bonds in full on account of the fact that the statute provided for payment in their numerical order. The court held that all of the bondholders of the series were entitled to participate pro rata where the funds were insufficient, and that the Legislature did not intend that providing for payment according to numerical order should give preference to one bondholder over another.

In Rothschild v. Calumet Park, 350 Ill. 330, 183 N.E. 337, it was held that when for any reason the full collection of a yearly installment assessment for a public improvement is not made, and the fund collected is not sufficient to pay all the yearly installment bonds payable out of such assessment, the deficiency must fall upon all the bondholders, and equity requires that the loss shall be borne ratably by each bondholder, and that it was the duty of the trustee of the district to disburse the funds in that manner.

In Snower v. Hope Drainage District (D.C.) 2 F.Supp. 931, it was held, where the fund was insufficient, that equality was equity.

In Moran v. State, 111 Fla. 429, 149 So. 477, it was held that one bondholder may not enforce by mandamus the payment of interest and principal of bonds to the exclusion of other bondholders of the district when the funds on hand are insufficient to pay all the bonds and coupons in default and in *prospective maturity,* on the ground that drainage districts are not under the law clothed with power to levy and collect taxes without limit.

In State v. Duncan, 334 Mo. 733, 68 S.W.(2d) 679, 684, we find the following: "The rule announced in many cases is that when a trust fund raised by special assessment is insufficient to pay all having equal claims upon it, payment should be made ratably. If a drainage district be insolvent, as held in Sturdivant Bank Case [State ex rel. Sturdivant Bank v. Little River Drainage Dist., 334 Mo. 753], 68 S.W.(2d) 671, all outstanding bonds (those not due as well as those matured) must be taken into consideration in the apportionment of the fund. If the district is solvent there still must be an apportionment, but it is limited to matured bonds and coupons because in that situation the statute pledges the fund on hand from time to time to the payment of matured (and after that next maturing) principal and interest. We understand this view to be in accord with the following decisions which we cited in the Sturdivant Bank Case, supra, and here referred to again: Rothschild v. Village of Calumet Park, 262 Ill.App. 96, 106; Thomas v. Patterson, 61 Colo. 547, 159 P. 34; Norris v. Montezuma Valley Irr. Dist. (D.C.) 240 F. 825; Norris v. Montezuma Valley Irr. Dist. (C.C.A.) 248 F. 369; Rohwer v. Gibson, 126 Cal.App. 707, 14 P.(2d) 1051."

In the case of State ex rel. Sturdivant Bank v. Little River Drainage Dist., 334 Mo. 753, 68 S.W. 671, the principles which we have stated are supported in a rather lengthy opinion, citing a number of cases, holding apportionment proper when the fund to be distributed is insufficient and the taxing power is limited; the rule being again stated that a distinction is made between a limited and an inexhaustible taxing power.

[7] We do not need to repeat what was said in the case of Rohwer v. Gibson, supra, nor again list the authorities there cited showing that all moneys collected under special assessments and under the reclamation laws of this state constitute a trust fund pledged as security for the payment of the bonded indebtedness incurred by a reclamation district based upon assessments.

In Kerr Glass Mfg. Corporation v. City of San Buenaventura, 62 P.(2d) 583, 588, the Supreme Court of this state, in an exhaustive opinion, reviews a large number of cases having to do with the question here involved and reaches the conclusion that where there is an insufficiency of the funds in a district not having an inexhaustible taxing power, distribution must be made pro rata. We quote the following from the opinion in that case: "With a large percentage of delinquencies and a reduction of the tax-collecting capacity to furnish a surplus in the general fund wherewith to replenish the bond redemption fund, either now or in the reasonably near future, by the amounts of improvement assessment installments falling due on delinquent property subsequent to its sale to the city, it can scarcely be doubted that the city has properly declared the bond redemption fund insolvent. In such a case it may restrict payments from the bond redemption fund on a pro rata basis among the holders of all bonds remaining unpaid, whether or not the same have matured."

It may be argued that the concluding words of the quotation above set forth were not necessary to the decision there had, but the principle stated, we think applicable, in order that equitable principles may be applied where the funds are insufficient and there is no immediate prospect of replenishing the fund sufficient to pay all bondholders in full. As said in one of the cases, "equality is equity," and equality means the inclusion of all claimants or bondholders of the district involved.

We have not set forth any of the cases cited by counsel having to do with mortgages securing the payment of notes due on different dates, for the reason that what we have said herein we think a sufficient answer to all the questions presented for our consideration in this cause.

It appears from the record that preferences have been given by the respondent

Gibson, in the payment of the fund derived from rentals, which can, and should be, adjusted among the different bondholders out of subsequent rentals, in order that all of the bondholders may be placed upon an equal basis.

The writ prayed for is hereby granted, to be executed and applied by the respondent Gibson, in the manner just stated.

We concur: PULLEN, P. J.; THOMPSON, J.

8 Cal.2d 427

MILLER & LUX, Inc., v. SAN JOAQUIN LIGHT & POWER CORPORATION et al.

L. A. 15252.

Supreme Court of California.

March 11, 1937.

Rehearing Denied April 5, 1937.

1. Waters and water courses 🔑158½(2)

Defense by power company to suit to restrain its use of water contrary to contract that contract was void on ground that it constituted attempt by private parties to interfere with property dedicated to a public use *held* without merit where, by the contract, the water theretofore dedicated to a public use was not in any manner taken from the public.

2. Waters and water courses 🔑158½(2)

Defense by power company to suit to restrain its use of water contrary to contract, that contract was void on ground that it was uncertain by reason of fact that there was no description of properties owned by plainitff *held* without merit, since parties may as between themselves contract with respect to certain designated rights without describing all of the incidents thereto and without necessarily describing property to which rights appertain, or lands for benefit of which water has been appropriated.

3. Waters and water courses 🔑144

Law relating to reasonable and beneficial use of water is to be applied in settlement of all water controversies.

4. Injunction 🔑24

Rule that one cannot sit idly by while his property is being devoted to public use and expensive works erected to that end and then assert claim to injunctive relief, having its foundation chiefly in the inconvenience to the public if service is interrupted by issuance of injunction, should not apply unless public is interested and unless service is to be impaired.

5. Waters and water courses 🔑158½(2)

Plaintiff *held* not barred by laches, estoppel, or waiver of contract provisions or of statute of limitations to maintain suit to restrain power company in its use of water contrary to contract with plaintiff, where violation of contract was not continuous but only intermittent, plaintiff protested violation of contract, power company agreed to conform to contract, further agreement supplementing contract was entered into, and where it was impossible for plaintiff from data furnished it by power company to determine whether power company was violating contract.

6. Adverse possession 🔑13

For party to assert title resulting from adverse possession, possession must be open, notorious, and adverse and under claim of right or title.

7. Appeal and error 🔑1099(4)

Interpretation of contract by District Court of Appeal in prior action between the same parties *held* the law of the case on subsequent appeal from a judgment in a later action.

8. Waters and water courses 🔑158½(2)

Defense by power company to suit to restrain its use of water contrary to contract that contract could not be specifically enforced and that therefore injunctive relief was improper because provision of contract required plaintiff to furnish personal service in measuring flow of river and report it to power company, which plaintiff had failed to do, *held* without merit where provision was merely incidental to contract and power company also failed to comply with provision.

9. Appeal and error 🔑1099(3)

Appellant could not complain of method of measurement of water which it had urged and succeeded in having established in prior action between the same parties as the proper interpretation of the contract and of which respondent did not complain.

10. Waters and water courses 🔑158½(2)

Plaintiff seeking to restrain power company from using water contrary to contract with plaintiff *held* not estopped to deny right of power company to so use water on ground that intervener had made vast improvements around lake where power company stored water, where evidence failed to disclose that there would be insufficient storage in lake if defendant was required to abide by contract.

11. Waters and water courses 🔑158½(2)

Where, pending action to restrain power company from using water contrary to contract, plaintiff sold part of its property to others, purchasers *held* not "necessary parties" (Code Civ.Proc. § 385).

[Ed. Note.—For other definitions of "Necessary Parties," see Words & Phrases.

In Bank.

Appeal from Superior Court, Fresno County; Frank Lamberson, Judge.

Action by Miller & Lux, Incorporated, against the San Joaquin Light & Power Corporation, wherein the Chowchilla Farms, Incorporated, intervened on behalf of the plaintiff, and The Pines, Incorporated, intervened on behalf of the defendant. From a judgment in favor of the plaintiff and the intervener on its behalf, the defendant and the intervener on its behalf appeal.

Affirmed.

Thomas J. Straub and W. R. Dunn, both of San Francisco, and Conley, Conley & Conley, of Fresno, for appellant San Joaquin Light & Power Corporation.

M. K. Wild, of Fresno, for appellant The Pines, Inc.

J. E. Woolley, V. J. McGovern, and M. T. Farmer, all of San Francisco, for respondent.

Athearn, Chandler & Farmer, of San Francisco, for respondent Chowchilla Farms, Inc.

THOMPSON, Justice.

This is the third time this case has been before the reviewing courts. On the first occasion, 120 Cal.App. 589, 8 P.(2d) 560, the question presented was whether the court had erred in sustaining a demurrer to the answer of the defendant. It was held that the demurrer was improperly sustained as to several of the separate defenses, but was properly sustained as to several others. On the second occasion, 136 Cal.App. 493, 29 P.(2d) 296, the appeal was from a judgment after trial. The appellate court determined that the trial court had misconstrued the contract involved herein, and that the water diverted on the south fork of the San Joaquin river by the Edison Company, other than that diverted on Big Creek, must be added to the flow of the river at plaintiffs' measuring point in order to determine the right of the defendant to store. While reference may be had to those cases for a more complete statement of the facts, the contract involved in this prolonged litigation in brief is as follows. It recites the ownership by plaintiff and the predecessors in interest of the intervener Chowchilla Farms, Inc., of a great deal of land (Miller & Lux owned and irrigated about 400,000 acres; Chowchilla Farms owned and irrigated about 43,000 acres) and that they owned riparian and appropriative rights in the flow of the San Joaquin river; that the defendant had constructed two small storage dams on the north fork of the San Joaquin capable of impounding about 5,000 acre-feet of water (Crane Lake Reservoir 4,300 and Chilcoot Lake 600 acre-feet); that defendant was desirous of increasing its storage capacity to a maximum of about 65,000 acre-feet, and that in order to prevent objection to the storage of the waters of the north fork by defendant on the part of plaintiff and the intervener Chowchilla Farms who were entitled under the law to the normal flow of the river by and through their properties, a method of diversion and storage was agreed upon, with certain minimum flows of the river below which the defendant would not be permitted to store. It was agreed that the defendant should not be permitted to store during the months of April, May, June, July, and August when the flow of the river, measured at Lone Willow Slough, a point below the junction of the north and south forks of the river and above the land of plaintiff and the intervener Chowchilla Farms, was 3,000 cubic feet per second or under; that during the remainder of the year when the flow of the river at the point mentioned was less than 1,500 cubic feet per second, the defendant would not be permitted to divert and store. The measurements at the point indicated were to be made by plaintiff by means of instruments and gauges installed by defendant. and for the proper operation of which defendant was to contribute, for the purpose of employing a man to tend the same, the sum of $75 per month. A second measuring point was established on the north fork of the river near the reservoir of defendant at the point where the natural flow was not interfered with, the measuring devices installed at this second point to be under the charge of defendant, and for the purpose of enabling defendant in the event of storms to store water during those months when the minimum flow was 1,500 cubic feet and by reason of the storm the fork was flowing in excess of the minimum. In other words, the second point was agreed upon to enable defendant to store during that lapse of time which would occur before the storm water reached the gauge at Lone Willow Slough several miles down the river. The defendant agreed that at least once a month a copy of the reading of the gauge installed at the second point should be sent to plaintiff, and that the measurements at the first point mentioned should be sent by mail to plaintiff at its office in San Francisco. In order to enable the defendant to keep in touch with the measurements at Lone Willow Slough it was to install a telephone between its plant and the point mentioned. It was also agreed that during certain months the defendant might be compelled by plaintiff to release stored waters for irrigating purposes. It should be noted in this connection that after such releases the minimum storage would be approximately 15,000 acre-feet.

This action was commenced in April, 1929, to enjoin the defendant from diverting and storing water at times when the river was flowing less than the amounts determined by the agreement, it being alleged that the defendant had, during the months of February and March, 1929, stored water flowing in the north fork on occasions when the flow was less than 1,500 cubic feet of water. The intervener, The Pines, Inc., has constructed resorts on the shores of Crane Lake, created by the storage of the waters, and claims the right to be protected in its investments therein. Upon the second trial, judgment was rendered in favor of plaintiff and the intervener Chowchilla Farms, enjoining defendant from storing when the river is flowing less than the minimum amounts determined by the contract, and the defendant and the intervener, The Pines, Inc., have appealed therefrom.

For the purposes of our discussion, we shall hereafter refer to plaintiff and the intervener Chowchilla Farms, Inc., as respondents, and to both of the other parties as appellants, which expression when applied to the contract shall include the predecessors in interest of the parties.

Briefly stated, it is the contention of the appellants that the contract, the substance of which we have already recited and which was entered into in June, 1909, is void because (1) it constitutes an attempt by private parties to interfere with property dedicated to a public use; (2) it is uncertain by reason of the fact that there is not contained in the agreement a description of the properties owned by the respondents. It is also contended, and this is one of the principal reasons urged by the appellants for the reversal of the judgment, that inasmuch as the water diverted was dedicated to a public use the public gained a right to divert water at times when the river was flowing less than the minimum amounts prescribed by the agreement. Further, it is asserted that the public gained a prescriptive title to divert the flow of the river through the defendant, a public utility, and that plaintiffs may not now be heard to complain. In reply to this, the respondents direct our attention to a contract executed in 1919, which they say ratifies and confirms the agreement of 1909, under which it was agreed that the defendant should be permitted to build another dam on the river with a capacity in the neighborhood of 3,000 acre-feet; and also that the defendant ratified and confirmed the agreement of June, 1909, as late as July, 1922, when the respondents consented, subject to the conditions of the contract of 1909, to permit the defendant without objection to divert an additional 175 cubic feet per second of water at the dam near the junction of the two forks. The respondents also claim that they did not have notice of the diversions, or sufficient knowledge to put them on inquiry, until some time in 1920, when they made vigorous protest to the appellant power company of the wrongful diversions and received from it assurance that the contract would be complied with; that on subsequent occasions they made like protests and received like assurances. It is also asserted that the public never gained any right to a use, nor were the waters dedicated to a public use which were diverted when the river was flowing less than the minimum flows established.

The appellants further assert that the judgment is contrary to the law of the case as established by the two former appeals and that, further, the contract is one which cannot be specifically enforced by the respondents, and therefore an injunction may not issue. Again it is urged that the method of measurement adopted by the court in its judgment (adding the amount diverted by the Southern California Edison Company to the flow of the river at the measuring points) amounts to the writing of a new contract by the court for the parties and is impracticable; that The Pines, Inc., have acquired rights by reason of having constructed valuable improvements around the lake, and that respondents are estopped as against The Pines, Inc., to now prevent the diversions of the water when the river is flowing less than the contract requires. It is further urged that all of the necessary parties to the action were not before the court, the argument in this instance proceeding upon the theory that the plaintiff had sold some of its properties under contract to others.

[1] Considering these arguments in the order of their presentation, it seems obvious that the first argument is unsound because by the contract the water which had been theretofore dedicated to a public use, consisting of approximately 5,000 acre-feet, was not in any manner taken from the public. The court found that it had not been taken, and it seems obvious that it could not have been taken for the following reasons: (1) The minimum storage resulting even after releases demanded by plaintiffs would never be less than approximately 15,000 acre-feet, as compared to the maximum of 5,000 acre-feet theretofore dedicated to a public use; (2) the defendant was acquiring water to be dedicated to a public use subject, of course, to respondents' rights, greatly in excess (maximum capacity 65,000 acre-feet) of that which it was formerly authorized to divert and store.

[2] The second argument, to wit, that the contract is void because it is uncertain, is equally without foundation. The contract does not purport to fix certain riparian rights for any particular land. It recognizes the existence of the riparian and appropriative rights of respondents, and their right to have the entire flow of the river pass along and through their lands and to their canals and irrigating works, and provides that respondents will not object to the interference with the flow of the river and their rights provided the minimum flows of 3,000 and 1,500 cubic feet are not interfered with. Appellants place great reliance upon the case of Title Ins., etc., Co. v. Miller & Lux, 183 Cal. 71, 190 P. 433, but a reading of that case demonstrates that what was there said is not pertinent to the case here. The contract concerning which the statement was made that riparian rights can exist only as a part and parcel of specific tracts of land was a contract by which the parties agreed to share the expense of litigation in proportion to the number of acres owned by them. Manifestly, two parties may as between themselves contract with respect to certain designated rights without describing all of the incidents thereto and without necessarily describing the property to which the rights appertain, or the lands for the benefit of which the water has been appropriated.

[3] As has been already indicated, the argument most persistently advanced by the appellants is that the water having been dedicated to a public use, the public gained a right to divert and store the same when the river was flowing less than the amounts required by the contract. It is well settled in this state that the law relating to the reasonable and beneficial use of water is to be applied in settlement of all water controversies. Gin S. Chow v. Santa Barbara, 217 Cal. 673, 22 P.(2d) 5, Peabody v. Vallejo, 2 Cal.(2d) 351, 40 P.(2d) 486, and Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.(2d) 489, 45 P.(2d) 972. If the diversion and storage of the water was not a reasonable and beneficial use of the waters flowing in the river, then the public could not have gained a right thereto. It seems obvious to us that it cannot be said that the water diverted and stored when the river was flowing below the minimum stages was a reasonable use. The trial court found that the public had no interest in the diversion or storage of water when the river was flowing below the minimum stages, and in truth proceeding upon the theory of reasonable and beneficial use found that the public had acquired no title therein. A portion of the finding in this particular reads as follows: "That it is not necessary, in order for defendant to adequately serve the public, that it store and impound the waters of the North Fork of the San Joaquin River otherwise than as provided for in said contract of June 14, 1909; and that the continued violation of said contract by defendant in storing water of the North Fork below the limitations expressed in said contract will not be of benefit to the public, and is not in the public interest; and that without the use of said water stored below the limitations of said contract, the public will be served with power by said defendant in the same quantities and in the same manner that the public would be served if said contract is violated by said defendant by impounding water below the limitations expressed in said contract."

[4] This finding, we believe, is supported by the evidence, as a moment's reflection will demonstrate. The right and theory of storage is to protect the utility against minimum flows. The San Joaquin river is a river of rapidly fluctuating flows, both as with respect to days and months, and even hours. The court found that there were great diurnal fluctuations in the river. When the water is at a low stage the only possible reasonable use by the power com-

pany is the then use of the water for the purpose of then and there manufacturing electric energy. When the river is at its higher stages, the diversion and storage of water is reasonable and beneficial in order to provide against the contingency of a low flow in the river. We arrive at the same conclusion by a slightly different method of reasoning. The rule that one cannot sit idly by while his property is being devoted to a public use and expensive works erected to that end and then assert his claim to injunctive relief has its foundation "chiefly [in] the inconvenience to the public if the service is interrupted by the issuance of an injunction to restrain the use." Burr v. Maclay Rancho Water Co., 160 Cal. 268, 280, 116 P. 715, 721. It would seem to logically follow that unless the public is interested, that unless the service is to be impaired, that the rule should not apply. This is but another way of saying that the use by the public must be beneficial.

[5] This brings us to the point, that if the water diverted when the river is flowing below the minimum stages fixed by the contract has not been devoted to a reasonable and beneficial public use and if the public has not gained a right thereto, then the power company is, in the face of its affirmance and reaffirmance of the contract, attempting to take advantage of its own wrong. A reading of the correspondence which passed between these parties, commencing in 1919 and down to a short time before this action was brought, clearly demonstrates that the appellant power company was relying upon the contract of June, 1909, and the contract of 1919, and was protesting its willingness to comply with all of the provisions thereof. To permit the defendant at this time to rest upon its violation of the contract would be to sanction its own wrongdoing. The trial court found in detail upon sufficient evidence that the respondents were not barred by laches, estoppel, waiver of the contract provisions, or the statute of limitations to maintain the action. A portion of the finding of the court is as follows:

"That it is true that since the construction of Crane Valley Lake and Chilcoot Lake referred to in the answer of defendant, defendant has at various times reservoired and stored in said lakes waters of the North Fork of the San Joaquin River and its tributaries, when defendant had no right to store and reservoir said water under said contract of June 14, 1909. That when such storage and reservoiring of said waters were done by said defendant, same were not continuous, but were intermittent, and were at all times mentioned herein unknown to the intervener Chowchilla Farms, Inc., and to its predecessors in interest. That on the 16th day of September, 1919, plaintiff and defendant entered into a contract under the terms of which defendant was permitted to construct on the main San Joaquin River immediately below where the said North Fork enters said river a dam, tunnel and power plant; that shortly thereafter said works were constructed and are known as the Kerckhoff Power Plant; that said power plant is so situated that it can and does utilize not only the natural stream flow, but water discharged from defendant's storage on said North Fork and water discharged from Southern California Edison Company Limited's storage in Huntington Lake, Florence Lake and Shaver Lake; that said contract permitting the construction of Kerckhoff Power Plant referred to the said contract of June 14, 1909, and reaffirmed said contract.

"In the year 1920 said defendant stored, as aforesaid, and plaintiff learned of such storage for the first time in that year, and immediately wrote defendant a letter of protest and demanded that defendant abide by the provisions of said contract of June 14, 1909; and defendant made no claim of any right to store other than is provided for in said contract, but, on the contrary, led plaintiff to believe that said contract would be conformed to in all respects; and after the year 1920, on each occasion when plaintiff learned that defendant had stored water below the limitations of said contract, said plaintiff protested such storage and demanded in writing of defendant that said contract be conformed to, and said defendant promised and agreed that it would not violate the provisions thereof.

"That in the month of July, 1922, plaintiff and defendant entered into a further agreement supplementing said agreement of the 16th day of September, 1919, under which defendant received the right to divert an additional one hundred and seventy-five (175) cubic feet per second of water through the Kerckhoff Power Plant; that said additional right was granted subject to the terms and conditions of said agreement of September 16, 1919; that at none of said times did defendant make any claims to the waters of said river adverse to the rights of plaintiff and intervener Chowchilla Farms, Inc., as set out in said contract of June 14, 1909.

"That owing to the fluctuation in the flow of said river from day to day, known as the diurnal change, it was impossible for the plaintiff to know from the storage data furnished it by defendant whether or not defendant was storing contrary to the terms of said agreement; that the only information supplied plaintiff by defendant concerning its storage operations referred to the mean flow of the river during a period of twenty-four hours and did not at any time show the diurnal changes in the flow of the river. That defendant for long periods of time did not supply plaintiff with any information concerning its storage operations, and particularly concerning the time and stages of the river flow when it was storing water, and plaintiff from time to time demanded of defendant that it supply such information.

"That it is not true that defendant relied upon any lack of protest from plaintiff, or from intervener Chowchilla Farms, Inc., or its predecessors in interest, or that defendant constructed additional power houses and facilities, or increased its output of power for the use of the public, on account of any lack of protest on the part of plaintiff or intervener Chowchilla Farms, Inc., or its predecessors in interest."

It is true that appellants argue that this finding is unsupported in the evidence so far as the question of notice is concerned. Without going into details with respect thereto, it is enough to say that the finding is amply justified.

[6] We do not intend to say that a party may not, for the purposes of asserting title resulting from adverse possession, take advantage of his own wrong; but in all such cases the possession must be open, notorious, and adverse, and under claim of right or title. We have here an instance where the power company was protesting that it claimed no more than that allowed it by the contract.

[7] With respect to the argument that the law of the case was established with reference to the interpretation of the contract, we must confess that the law of the case was therein determined; but the judgment here, in our opinion, does not violate the law of the case as there laid down. One of the findings of the court is that with the exception of the storage on Big Creek, the waters diverted and stored by the Edison Company may be added to the flow of the river at the plaintiff's measuring point for the purpose of determining the right of the defendant to divert and store in accordance with the contract. As we read the opinion in 136 Cal.App., 29 P.(2d), this is exactly the interpretation put upon the contract by the appellate court. We might have some doubt concerning whether the interpretation adopted by the appellate court is correct in view of the fact that the contract seems to imply that such storage shall not be added to the flow of the river. But be that as it may, the law of the case was established in that opinion, and as we read the finding of the court it has strictly conformed thereto.

[8] With respect to the contention that the contract cannot be specifically enforced and therefore it was improper for the court to grant injunctive relief, the appellants ground their argument first upon the proposition that while the contract of 1909 required the plaintiff to make measurements of the flow of the river at Lone Willow Slough, that plaintiff had failed in accordance with the contract to report the daily flow of the river at that point. The evidence discloses that the defendant was to pay not to exceed $75 per month for the employment of a man to measure the river at that point, and that for more than five years the defendant failed to make any such payments, and the evidence also establishes that the defendant asked for no such records. Furthermore, it appears that while this provision did in truth call for personal services, yet it was personal service to be rendered to a degree by the defendant, and that it was only incidental to the main features of the contract. It was, indeed, agreed upon only as a means of enforcing the contract. Under such circumstances the failure of the plaintiffs should not bar their right to enforce the contract, particularly where the defendant itself was guilty of a contemporaneous failure to comply with the particular provision. It is urged that there was no mutuality of remedies. It is difficult to follow the appellants' argument in this instance. Certainly if the respondents had tried to assert rights by force or otherwise contrary to their stipulations in the contract, a court of equity would have held that plaintiff was without such right and would have

enjoined any forcible attempt to assert rights contrary to the provisions of the contract. It is also asserted by appellants that the plaintiff is barred by laches and that the public interests have intervened. The answer to this argument is contained in the answer heretofore made to similar questions.

[9] As we have noted, the argument is advanced that the court in effect made a new contract for the parties when it established a method for the measurement of the flow of the river different from that fixed in the contract, and a method which is impractical and extremely difficult. In this regard a reading of the opinion in 136 Cal. App. at page 493, 29 P.(2d) 296, is interesting. The appellant there argued, and was sustained, (as to the diversions of water except on Big Creek) to the effect that the contract required that the water diverted by the Edison Company be added to the flow of the river in order to determine its right. To permit the appellant to now argue that this method is contrary to the contract would be to permit it to right-about-face, or to blow hot and cold. It cannot now be heard to complain of a method of measurement which it urged and succeeded in having established as the proper interpretation of the contract, and of which respondent does not now complain. It is further to be noted that there is relatively a very small portion of the year when such a method is required.

[10] We now come to the claim that respondents are estopped to deny the right of the defendant to divert when the river is flowing less than the required amounts by reason of the fact that The Pines, Inc., made vast improvements around the lake, relying upon the diversion of the water. This argument is likewise without merit. The evidence fails to disclose that there would be insufficient storage in the lake if the defendant were denied the right to store below the limits. In fact, the court found upon evidence which fully supports the finding as follows:

"That it is not true that the availability, attractiveness or success of The Pines, Inc., as a summer resort, or Crane Valley Lake as a summer resort, will be seriously affected if defendant is required to conform to the storage limitations expressed in said contract of June 14, 1909. That in normal years said lake will be filled, or substantially filled, with water, but in dry years said lake will be only partially filled under any conditions, but will have less water therein if defendant conforms to said storage limitations.

"That it is not true that the granting of an injunction herein on behalf of plaintiff and intervener Chowchilla Farms, Inc., will cause said Crane Valley Lake to be eliminated and destroyed, or greatly reduced in size, or will leave ugly and unhealthful mud flats adjacent to the property so leased by intervener The Pines, Inc.

"That it is true that in the normal operation of Crane Valley Reservoir the defendant stores water therein during the period of large runoff, and withdraws the water therefrom commencing generally in the month of July. That as the water is drawn off during such normal operation of said reservoir, mud flats appear as soon as said water is commenced to be drawn off, and are progressively enlarged as the reservoir or lake is emptied."

The truth of the situation is that the graphs introduced by the power company indicate that year after year the reservoir could have been filled with diversions and storage within the contract limits. Aside from the finding, which completely disposes of appellants' contention, we should be compelled to deny it force upon the same theory and findings by which we have concluded that respondents were not foreclosed of their right to press their claim for injunctive relief against the power company.

[11] With respect to the last argument of appellants that all of the persons necessary to the action were not before the court, it is sufficient to cite section 385 of the Code of Civil Procedure, which in its material part provides that an action or proceeding may be continued in the name of the original party after transfer, or may be continued in the name of the grantee. It cannot be disputed that the plaintiff and intervener were the original parties in interest, and therefore were authorized to bring the action for relief under the contract.

No other points require discussion. The judgment is affirmed.

We concur: WASTE, C. J.; EDMONDS, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

8 Cal.2d 444

WHITTEN v. CALIFORNIA STATE BOARD OF OPTOMETRY.

L. A. 16082.

Supreme Court of California.

March 16, 1937.

Rehearing Denied April 15, 1937.

1. Prohibition ⚷6(1)

Writ of prohibition does not lie to officer or board exercising purely ministerial functions.

2. Prohibition ⚷6(2)

State board, such as board of optometry, cannot exercise judicial functions, in absence of constitutional grant of such power, so that writ of prohibition to restrain such board from exercising ministerial functions, as in proceeding to revoke optometrist's license, is inappropriate (St.1913, p. 1097, as amended).

3. Prohibition ⚷6(2)

Failure of Optometry Law to provide method for review of state optometry board's order revoking optometrist's license, as by trial de novo in superior court, is matter for consideration by Legislature, not by courts in action for writ of prohibition restraining board from taking further action in proceeding to revoke license (St.1913, p. 1097, as amended).

4. Certiorari ⚷24

State boards, such as board of optometry, being engaged in enforcing administrative determinations, cannot declare law, but perform sole duty of ascertainment thereof, so that their orders are not reviewable on certiorari, but their discretion may be confined within legal limits by statutory review, trial de novo before superior or municipal court, or writ of mandamus.

5. Prohibition ⚷6(2)

Optometrist, instituting proceeding for writ of prohibition, restraining state board of optometry from taking further action in proceeding to revoke his license, before time set for hearing of charges that he untruthfully advertised glasses for sale at price for which he refused to sell them to persons answering advertisement, *held* not entitled to any relief (St.1913, p. 1097, as amended).

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Ward M. Whitten for a writ of prohibition, restraining the California State Board of Optometry from taking further action in a proceeding to revoke plaintiff's license as an optometrist. From a judgment granting a peremptory writ of prohibition, defendant appeals.

Reversed and writ discharged.

Prior opinion (Cal.App.) 60 P.(2d) 196.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for appellant.

Frank S. Hutton, of Los Angeles, for respondent.

THOMPSON, Justice.

This case was transferred to this court after decision by the District Court of Appeal, Second Appellate District, Division 2, in order that we might give further consideration to the propriety of the issuance of the writ of prohibition to restrain the respondent board from taking further action in proceedings to revoke the license of Ward M. Whitten for the making of untrue statements in his advertising in violation of the Optometry Law (St.1913, p. 1097, as amended.) The action was commenced in the superior court and the peremptory writ of prohibition was ordered to issue. The board prosecutes this appeal therefrom.

[1-3] The office of the writ of prohibition is limited by the Constitution to the restraint of a threatened exercise of the judicial power in excess of jurisdiction and it does not lie to an officer or board exercising purely ministerial functions. Camron v. Kenfield, 57 Cal. 550; Baines v. Zemansky, 176 Cal. 369, 168 P. 565; Santini v. Justice's Court, 218 Cal. 671, 24 P.(2d) 761. The Optometry Law, provides for a state board of examiners in optometry having state-wide jurisdiction over the practice of optometry. Hence the case comes squarely within the rule, recently reiterated in the case of Standard Oil Co. of California v. State Board of Equalization (Cal.Sup.) 59 P.(2d) 119, that, in the absence of a constitutional grant of judicial power a state board cannot exercise judicial functions and the Legislature is powerless to confer such power upon it. Hence the writ of prohibition is inappropriate. The fact that the Optometry Law fails to provide a method of review, perhaps by trial de novo in the superior court, is a matter for the consideration of the Legislature.

[4] The cases of Millsap v. Alderson, 63 Cal.App. 518, 219 P. 469, and Grisso v.

Board of Medical Examiners, 75 Cal.App. 385, 242 P. 912, can no longer be considered as establishing that the Legislature cannot confer upon the person deprived of a license or privilege the right to have his cause heard by way of a statutory review or trial de novo before the superior or municipal court. The distinction between the absence of authority in the Legislature to enlarge or decrease the superior court's jurisdiction and its power to create or diminish rights, which, in effect, creates new or limits old causes of action, is well drawn in Spreckels v. Hawaiian Commercial & Sugar Co., 117 Cal. 377, 381, 49 P. 353. See, also, Wright v. Superior Court, 139 Cal. 469, 73 P. 145, and Reclamation Dist. v. Superior Court, 171 Cal. 672, 681, 154 P. 845.

However, it is suggested that the line of cases exemplified by Suckow v. Alderson, 182 Cal. 247, 187 P. 965; and State Board of Chiropractic Examiners v. Superior Court, 201 Cal. 108, 255 P. 749, should govern the instant case rather than Standard Oil Co. of California v. State Board of Equalization, supra. We are unable to find any substantial difference between the functions exercised. While it is true that in the authorities mentioned it is held that the writ of certiorari would lie to review the wrongful revocation of a license of a physician and surgeon on the theory that the medical board was exercising a quasi judicial function, we think that the sounder conclusion, in view of changing and increasing governmental activities, is that such boards are actually engaged in enforcing administrative determinations. Agencies engaged in making administrative determinations, unlike courts, have the power and the facilities to investigate and initiate action and, more or less informally, find the facts which under the law justify a course of action. They cannot and do not declare the law but perform the sole duty of ascertainment. Dominguez Land Corp. v. Daugherty, 196 Cal. 468, 483, 238 P. 703. Under this theory the order of state-wide agencies such as the Board of Optometry would not be subject to review in response to the writ of certiorari, but their discretion could be confined within legal limits either by the procedure heretofore suggested or by the use of the writ of mandamus.

[5] Aside from the fact that the writ of prohibition will not lie, for the reasons already stated, we are of the opinion that the petitioner is not at this time entitled to any relief upon the showing made. He is accused of making untruthful statements, in this, that he advertised "for sale complete glasses containing single vision lenses and including frames and examination for seven and 50/100 ($7.50) dollars", but "refused to sell" the same for that price "to persons answering that advertisement". No evidence was taken, this proceeding having been instituted before the time set for hearing. We can appreciate that under certain testimony it might be proven that the advertisement was not an untruthful statement, whereas, under other circumstances, it would be demonstrated to be untruthful and intentionally drawn to mislead. Certainly untruthful advertising should be held to constitute an untruthful statement. Under such circumstances the respondent board should be permitted to proceed.

Accordingly, the judgment is reversed, and the peremptory writ of prohibition is discharged.

We concur: WASTE, C. J.; EDMONDS, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

8 Cal.2d 450

STITT v. STITT.

L. A. 15376.

Supreme Court of California.

March 18, 1937.

1. Husband and wife 🔑299(1)

In action for separate maintenance, court properly awarded community property to wife, where complaint prayed for support and maintenance, costs, order restraining dissipation of assets by husband, and for general relief.

2. Divorce 🔑93(3)
Husband and wife 🔑296

Complaint for divorce or separate maintenance on grounds of extreme cruelty is not insufficient merely because it alleges only acts of cruelty committed subsequent to final separation of husband and wife (Civ.Code, §§ 92, 137).

3. **Husband and wife** ⚷297

In absence of allegations and proof in action for separate maintenance, it could not be presumed that separation was without justification on part of aggrieved wife.

4. **Husband and wife** ⚷296

Complaint in action for separate maintenance did not fail to state a cause of action for failure to allege that separation was justified or that separation was alleged to have taken place before acts of cruelty (Civ. Code, §§ 92, 137).

In Bank.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge pro tem.

Action by Julia Louise Stitt against Corwin J. Stitt. From an adverse judgment, defendant appeals.

Affirmed.

W. C. Dalzell, of Los Angeles, and Corwin J. Stitt, for appellant.

Paul J. Otto and Paul E. Iverson, both of Los Angeles, for respondent.

WASTE, Chief Justice.

This action was brought by plaintiff, Julia Louise Stitt, against her husband, Corwin J. Stitt, charging cruelty and seeking separate maintenance for herself and three minor children of the marriage. Issue was joined by defendant, and the cause went to trial. The trial court found the material allegations of plaintiff's complaint to be true and gave judgment that she have custody of the minor children with right of reasonable visitation by defendant; that she be awarded, from the community assets, the family home and furnishings; and that defendant pay, through a court trustee, for her support and that of the three children, the sum of $60 a month, together with attorney's fees and costs. From said judgment, defendant appealed on the judgment roll and the cause is now before this court on motion of plaintiff to dismiss the appeal or affirm the judgment.

[1] No substantial question is raised by the appeal. Appellant's nine-page opening brief states five questions, but argues only three of them, and, of the three, one was completely answered when this court ordered a diminution of record on February 13, 1936, Stitt v. Stitt, 5 Cal.(2d) 329, 54 P.(2d) 460, correcting the findings as to two typographical errors in Roman numerals referring to paragraphs of pleadings found to be true or untrue. As to the second point, under the allegations of plaintiff's complaint, with its prayer for support and maintenance, for costs, for an order restraining dissipation of assets by defendant, and for general relief, it was proper for the court to make the aforesaid award of community property to plaintiff. D'Arcy v. D'Arcy, 89 Cal.App. 86, 264 P. 497.

This brings us to the third and last point. The complaint, for purposes of the State Bureau of Vital Statistics, as required by section 426a of the Code of Civil Procedure, set forth the date of marriage of the parties, November 15, 1920, and the date of separation as "on or about the 1st day of July, 1934." The four acts of cruelty charged took place in August, October, and November, 1934. Appellant contends that, where a complaint alleges a separation, without allegation as to whether it was justified or unjustified, and acts of cruelty committed subsequent thereto, it fails to state a cause of action for separate maintenance.

[2-4] The contention is without merit. A complaint for divorce or separate maintenance on grounds of extreme cruelty is not insufficient merely because it alleges only acts of cruelty committed subsequent to final separation of husband and wife. Civ. Code, §§ 92 and 137; MacDonald v. MacDonald, 155 Cal. 665, 672, 673, 102 P. 927, 25 L.R.A.(N.S.) 45; Valensin v. Valensin, 73 Cal. 106, 109, 14 P. 397; Newby v. Newby, 55 Cal.App. 114, 202 P. 891, 9 Cal.Jur. § 33, p. 661. In the absence of allegations and proof, it cannot be presumed that the separation was without justification on the part of the aggrieved spouse. Moreover, in this case, although the date of separation given for statistical purposes may have been the date upon which the spouses ceased to have sexual relations, it obviously was not the actual final date of their separation, upon which they ceased to live together in the family home, for the complaint shows on its face that the various acts of cruelty charged took place in the family home and involved the relation of both parents and children, all residing there together. The pleading stated a cause of action. Neither side has cited authority on the point just discussed. We wish, however, to refer to the case of Mayo v. Mayo, 3 Cal.(2d) 51, 43 P.(2d) 535, and to state that any intimations contrary to the views above expressed which

may be found in that decision are deemed overruled.

The judgment is affirmed.

We concur: SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; THOMPSON, J.; EDMONDS, J.

---

18 Cal.App.2d 592

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. O'CONNOR et al.

Civ. 11148.

Supreme Court of California.

March 18, 1937.

Mortgages 🔑578

Where, on foreclosure of mortgage, property sold for amount sufficiently large so that there was no occasion for a deficiency judgment, the question whether the judgment properly made provision for a deficiency judgment became moot.

In Bank.

On petition for hearing in Supreme Court.

Petition denied.

Prior opinion, 64 P.(2d) 487.

Irvin C. Louis and H. B. Pool, both of Los Angeles, for appellant.

Sherrill B. Osborne and Thorpe & Bridges, all of Los Angeles, for respondent.

PER CURIAM.

The petition for hearing is denied.

The opinion of the Appellate Court inadvertently indicates that in the case of Visalia Savings Bank v. Curtis, 135 Cal. 350, 67 P. 329, a claim was not filed. The opinion in that case expressly states that a claim upon the mortgage debt was presented, allowed, and filed.

It appears from the opinion of the Appellate Court herein that in fact the property involved in the instant case was sold under foreclosure subsequent to the judgment herein appealed from for an amount "sufficiently large so that there was no occasion for a deficiency judgment." In view of this fact, the question of whether the judgment properly made provision for a deficiency judgment has become moot. We, therefore, withhold our approval from that portion of the opinion which finds that the provision for a deficiency is in accordance with law, and do not express an opinion on that question.

---

8 Cal.2d 447

WALKER et al. v. WELLS FARGO BANK & UNION TRUST CO. et al.

S. F. 15777.

Supreme Court of California.

March 16, 1937.

1. Appeal and error 🔑479(2)

Writ of supersedeas to stay proceedings pending appeal from order denying change of venue is discretionary, and will issue only on showing that substantial questions will be presented on appeal (Code Civ.Proc. § 949).

2. Venue 🔑21

Action to remove trustee and for accounting is "personal" and is triable in county of residence of trustee, notwithstanding that trust property may be located in another county.

[Ed. Note.—For other definitions of "Personal Action," see Words & Phrases.]

3. Corporations 🔑503(3)

In action for removal of individual and corporate trustees, and for accounting, trustees were entitled to change of venue from county in which trustees were appointed to county in which corporate trustee "resided," unless action was commenced in one of the other several places wherein corporations could be sued under the Constitution (Const. art. 12, § 16).

4. Corporations 🔑503(1)

Constitutional provision that corporation "may be sued" in any one of several designated places meant not merely that action might be commenced, but that it might be prosecuted to final judgment in such places, unless defendant showed sufficient grounds for change, other than mere fact that principal place of business of corporation was in another county (Const. art. 12, § 16).

5. Appeal and error ⚷458(2)

Trustees appealing from order denying their motion that venue of action for their removal and for accounting be changed from county in which trustees were appointed to county in which corporate trustee "resided" *held* entitled to writ of supersedeas, since appeal presented substantial question whether action might not have been commenced where obligation arose, or breach occurred, or in any of the places designated in Constitution as proper for suit against corporation (Code Civ.Proc. § 949; Const. art. 12, § 16).

In Bank.

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Action by Frances B. Walker and others against the Wells Fargo Bank & Union Trust Company and another. From an order denying defendants' motion for change of venue, the defendants appeal, and seek a writ of supersedeas.

Writ issued.

Archibald B. Tinning and Tinning & De Lap, all of Martinez, and Lloyd W. Dinkelspiel, Richard E. Guggenhime, and Heller, Ehrman, White & McAuliffe, all of San Francisco, for appellants.

McAdoo, Neblett & Warner, of Los Angeles, for respondents.

WASTE, Chief Justice.

Some twelve years after defendants had been appointed in Contra Costa county trustees of a testamentary trust, this action was commenced therein to have them removed and for an accounting. The individual defendant joined with the corporate defendant in moving the court below for a change of venue to San Francisco county, the principal place of business or "residence" of the corporate defendant. Pending this court's disposition of an appeal from the order denying their motion, the defendants seek a writ of supersedeas. Under the provisions of section 949 of the Code of Civil Procedure an appeal from an order denying a change of venue does not stay proceedings in the absence of such a writ.

[1] The issuance of a supersedeas is a discretionary matter and is justified only when there is a showing that substantial questions will be presented upon the appeal from an order denying change of venue. Bardwell v. Turner, 219 Cal. 228, 229, 25 P.(2d) 978; McKenzie v. Los Angeles Life Ins. Co., 88 Cal.App. 259, 263 P. 338. Examination of the briefs discloses that such a showing has been here made. In fact, respondents "concede" for the purposes of this hearing "that a substantial legal question will be presented by [the] appeal."

[2, 3] An action to remove a trustee and for an accounting is personal in character and triable in the county of the residence of the defendant, and even the presence of the trust property elsewhere cannot deprive the defendant of his right to place of trial. Golden Cross M. & M. Co. v. Spiers, 115 Cal. 247, 250, 47 P. 108; Spangenberg v. Spangenberg, 123 Cal.App. 387, 390, 391, 11 P.(2d) 408. Therefore, in response to their joint motion, the defendants were entitled to a change of venue to the "residence" of the corporate defendant unless the action was commenced in one of the other several places wherein corporations may be sued, as provided in section 16 of article 12 of the Constitution. Briefly, that section declares that a corporation may be sued where the contract is made or is to be performed, or where the obligation or liability arises, or where the breach occurs, or in the county of its principal place of business.

[4] The language of this constitutional provision that a corporation "may be sued" in any one of the several designated places has been held to mean not merely that an action may be commenced but that it may be prosecuted to judgment in any one of said several places, unless the corporate defendant can allege and show some sufficient ground for a change of the place of trial other than the mere fact that the principal place of business or "residence" of the corporation is in another county. McDuffie v. California T. Land Corp., 138 Cal.App. 245, 247, 32 P.(2d) 385; Cook v. Ray Mfg. Co., 159 Cal. 694, 115 P. 318.

[5] Our examination of the briefs and the authorities reveals that a substantial question will be presented by the appeal as to whether the action for removal, having been brought in the same county where the defendants many years previously had been appointed trustees, may not have been commenced where the obligation or liability arose or where the breach occurred or in any one of the places designated in the Constitution, other than the "residence" of

the corporate defendant, as proper for suit against a corporation. If not so commenced, the motion for change of venue should have been granted. This is a question that must be decided when the appeal is heard on the merits. To decide it now would render the appeal moot. In view of the substantial nature of the question involved on the appeal, a supersedeas appears proper in this cause.

Let the writ issue as prayed.

We concur: THOMPSON, J.; SHENK, J.; SEAWELL, J.; EDMONDS, J.; CURTIS, J.; LANGDON, J.

---

18 Cal.App.2d 559

CENTRAL BANK OF OAKLAND v. WELLS FARGO BANK & UNION TRUST CO.

Civ. 10051.

Supreme Court of California.

March 18, 1937.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

On rehearing.

Rehearing denied.

Prior opinion, 64 P.(2d) 465.

Sherman & Peters, of San Francisco, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

PER CURIAM.

The petition for hearing is denied. We are not willing to give our approval to the statement in the opinion that the assumption of the encumbrance of the lien by the purchaser of the encumbered property is an offer to the mortgagee which becomes in all events binding upon the purchaser when accepted by the mortgagee. We base our order denying a hearing upon the finding that there had been no rescission by the purchaser of his agreement to assume and pay the lien against the property purchased.

---

8 Cal.2d 331

LA FRANCHI v. CITY OF SANTA ROSA et al.

Sac. 4962.

Supreme Court of California.

Feb. 25, 1937.

1. Food ⚷1

Ordinance prohibiting sale of pasteurized milk in municipality unless milk was pasteurized within corporate limits of municipality *held* invalid, as respects producer within same inspection district as municipality, as conflicting with statutes giving director of agriculture supervision of milk inspection services and providing for right of sale in inspection district wherein milk is inspected and graded (St.1933, pp. 139, 140, §§ 490, 492; St.1935, pp. 845, 846, §§ 491, 493).

2. Food ⚷1

Municipality may provide for standards higher than those fixed by Agricultural Code, but may not provide for lower standards.

3. Food ⚷1

Municipality may adopt zoning ordinances as respects regulation of production and sale of milk.

4. Food ⚷1

Ordinance prohibiting sale of pasteurized milk in municipality unless milk was pasteurized within corporate limits of municipality *held* invalid exercise of police power, as intended merely to erect tariff barrier, and as having no reasonable relation to proper legislative objective, as respects producer within same inspection district as municipality (St.1933, p. 130, § 451 et seq., as amended).

5. Licenses ⚷7(1)

Ordinances designed for the purpose of erecting tariff barriers are void.

In Bank.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by M. J. La Franchi against the City of Santa Rosa and another. From an adverse judgment, plaintiff appeals.

Reversed.

Prior opinion, 52 P.(2d) 558.

J. N. De Meo, of Santa Rosa, for appellant.

Edward M. Selby and Lewis D. Collings, both of Los Angeles, and Philip S. Ehrlich and Albert A. Axelrod, both of San Francisco, amici curiæ.

Edward T. Koford, City Atty., of Santa Rosa, for respondents.

H. B. Churchill, of Santa Rosa, John J. O'Toole, City Atty., of San Francisco, and Ray L. Chesebro, City. Atty., Frederick Von Schrader, Asst. City Atty., and Arthur Loveland, Deputy City Atty., all of Los Angeles, amici curiæ.

THOMPSON, Justice.

This is an action for declaratory relief instituted for the purpose of testing the validity of Ordinance No. 473 of the City of Santa Rosa. The appeal is taken by the plaintiff from a judgment of dismissal entered upon an order sustaining a demurrer to the complaint without leave to amend. Ordinance No. 473 provides for the amendment of an existing ordinance by the addition of a new section, to be numbered 6½, reading: "It shall be unlawful for any person to sell, offer for sale, distribute or have in his possession for sale or distribution, within the City of Santa Rosa, any milk intended for human consumption which has been pasteurized outside the corporate limits of the city."

It is alleged in the complaint that the plaintiff conducts a dairy ranch and dairy business about five miles outside the city limits and is engaged in the production, sale, and distribution of raw and pasteurized milk; that both his pasteurized and raw milk plants are maintained and operated in compliance with all the requirements of the State Department of Agriculture, ordinances of Sonoma County, and of the City of Santa Rosa, other than the questioned ordinance; that the City of Santa Rosa has a milk inspection service approved by the Department of Agriculture; that E. J. Helgren is the city milk inspector in charge of that inspection service and also the milk inspector for the City of Sebastopol; that, in his capacity of inspector for the City of Santa Rosa, Helgren inspects plaintiff's raw milk plant and the milk produced thereat for sale in the City of Santa Rosa and pasteurizing plants located within the city limits of Santa Rosa; that, in his capacity of inspector for the City of Sebastopol, Helgren inspects the plaintiff's pasteurizing plant and the pasteurized milk produced thereat; that the plaintiff's pasteurizing plant is inspected by Helgren at the same periodic intervals and by the same scores and standards as the pasteurizing plants within the city limits and that the milk produced by plaintiff scores equally as high, both before and after pasteurization, as the milk produced for, pasteurized and handled by the pasteurizing plants within the limits of the City of Santa Rosa; "that the City of Santa Rosa has, and since the year 1928 A. D. has had, a Milk Inspection Service approved by the Department of Agriculture of the State of California, in pursuance of statute in such case provided, and in pursuance of said Ordinance No. 444; that the plaintiff's said dairy ranch and business are under the jurisdiction of the said Milk Inspection Service of the City of Santa Rosa"; that the City of Santa Rosa would incur no additional expense or inconvenience if its milk inspector inspected the plaintiff's pasteurizing plant at the same time as he inspected his raw milk plant; that for the inspection of his raw milk plant the plaintiff pays a fee of one-half cent a gallon for milk sold in the City of Santa Rosa; and that this fee and the fee paid by others selling milk in the city and that which will be derived from the sale of pasteurized milk within the city are ample to defray the cost of inspection of plaintiff's pasteurizing plant by Helgren, acting as city milk inspector for the City of Santa Rosa.

It is argued that the state has, in division 4 of the Agricultural Code (St.1933, p. 130, § 451 et seq., as amended), enacted a general law covering the entire field of regulation and inspection of production, pasteurization, marketing, sale, and distribution of milk and dairy products, with which the present ordinance conflicts by adding the additional requirement that pasteurized milk sold within the City of Santa Rosa must be pasteurized within the city limits. On behalf of the city it is insisted that municipalities are free to enact additional regulations which are not in conflict with, but in furtherance and aid of, the general law when such regulations are reasonable and are adopted in pursuance of the lawful exercise of the police power of the municipality.

To support the ordinance as a police regulation, the respondents rely almost entirely upon Witt v. Klimm, 97 Cal.App. 131, 274 P. 1039, holding valid an ordinance of the City and County of San Francisco. The ordinance there involved provided that milk brought into the city from another inspection district if it were to be sold as pasteurized milk would have to be pasteurized in San Francisco, that other milk received at a central cooling plant outside of San Francisco would have to be inspected by an inspector paid by the owner of the business but appointed by the San Francisco board of health. It will be observed that a very important difference exists between the two cases. In the Witt Case milk was being brought in from another inspection district, whereas in the present case it is alleged that the appellant's business is located within the Santa Rosa district, approved, as required by the Agricultural Code, by the director of agriculture.

In this connection certain provisions of the Agricultural Code become important. Section 491 (St.1933, p. 140, as amended by St.1935, p. 845, Deering's Supp. to Codes and Laws, 1935, p. 405) provides that cities or counties or groups of either may maintain a milk inspection service "conformable to the provisions" of the act "and the rules and regulations promulgated by the director" of agriculture and subject to his approval, and may by contract with a county or city maintain "such milk inspection service and laboratory within the limits" of another. Upon approval of such milk inspection service it is provided that the milk shall be graded in accordance with the act.

In another section (490 [St.1933, p. 139]) it is provided that milk from the jurisdiction of one milk inspection service may be sold within the jurisdiction of another milk inspection service "if the consent" of the latter has been obtained. And by section 492 (St.1933, p. 140) a person may, upon application to the director of agriculture, secure the establishment of an approved milk inspection service where one does not exist if it appears necessary and advisable to the director upon agreement by the applicant to pay the expenses incident thereto. And, to further indicate the tenor of the act, section 493 (St.1933, p. 141, as amended by St.1935, p. 846) provides that any milk delivered by the producer to be sold as of a certain grade shall not be degraded or excluded from the market when the score of the dairy temporarily falls below the specified legal minimum.

[1] Two things stand out in these provisions: The first is that the administration of the act and the supervision of the milk inspection services is in the hands of the director of agriculture. A health department of a city or county or any combination thereof must secure the approval of the director for the establishment of such a service which must be conducted in conformity with the act and rules and regulations promulgated by the director. He may order new services to be established, and it is clearly within his power, by the exercise of his discretionary approval or disapproval, to fix the jurisdiction of the services. The second is that, when milk has been inspected and graded within the jurisdiction of a service, it can be sold therein, although not within the jurisdiction of another service without its consent. And in this regard it is important to note that nowhere in the act is any distinction made between raw and pasteurized milk. It is obvious that, where a milk inspection service or district has been established in accordance with the provisions of the Agricultural Code, it is without the power of any agency therein to limit or place restrictions in conflict with the state law upon the sale of milk, raw or pasteurized, which has been inspected and graded in accordance with the act. It therefore follows, assuming, as we must, that the allegations of the complaint are true, that the ordinance here involved is invalid as to the appellant.

[2-4] There is another reason why we must hold the questioned ordinance to be void under the allegations of the present complaint. In considering this phase of the case, however, we may first assume that the municipality may adopt reasonable requirements with regard to the standards of the products which are not inconsistent with the Agricultural Code; that is to say, that the municipality may provide for standards higher than those fixed by the Agricultural Code, although it may not provide for standards below those fixed by the Agricultural Code. In re Hoffman, 155 Cal. 114, 99 P. 517, 132 Am.St.Rep. 75, and In re Iverson, 199 Cal. 582, 250 P. 681. It must also be taken for granted that the municipality may adopt zoning ordinances. Under the allegations of the complaint in the instant cause it appears that the ordinance here in question does not purport to increase the standards of the product nor relate to a particular portion of the city in which pasteurization plants may be located. The allegations are to the effect that the appellant has complied with all of the ordinances of the City of Santa Rosa and the requirements of the State Department of Agriculture with respect to the standards of his products; that the inspector in charge of the Santa Rosa inspection district not only inspects his raw milk plant, but, in his capacity as inspector for the city of Sebastopol, inspects his pasteurizing plant and the

pasteurized milk produced thereat. It therefore appears that the purpose of the ordinance is to exclude milk from the market which is not pasteurized in Santa Rosa. In other words, its purpose is to erect a tariff barrier against milk which is not pasteurized within the city limits. The question then is, Is this a reasonable ordinance, or is it reasonably related to a proper legislative objective? We think the answer must be in the negative. In Whitney v. Watson, 85 N.H. 238, 157 A. 78, 81, the board of health refused to grant a license to sell dairy products to a producer whose plant was outside the city limits. The court said: "It is manifestly impossible to bring the applicant's plant to the board. If the assurance provided by the statute cannot be had without a view and physical examination thereof, it is obvious that some limitation of the area in which they are to be had and conducted must have been contemplated. It would seem that the board, as an incident to the performance of its duty, must have power to determine, as a practical matter, what that limitation is. In other words, a reasonable boundary of the area within which the board shall be required to sit in its investigation of the facts was impliedly intended. The Legislature meant to enact a workable law, and therefore to impose such a limitation of the field of its operation as permits of the supervision for which it provides without unreasonable expense. State v. Hoyt, 84 N.H. 38, 41, 146 A. 170. The search, however, being for the line limiting the area of practical administration, the city boundary, considered alone, has no significance. Distance, moreover, may not be the test. Topographical transportation and other conditions may figure in the problem. What are the reasonable limits under all the conditions is a question for the board, subject to revision by the court if not fixed by the exercise of a reasonable discretion." In State v. Minneapolis, 190 Minn. 138, 251 N.W. 121, 123, an ordinance in all respects similar to the one here in question was involved. The court declared it to be unconstitutional because unreasonable. The difference in the two cases is that in the Minneapolis Case the pasteurization plant was thirty miles outside the city limits, and here it is five. The court said: "If the inspection fee is deemed insufficient, there appears to be no good reason why such insufficiency cannot be remedied in a manner that would impose no unjust hardship on any one concerned. There is nothing in the record to show what, if any, inconvenience the city may be put to that would justify such a harsh requirement as provided by the ordinance. We are obliged to hold that the ordinance, in so far as it prohibits the sale of pasteurized milk or its products in the city of Minneapolis, unless the same shall have been pasteurized in a pasteurization plant located within the city limits, violated relator's constitutional rights of propery and contract. The restriction contained therein goes 'beyond the reasonable demands of the occasion,' and is not adaptable to the end sought." A late case along the same general lines is that of Sheffield Farms Co. v. Seaman, 114 N.J. Law, 455, 177 A. 372, 375, decided in February, 1935. The board of health refused a permit because of a limited budget which prevented the making of inspections at distant places and also because their city had a sufficient supply. The court there said: "It will serve no useful purpose to answer or further discuss the purported reason argued upon which the refusal is sought to be justified. Suffice it to say that the meager facts, relevant as to the occasion and history of the refusal, lead us to the conclusion that they are without substance. They are excuses rather than legal reasons. The city just took the position that it had enough milk dealers and that it had the situation 'well in hand.' Such a position is unreasonable; it is arbitrary, capricious, and discriminatory. It unlawfully curtails prosecutor's common-law right to engage in a lawful business, notwithstanding that it has fully complied with the requirements of the state and city. This the city cannot lawfully do."

Again in Grant v. Leavell, 259 Ky. 267, 82 S.W.(2d) 283, decided in April, 1935, that part of an ordinance was declared invalid which required such plants to be located within the city. In other words, it has been held quite generally that the city limits as the boundary line outside of which plants may not be located if the milk is to be sold within the city do not have a reasonable relationship to a proper legislative object and therefore ordinances fixing such a boundary are invalid.

[5] In line with the authorities from other jurisdictions from which we have quoted are those from our own courts declaring that ordinances designed for the purpose of erecting tariff barriers are void, such as Ex parte Frank, 52 Cal. 606, 28 Am. Rep. 642; In re Hines, 33 Cal.App. 45, 164 P. 339; In re Hart, 36 Cal.App. 627, 172 P. 610; In re Riley, 39 Cal.App. 58, 177 P.

854, and In re Robinson, 68 Cal.App. 744, 230 P. 175.

It follows from what we have said that the court was in error in sustaining the demurrer and that the judgment should be, and it is hereby, reversed.

We concur: WASTE, C. J.; EDMONDS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

---

8 Cal.2d 378

STANISLAUS COUNTY DAIRYMEN'S PROTECTIVE ASS'N v. STANISLAUS COUNTY et al.

Sac. 4972.

Supreme Court of California.
Feb. 27, 1937.

Dissenting Opinion March 10, 1937.

1. Pleading 🔑8(1)

Allegations of conclusions in complaint with respect to purpose or result of county ordinance are not binding on court in construction thereof.

2. Counties 🔑55
Municipal corporations 🔑597

Powers of counties and chartered cities to enact police ordinances for sanitation or health are as broad as same powers of Legislature, except ordinances of counties and chartered cities must not conflict with Constitution or general laws, and must be confined in their application to city or county adopting them.

3. Counties 🔑55

In determining whether county ordinance is unreasonable, discriminatory, or oppressive, intent and object of legislation should be ascertained, if possible, from act itself.

4. Counties 🔑55

Purpose and spirit of county ordinance should be considered by court in determining whether ordinance is unreasonable, discriminatory, or oppressive.

5. Counties 🔑55

County ordinance relating to control of tubercular cattle providing new and additional regulations beyond those of Agricultural Code would be valid so long as its provisions did not conflict with provisions of Code (Gen.Laws Supp.1933, Act 144).

6. Counties 🔑55

State will assume authority to enforce provisions of Agricultural Code with respect to tubercular cattle in districts consisting of one or more counties only after such areas have been established by Agricultural Department, and hence ordinance of county which is not in area so established dealing with same subject covered by state law is not in conflict therewith (Gen.Laws Supp. 1933, Act 144, §§ 234.25, 234–239).

7. Counties 🔑55

Under provision of Agricultural Code that, in any county where Agricultural Department had not established a tuberculosis control area, county could declare "any portion" of county a voluntary tuberculosis control area, county could include all portions or entire county in voluntary control area (Gen.Laws Supp.1933, Act 144, § 234.25).

[Ed. Note.—For other definitions of "Any Portion," see Words & Phrases.]

8. Counties 🔑55

County which was not included by Agricultural Department in any bovine tuberculosis control district within state *held* entitled to organize such a district within its own borders under Agricultural Code (Gen. Laws Supp.1933, Act 144, § 234.25).

9. Counties 🔑55

That county ordinance making county a bovine tuberculosis control district was couched in same language, or intended to serve same purpose, as districts formed by the Agricultural Department under the Agricultural Code, *held* not to affect validity of ordinance, where county had not been included within any control district by Agricultural Department (Gen.Laws Supp.1933, Act 144, § 234.25).

10. Statutes 🔑225

Statutes may be identical in language and purpose, but, if they apply to distinctly separate districts, they are not conflicting.

11. Animals 🔑29

Agricultural Code *held* not discriminatory or void because it provided for organization of separate districts within state for purpose of regulating and eradicating tuberculosis from dairy cattle (Gen.Laws Supp. 1933, Act 144).

12. Counties 🔑55

County ordinance making county voluntary tuberculosis control area *held* not to conflict with provisions of Agricultural Code relating to control of tuberculosis as affecting cattle because ordinance failed to provide for compensation of owners of condemned cattle while Code did, since ordinance and Code applied to different districts (Gen. Laws Supp.1933, Act 144, § 234.25).

13. Constitutional law 🔑62

Authority may be delegated by Legislature to administrative boards or officers to adopt reasonable rules to carry out general purpose for which a statute is enacted, even though delegated power confers discretion or necessity of determining terms, qualifications, or facts upon board or officer within the scope of the legislative act.

14. Counties 🔑55

Provision of county ordinance delegating discretionary authority in testing, segregating, and slaughtering cattle infected with tuberculosis to county livestock inspector and to county veterinarians *held* invalid to extent that it gave veterinarians authority independent of county livestock inspector (Gen.Laws Supp.1933, Act 144, §§ 234.25, 234–239; Const. art. 11, § 11).

15. Counties 🔑55

Ordinance making county voluntary bovine tuberculosis control area and delegating power to make tuberculin tests to county livestock inspector and county veterinarians *held* not rendered entirely void because it purported to delegate discretionary authority to veterinarians, where invalid provision was readily separable and ordinance contained saving clause (Gen.Laws Supp.1933, Act 144, § 234.25; Const. art. 11, § 11).

16. Counties 🔑55

That county ordinance making county voluntary tuberculosis control area exempted beef cattle from requirements applicable to dairy cows found to be infected with tuberculosis did not render ordinance discriminatory (Gen.Laws Supp.1933, Act 144, § 234.-25; Const. art. 1, § 11).

17. Constitutional law 🔑293

Ordinance making county voluntary tuberculosis control area and providing for slaughter of infected cattle without providing for compensation of owners *held* not violative of due process, since ordinance was within police power of county and its execution was in hands of skilled agents (Const. U.S. Amend. 14; Const.Cal. art. 11, § 11).

18. Constitutional law 🔑293

County ordinance making county voluntary tuberculosis control area and providing for cleaning and disinfecting premises from which diseased cattle were removed *held* not violative of due process because it made no provision for compensation of owners, being within police power of county (Const.U.S. Amend. 14; Const.Cal. art. 11, § 11).

19. Constitutional law 🔑293

That county ordinance provided for slaughter of tubercular cattle under supervision of federal, state, or state approved municipal meat inspector did not render ordinance violative of due process, since owners of such stock were not thereby deprived of vested rights, and, even if clause were invalid, saving clause would preclude its affecting balance of ordinance (Const.U.S. Amend. 14).

EDMONDS, J., dissenting.

In Bank.

Appeal from Superior Court, Stanislaus County; L. J. Maddux and Roy B. Maxey, Judges.

Action by the Stanislaus County Dairymen's Protective Association, a voluntary unincorporated association, and another, against Stanislaus County, a political subdivision, and others. Judgment for defendants upon an order sustaining a demurrer to complaint without leave to amend, and plaintiffs appeal.

Affirmed.

Prior opinion, 58 P.(2d) 706.

Hawkins & Hawkins, of Modesto, and Whitehurst & Logan, of Patterson, for appellants.

Leslie A. Cleary, Dist. Atty., and Frank B. Collier, Deputy Dist. Atty., both of Modesto, for respondents.

CURTIS, Justice.

This action, originally appealed to this court, was transferred by our order to the District Court of Appeal for the Third District. That court rendered its decision affirming the judgment of the trial court. A petition for hearing by this court after said decision was later granted. While we are in accord with the conclusion reached by the District Court of

Appeal, we are not in entire agreement with said court in all that was said in said opinion. We therefore adopt as the opinion of this court the opinion rendered by the District Court of Appeal with such changes or modifications as we think necessary to express our views upon the legal questions present in the case. Such changes or modifications as we have made in the opinion as rendered by the District Court of Appeal are set off in brackets from those portions of the original opinion which we have adopted.

The opinion as changed or modified by us is as follows:

The plaintiffs have appealed from a judgment which was rendered against them upon an order sustaining a demurrer to a complaint without leave to amend the pleading. The action was brought to enjoin the officers of the Stanislaus County Voluntary Tuberculosis Control Area from enforcing an ordinance of that district authorizing the inspecting, condemning, or slaughtering of dairy cattle infected with tuberculosis. It is contended the ordinance is unconstitutional and void for the reason that it is in conflict with the Agricultural Code of California (Gen. Laws Supp.1933, Act 144), which purports to legislate for the entire state upon the same subject, and because the ordinance is discriminatory, unreasonable, and oppressive. The demurrer was sustained on the ground that the complaint fails to state facts sufficient to constitute a cause of action authorizing the injunctive relief which is sought.

[1] It is contended the demurrer was improperly sustained for the reason that the facts which are alleged show that the county ordinance is unreasonable, discriminatory, and void, and that evidence may be adduced to prove that an act which may appear on its face to be valid is, nevertheless, void. It is stated in 2 McQuillin on Municipal Corporations, p. 732, § 766, in that regard: "It is well settled that in case of an act of the legislature, or of a municipal ordinance which has been expressly ratified by the legislature, evidence may not, as a general rule, be introduced for the purpose of showing that the statute or ordinance is unreasonable, and therefore unconstitutional, while in the case of an ordinance or municipal regulation adopted under authority of the legislature, but *not specially ratified* after adoption, it may be attacked on the ground that it is unreasonable, and to support this claim evidence may be introduced."

Conceding that a different rule prevails in that regard in determining whether a county ordinance is unreasonable and void from that which applies with relation to the ordinance of a city which is enacted under an express delegation of authority contained in a charter which has been approved by the Legislature, still we are of the opinion the present county ordinance does not appear to be unreasonable or discriminatory. The mere allegations of conclusions with respect to the purpose or result of an ordinance are not binding on a court in the construction thereof. The ordinance itself is clear with respect to its purpose and procedure.

[2] The County of Stanislaus was granted authority to adopt local, police, sanitary, or other regulations not in conflict with general laws. Article 11, § 11, Const.Calif. The only questions to be determined are whether the challenged ordinance constitutes a violation of that constitutional delegation of authority, or whether it is in conflict with the Agricultural Code of California. The authority to enact police ordinances for sanitation or health on the part of counties as well as chartered cities is just as broad, sweeping, and inclusive as the powers with relation thereto which are vested in the Legislature itself, except that they must not conflict with the Constitution or with general laws, and must be confined in their application only to the city or county adopting them. People v. Velarde, 45 Cal. App. 520, 188 P. 59; In re Maas, 219 Cal. 422, 27 P.(2d) 373.

[3] In determining whether the ordinance is unreasonable, discriminatory, or oppressive, and therefore void, the intent and object of the legislation should be ascertained, if possible, from the act itself. In 59 Corpus Juris, p. 961, § 571, it is said in that regard: "In construing a statute to give effect to the intent or purpose of the legislature, the object of the statute must be kept in mind, and such construction placed upon it as will, if possible, effect its purpose and render it valid."

[4] But the purpose and spirit of the act should also be considered. In 59 Corpus Juris, p. 964, § 573, it is said: "In pursuance of the general object of giving effect to the intention of the legislature the courts are not controlled by the literal

meaning of the language of the statute, but the spirit or intention of the law prevails over the letter thereof, it being generally recognized that whatever is within the spirit of the statute is within the statute although it is not within the letter thereof, while that which is within the letter, although not within the spirit, is not within the statute. Effect will be given the real intention even though contrary to the letter of the law. The rule of construction according to the spirit of the law is especially applicable where adherence to the letter would result in absurdity or injustice, or would lead to contradictions, or would defeat the plain purpose of the act * * * When the law is free and clear of ambiguity, the letter of it is not to be disregarded on the pretext of pursuing its spirit."

[5, 6] It is asserted sections 234 to 239 of the Agricultural Code of California (Deering's Supp. to Gen.Laws of Calif. 1933, p. 841 et seq.) includes all of the provisions with relation to the control of tuberculosis as affecting cattle within the state, which are found in the Stanislaus ordinance, which latter measure is a mere attempt to regulate the same subject covered by the state law, and that the ordinance is therefore ineffectual and void. In re Sic, 73 Cal. 142, 14 P. 405; In re Mingo, 190 Cal. 769, 214 P. 850; Atlas Mixed Mortar Co. v. City of Burbank, 202 Cal. 660, 262 P. 334. The application of this rule depends upon whether the Agricultural Code does in fact cover regulations in the same district regarding tubercular cattle which are sought to be enforced by the Stanislaus ordinance. If the ordinance does enact new and additional regulations beyond those which are covered by the state law, then those measures may be upheld as valid so long as they do not conflict with the provisions of the state law. It is said in Re Iverson, 199 Cal. 582, 250 P. 681, 682, in that regard: "Where the Legislature has assumed to regulate a given course of conduct by prohibitory enactments a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purposes of the general law as may seem fit and appropriate to the necessities of the particular locality and which are not in themselves unreasonable. Mann v. Scott, 180 Cal. 550, 556, 182 P. 281. * * * Whether the Legislature has undertaken to occupy exclusively a given field of legislation is to be determined in every case upon an analysis of the statute and of the facts and circumstances upon which it was intended to operate."

After comparison of the Stanislaus County ordinance with the Agricultural Code we are satisfied these measures are not in conflict [except in one respect which will be hereinafter considered]. It is recited that the County of Stanislaus adopted an ordinance pursuant to section 234.25 of the Agricultural Code declaring that county to be an independent "voluntary tuberculosis area." This procedure is authorized by the Code. The theory of the Agricultural Code is that the state will assume authority to enforce the provisions thereof with respect to tubercular animals only in districts consisting of one or more counties *after such areas have been segregated and established by the Agricultural Department.* Section 234 of the Code provides in that regard: "The department may establish and maintain tuberculosis control areas within this State, wherein said department shall examine and tuberculin test all dairy cattle, and, with the consent of the owner, such beef cattle as he may specify, as often as may be deemed necessary, in order to determine which animals are affected with tuberculosis. Any tuberculosis control area shall consist of one or more entire counties."

This provision is followed by section 234.25, which authorizes any county which is not included in a district organized by the department to create by ordinance its own area "until the department shall establish such county as a tuberculosis control area," within which county or any portion thereof the board of supervisors may provide for the regulation and testing of all cattle for the purpose of eradicating tuberculosis. That is exactly what was done in the present case. The last-mentioned section provides:

"In any county which has not been established by the department as a tuberculosis control area as provided in the preceding section, the board of supervisors of such county may, by ordinance, declare any portion of said county a voluntary tuberculosis control area, for the purpose of eradicating bovine tuberculosis therein; the same to continue, as such, only until the department shall establish such county as a tuberculosis control area.

"The county livestock inspector shall, subject to the supervision of the director, examine and tuberculin test all dairy cattle within such voluntary tuberculosis control area, as often as may be deemed necessary, in order to determine which animals are affected with tuberculosis.

"The board of supervisors of such county shall provide by ordinance for the formation, regulation, and operation of all such voluntary tuberculosis control areas, as may be so established within such county, necessary to accomplish the object of this section. The provisions in this code for payment of indemnity shall not apply to any voluntary tuberculosis control area established by authority of this section."

[7] It is alleged the board of supervisors of Stanislaus County enacted Ordinance No. 170 pursuant to the provisions of section 234.25 of the Agricultural Code on January 19, 1935, creating a voluntary tuberculosis control area of the entire county for the purpose of eradicating tuberculosis from cattle. That ordinance is referred to as Exhibit A and is made a part of the complaint. It is claimed that, since the last-mentioned section only authorizes a board of supervisors to declare "*any portion* of said county a voluntary tuberculosis control area," the effort to include the entire county in such district is unwarranted and void. We think there is no merit in this contention. We are of the opinion the authority to embrace within the area "any portion of the county" necessarily confers the right to include all portions or the whole thereof. Coelho v. Truckell, 9 Cal.App.(2d) 47, 48 P.(2d) 697.

The complaint then alleges that the board of supervisors of Stanislaus County enacted Ordinance No. 171 on February 25, 1935, which ordinance is also referred to as Exhibit B and made a part of the pleading. This ordinance appears to conform to the requirements of section 234.25 of the Agricultural Code (except in the one respect already referred to), and provides in detail for the regulation and control of the testing, branding, and disposition of tubercular animals within that county.

The first ordinance created the district. The second one provided the authority and procedure for eradicating tuberculosis from dairy cattle within that area. This right also is given to said county by the terms of the Agricultural Code above quoted.

[8-11] [Since it does not appear that Stanislaus County was included by the Agricultural Department in any tuberculosis control district within the state, it is clear that the county had a right to organize such a district within its own borders. In fact, as we have seen, this right is expressly given said county by the terms of the Agricultural Code quoted above. This is exactly what the County of Stanislaus proceeded to do. As no such district was established in said county by the Agricultural Department, the county was left free to establish such a district within its territorial limits, and provide in the ordinance establishing the same such legal regulations as in the judgment of the board of supervisors would meet the needs of said county. There can be no valid objection to such an ordinance that it is couched in the same language, or that it may be intended to serve the same purpose, as districts formed by the Agricultural Department under the Agricultural Code.] Statutes may be identical in language and purpose, but, if they apply to distinctly separate districts, they are not conflicting. The Legislature had a right to authorize the organization of separate districts within the state for the purpose of regulating and eradicating tuberculosis from dairy cattle. This districting of the state has been done with respect to fishing and hunting and in various other regulatory enactments. The Agricultural Code is not discriminatory or void on that account.

[12] The appellants suggest that the Stanislaus ordinance conflicts with the Agricultural Code in many particulars, among which is the fact that section 238 of the Code provides that animals shall not be tested for tuberculosis or slaughtered unless there are funds available from federal and state sources to compensate the owner of the stock for the loss thereof, while the ordinance provides for no compensation under such circumstances. But, as we have said, there is no conflict between these measures since the Code does not apply except in districts which have been established by the Agricultural Department, and Stanislaus County was not included in such an area. Section 234.25 of the Agricultural Code specifically declares that: "The provisions in this code for payment of indemnity shall not apply to any voluntary tuberculosis con-

trol area established by authority of this section."

[In view of the fact that no tuberculosis control district has been established by the Department of Agriculture in the County of Stanislaus, we are not concerned with the problems as to whether the Agricultural Code is unconstitutional for the alleged reason that it is unreasonable, discriminatory, or oppressive, or that it constitutes an unlawful delegation of judicial authority or otherwise. The officials of the County of Stanislaus are not pretending to regulate tuberculosis among dairy cattle pursuant to the Agricultural Code, but are acting in pursuance of the authority given them by the terms of said ordinance.]

[13] We are of the opinion the ordinance is not void because it purports to delegate certain discretionary authority in testing, segregating, or slaughtering cattle which are infected with tuberculosis. The ordinance is evidently intended as a police and sanitary measure adopted under the provisions of article 11, § 11, of the Constitution of California, chiefly to eradicate tuberculosis from dairy cattle in Stanislaus County for the protection of the consumers of milk against that prevalent disease. This discretion is conferred by the ordinance on the county livestock inspector or upon the county veterinarians, subject to the rules therein provided for the purpose of regulating the dairy business and eradicating tuberculosis. Sections III to VI of the ordinance are quoted in part and provide:

"III. All bovine animals within the voluntary tuberculosis control area herein created shall be tuberculin tested by the county livestock inspector or veterinarians as often, in the opinion of said livestock inspector or veterinarians, as may be deemed necessary to accomplish the purpose of this ordinance. * * *

"IV. Each reactor shall * * * be marked * * * under the supervision of the county livestock inspector of a veterinarian. * * *

"V. Any bovine animal in Stanislaus County reacting positively to a tuberculin test conducted by a veterinarian or the livestock inspector * * * shall immediately be segregated * * * and shall be slaughtered within 30 days * * * under supervision of a federal, state, or state approved municipal meat inspector.

"VI. After removal of reactors the premises occupied and used by the reactors must be cleaned and disinfected by the owners thereof at their expense, to the satisfaction of a veterinarian or the county livestock inspector."

For the purpose of enforcing this ordinance the county livestock inspector or county veterinarians are constituted the agents or officers of that district.

Regarding the right of the Legislature to delegate to administrative boards or officers the authority to adopt reasonable rules or methods of supervising or regulating a business or enterprise within the general purpose for which the statute is enacted, the language used in the case of Fillmore Union High School District of Ventura County v. Cobb, 5 Cal.(2d) 26, 53 P.(2d) 349, 352, appears to answer the appellants' objections to the ordinance which is involved in this case. That opinion says in that regard:

"It is a well-established rule of law that authority may be delegated by the Legislature to administrative boards or officers to adopt reasonable rules and terms to carry out the general purpose for which a statute is enacted, even though the delegated power confers a discretion or the necessity of determining terms, qualifications, or facts upon the board or officer within the scope of the legislative act. 6 R.C.L. p. 179, § 179; 5 Cal.Jur. p. 683, § 97; 1 Cooley's Const.Lim. p. 228; School District No. 7, etc., v. Hunnicutt (D.C.Okl.) 51 F.(2d) 528; People v. Kuder, 93 Cal.App. 42, 269 P. 198, 630; In re Halck, 215 Cal. 500, 11 P.(2d) 389; Ex parte McManus, 151 Cal. 331, 335, 90 P. 702; In re Weisberg, 215 Cal. 624, 12 P.(2d) 446, 450. In 1 Cooley's Const.Lim. (8th Ed.) p. 231, it is said in that regard: 'Boards and commissions now play an important part in the administration of our laws. The great social and industrial evolution of the past century, and the many demands made upon our legislatures by the increasing complexity of human activities, have made essential the creation of these administrative bodies and the delegation to them of certain powers. Though legislative power cannot be delegated to boards and commissions, the legislature may delegate to them administrative functions in carrying out the purpose of a statute and various governmental powers for the more efficient administration of the laws.'

"In the case of In re Weisberg, supra, in upholding a statute authorizing the state fire marshal to license certain establishments for sponging and pressing garments, the Supreme Court said with respect to these delegated powers: 'We find no merit in petitioner's claim that the act confers arbitrary and uncontrolled power upon the state fire marshal to determine the persons entitled to pursue and the conditions upon which they may conduct the regulated businesses. This contention is sufficiently answered by Carter v. Stevens, supra, 211 Cal. 281, 289–293, 295 P. 28, and Gaylord v. City of Pasadena, 175 Cal. 433, 436, 166 P. 348, 349. As stated in the latter case, "it has become increasingly imperative that many quasi-legislative and quasi-judicial functions, which in smaller communities and under more primitive conditions were performed by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all and their doing, in a very real sense, makes for the safety of the republic and is thus sanctioned by the highest law. For, as the Supreme Court of the United States declares: 'Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.' Union Bridge Co. v. United States, 204 U.S. 364, 367, 27 S.Ct. 367, 51 L.Ed. 523."'"

There is nothing in the able opinion of Mr. Chief Justice Hughes in the case of Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446, commonly called the "hot oil" case, upon which the appellants rely, in conflict with the authorities from which we have previously quoted. Moreover, the appellants are assailing section 234.25 of the Agricultural Code in that regard, and not the provisions of the county ordinance.

[14, 15] [However, it will be noted that the ordinance of the board of supervisors of Stanislaus County (section III) provides that bovine animals within the district created by said ordinance shall be tuberculin tested by the county livestock inspector, or veterinarians, as often, in the opinion of said livestock inspector, *or veterinarians,* as may be deemed necessary to accomplish the purpose of the ordinance. It will be noted that by this ordinance the right to test bovine animals is given to veterinarians as well as to the livestock inspector, while by the terms of section 234.25 of the Agricultural Code it is provided that "the county livestock inspector shall * * * test all dairy cattle within such voluntary tuberculosis control area." It is apparent in reading these two provisions, one from the county ordinance and the other from the Agricultural Code, that the provision of the ordinance is broader than that upon the same subject found in the Code. The latter provision makes it the duty of the county livestock inspector to test all dairy cattle within the district, while the county ordinance empowers veterinarians, as well as the county livestock inspector, to make such test. This attempt to give this power and authority to a veterinarian who is not the county livestock inspector cannot be sustained. Whether we hold that the County of Stanislaus in the enactment of said ordinance was proceeding under the powers bestowed upon counties by section 11 of article 11 of the Constitution, or under section 234.25 of the Agricultural Code, this provision of the ordinance cannot be sustained. If said ordinance was enacted under section 11 of article 11 of the Constitution giving counties power to make and enforce local, police, sanitary, and other regulations as are not in conflict with general laws, then the provision of the ordinance in question is in conflict with the general law of the state as contained in the Agricultural Code. If the ordinance was passed under the authority given said county under the Agricultural Code, then it is in conflict with the express provisions of said statute which provides that all testing of any cattle shall be done by the county livestock inspector. In our opinion, this provision in the ordinance is a most material departure from the power conferred upon the county. Those empowered to make said test, as will appear from the reading of sections III to VI, both inclusive, hereinbefore set out, are given the further power to condemn and to order slaughtered all animals reacting positively to a tuberculin test. When we realize that under this ordinance no provision is made for compensation to owners of cattle ordered slaughtered, we can see at a glance that the giving of such power to veterinarians indiscriminately might result in most serious consequences to owners of cattle in the said district. Even in involuntary districts created under the Agricultural Code where provision is made to reimburse owners of slaughtered cattle, the testing is done by officials of the state and not left indiscriminately to veterinarians generally. Undoubtedly, the Legislature realized that the power of testing cattle and ordering their slaughter when found to be diseased, while necessary to be lodged in some board or officer, was a grave responsibility, and by the provisions of the Agricultural Code expressly limited its exercise to those officials whose qualifications peculiarly fitted them for the discharge of that duty. The provision of section III of said ordinance to the extent that it requires or permits "veterinarians" to make the tuberculin test of bovine animals within a voluntary tuberculosis control area, being in conflict with and contrary to the Agricultural Code, is invalid, and for that reason not within the power of said county to enact. County of San Luis Obispo v. Graves, 84 Cal. 71, 74, 23 P. 1032; Ex parte Keeney, 84 Cal. 304, 24 P. 34; In re Mingo, 190 Cal. 769, 214 P. 850; In re Murphy, 190 Cal. 286, 212 P. 30. However, this invalid provision of said ordinance does not render invalid the remaining portions of said ordinance. This invalid provision is readily separable from the remaining portions thereof. Besides, the ordinance provides that the invalidity of one portion thereof will not affect the remainder of the ordinance.]

The ordinance does not unlawfully discriminate between the owners of beef cattle and dairy cows in violation of article 1, § 11, of the Constitution of California, nor does it deprive any owner of property without due process of law, contrary to the inhibition of the Fourteenth Amendment of the Federal Constitution.

[16] The ordinance does exempt beef cattle from the necessity of inspection, testing, or slaughter in the manner which is applicable to dairy cows which are found to be infected with tuberculosis. We are of the opinion this is a reasonable and valid classification. It is apparent the act is primarily intended to regulate the control of milk cows for sanitary and police purposes so as to protect the dairy business for the well-known reason that milk, which is susceptible to infection from tubercular germs, is peculiarly dangerous for human consumption. Stanislaus County is a famous dairy county. There is good reason why that industry should be strictly regulated and protected in that district. It may be true that beef cattle may also be dangerously infected with tuberculosis. The general laws of inspecting, classifying, and marketing beef may adequately provide for safety against tubercularly infected meat, independently of the Stanislaus County ordinance. At least the reasonableness of the classification of dairy cows from beef cattle is a question resting very largely in the discretion of the legislative authority. It is said in the case of Martin v. Superior Court, 194 Cal. 93, 227 P. 762, 765: "The authority and the duty to ascertain the facts which will justify classified legislation must of necessity rest with the Legislature, in the first instance, to whom has been given the power to legislate, and not to the courts, and the decision of the Legislature in that behalf is ordinarily conclusive upon the courts. Every presumption is in favor of the validity of the legislative act, and the legislative classification will not therefore be disturbed unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason."

To the same effect are the cases of Dooley v. Johnson, 133 Cal.App. 459, 24 P.(2d) 540, and Jochimsen v. City of Los Angeles, 54 Cal.App. 715, 202 P. 902, 903. In the case last cited it is said: "The state may distinguish, select, and classify objects of legislation, and necessarily the power must have a wide range of discretion. 'Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary.'"

[17] It is contended the ordinance violates the provisions of the Fourteenth Amendment to the Federal Constitution by depriving the owners of cattle of their property without due process of law, and that it is unreasonable and oppressive, and therefore unconstitutional and void.

It is true that the ordinance does provide for the inspection and slaughter of cattle found to be infected with tuberculosis, without providing for compensation therefor. This condemning and slaughter of cattle without providing for compensation therefor, and at the discretion of the county livestock inspector [..........] raises a close and serious constitutional question. Most statutes and ordinances enacted for the summary destruction of diseased animals which are dangerous to health provide for reasonable methods of ascertaining and compensating the owners for their value. This is the safe and just method of disposing of diseased livestock. But it appears that under the police powers, in emergencies arising from the prevalence of diseased animals which are dangerous to the health of individuals, such as stock which is infected with the virulent "hoof-and-mouth disease" or other contagious or infectious diseases, statutes have been held to be valid which provide for the summary destruction of the animals, even though they do not provide for compensation for the value of the animals. These statutes are upheld on the theory that under the police power the agencies of the government are authorized to abate a public nuisance dangerous to the health of individuals. New Orleans v. Charouleau, 121 La. 890, 46 So. 911, 18 L.R.A.(N.S.) 368, 126 Am.St.Rep. 332, 15 Ann.Cas. 46; Newark & S. O. Horse Car Co. v. Hunt, 50 N.J.Law, 308, 12 A. 697; Torruella v. Fernandez, 14 Puerto Rico, 591; 3 C.J. p. 54, § 151; 1 R.C.L. p. 1158, § 102; 67 A.L.R. 208, note. We are of the opinion the ordinance which is involved in this case falls within that rule, for the reason that it is enacted under the police power specifically delegated to the county by the provision of the State Constitution, and is intended to eradicate tuberculosis from dairy cattle and to regulate the producing and distribution of pure milk free from infected germs which are dangerous to health. We are pointed to no case which has held such statutes or ordinances to be unconstitutional or void on account of a failure to provide for compensating the owners of such diseased cattle for their summary destruction. The ordinance provides for the segregation of such diseased cattle for a period of thirty days, during which time they shall be slaughtered. This seems to afford reasonable assurance that they are actually dangerously diseased before their destruction is authorized. The delegation of enforcing this provision of the ordinance to a county livestock inspector is not unreasonable, arbitrary, or oppressive. These officers are deemed to be the skilled agents of the county for the purpose of inspecting, segregating, and destroying diseased dairy cattle for the preservation of the health of the consumers of milk so commonly used by the public.

[18] The same reason prompts the sustaining of section VI of the ordinance which provides for the cleaning and disinfecting of the premises from which such diseased cattle have been removed, under the supervision and to the satisfaction of the same county livestock inspector.

[19] The mere fact that the ordinance provides that diseased cattle shall be slaughtered "under supervision of Federal, State or State approved municipal meat inspector" is harmless. The mere supervision of the actual destruction of diseased animals on the part of federal or state approved officers deprives the owners of such stock of no vested property rights. Moreover, if that clause be deemed to be invalid, it does not affect the balance of the ordinance, which specifically provides that the invalidity of any section, paragraph or phrase thereof "shall not affect the validity of the remaining portion of the ordinance."

Nearly every issue which is involved in this appeal was determined adversely to these appellants in the recent case of Coelho v. Truckell, 9 Cal.App.(2d) 47. 48 P.(2d) 697, in which a hearing was denied by the Supreme Court. In that case Kings County organized a tuberculosis control area under the provisions of section 234.25 of the Agricultural Code of California, including the entire county in that district, just as Stanislaus County did in the present case. Kings County then adopted an ordinance under the police power conferred upon it by the Constitution of California providing for the testing, branding, segregation, and slaughter of cattle within the district which were found to be infected with tuberculosis. The slaughter of such diseased cattle was authorized without compensation to the owners thereof. The enforcement of the ordinance was delegated to the livestock inspector of the county, or to qualified veterinarians employed by the Bureau of Animal Industry of the United States. [It is true that the Kings County ordinance provided that the testing of cattle shall be done by "a bureau veterinary inspector, a co-operating regularly employed state or county veterinary inspector or an accredited veterinarian." The only point raised as to the validity of this provision of the Kings County ordinance was that it attempted to "vest authority to execute its terms in the representatives of the Federal Bureau of Animal Industry, none of whom are residents or electors of Kings County, and therefore not qualified to become officials or deputies of officials of that county." In answering this argument, the court stated, 9 Cal.App.(2d) 47, on page 57, 48 P.(2d) 697, 702: "The Bureau of Animal Industry is willing to permit its employees to assist the state and county officials in eradicating bovine tuberculosis. The two mentioned in the agreed statement of facts, being the only federal employees with whom we are concerned, are regular veterinarians and qualified to administer tuberculin tests. We can see no good reason why they should not be permitted to assist the officials of Kings county in making such tests. It should be no more necessary for them to be officers or deputies of officers of the county in order to enable them to administer tuberculin tests than it should be necessary for a duly licensed physician to be a health officer or a deputy in order that he may be permitted to diagnose the case of a patient and determine that he is suffering from a contagious disease and should be quarantined."

No contention was made, or at least was not considered by the court, that the provision, authorizing the testing of cattle by others than the county livestock inspector, was invalid by reason of the conflict with section 234.25 of the Agricultural Code. The decision in that case, therefore, is not decisive of that question. Upon the issues that were determined in that case, the decision therein is in strict accord with the views herein expressed.

We do not intend to intimate by anything that we have said in this opinion that the county livestock inspector must personally perform all acts required in testing dairy cattle within the district. This, at least in some instances, would be a physical impossibility. He may act through deputies or call in veterinarians to assist him in the performance of his duties. But what we do mean to hold is that the portion of section III of the ordinance which apparently attempts to give veterinarians, independent of the county livestock inspector, the power to test animals and order slaughtered those found to be diseased, is an invalid provision of said ordinance.]

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; SEAWELL, J.

I dissent: EDMONDS, J.

EDMONDS, Justice (dissenting).

I dissent. The view taken by the majority of the court is, in my opinion, inconsistent with the decision of this court in La Franchi v. City of Santa Rosa, 65 P.(2d) 1301, rendered February 25, 1937. In that case an ordinance of the City of Santa Rosa was held to be in conflict with the provisions of the Agricultural Code. For the same reason the ordinance here involved should be held to be inconsistent with the provisions of the Agricultural Code dealing with the same subject matter.

It is perfectly clear that the state has power to adopt measures looking toward the eradication of bovine tuberculosis under the police power, and there can be no doubt of the power of the state to assume exclusive control of the entire subject matter. It is equally clear that under article 11, § 11, of the State Constitution this subject matter could be left to the control of the cities and counties. However, if the state has acted by general law, the regulations enforceable by the subordinate agencies are limited to enactments not inconsistent with the general law. It is elementary, and the State Constitution so provides, that all laws of a general nature shall have a uniform operation. The Federal Constitution prohibits any state from making or enforcing a law denying to any person the equal protection of the law. Applying these general principles to the instant case, it is my opinion that the ordinance is inconsistent with the general law.

The Agricultural Code, which includes in its provisions authority for the eradication of bovine tuberculosis, is a general law. Ex parte Beck, 162 Cal. 701, 124 P. 543; In re Cencinino, 31 Cal.App. 238, 160 P. 167; Ex parte Grey, 11 Cal.App. 125, 104 P. 476. By these provisions the State Department of Agriculture is authorized to establish and maintain tuberculosis control areas wherein the department shall examine and test all dairy cattle. The Code also provides that reactors shall be segregated and slaughtered and the owner compensated therefor. A further provision is that, if funds are insufficient for administration and indemnification, the department may withdraw one or more counties from the area, which withdrawn area shall become a provisional control area wherein cattle may be tested at the request of the owner, but with no authority for their slaughter.

The Agricultural Code thus expresses as a general legislative policy that no cattle shall be tested or destroyed under the article relating to bovine tuberculosis unless funds are available from appropriation for payment of indemnity to the owner. However, one of the provisions of this article authorizes the board of supervisors of a county which has not been established by the Department of Agriculture of the State as a tuberculosis control area, to by ordinance declare any portion of the county a voluntary tuberculosis control area. "The provisions in this code for payment of indemnity shall not apply to any voluntary tuberculosis control area established by authority of this section." Section 234.25, Agricultural Code.

The ordinance here attacked was enacted pursuant to the provisions of the Code. But, if the ordinance is valid, the right of an owner of destroyed cattle to indemnification depends upon the county in which they may have been located. If they were examined and slaughtered within a tuberculosis control area established by the state, the owner is entitled to receive the payments specified by the act. But, if the cattle were destroyed within a voluntary tuberculosis control area established by the county ordinance in conformity to the act, the owner receives nothing for his animals. Under such circumstances the right to indemnification may depend entirely upon the location of the infected cattle.

The state probably could have provided for the summary slaughter of infected cattle without indemnification (Randall v. Patch, 118 Me. 303, 108 A. 97, 8 A.L.R. 65; Miller v. State Entomologist, 146 Va. 175, 135 S.E. 813, 67 A.L.R. 197), but it has not seen fit to do so. A fundamental part of the plan adopted by the state is that cattle shall only be destroyed when funds for indemnification are available.

As already pointed out, the state law is a general law, and such laws must be uniform in their operation. There is no reasonable basis for classification under a state law by which dairymen in one county are entitled to indemnification while those in an adjoining county are denied the same right. It is apparent that, if the state by statute had directly provided for such a classification, it would be invalid. What the state cannot do directly it cannot do indirectly. It cannot create certain rights in some of its citizens and then delegate to counties the power to deny these rights to other citizens similarly situated.

There is still another reason why the decision of the majority, in my opinion, is unsound. The complaint of the plaintiffs contains many allegations indicating that the present ordinance is unreasonable. They were entitled to a trial on the issues thus presented. 2 McQuillin on Municipal Corporations, § 766, p. 732; In re Smith, 143 Cal. 368, 77 P. 180; Dobbins v. Los Angeles, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169.

In my opinion the judgment should be reversed, with directions to the trial court to allow the defendants to answer.

---

8 Cal.2d 442

PEOPLE v. WOODS.

Cr. 4091.

Supreme Court of California.

March 16, 1937.

Homicide ⟹253(1)

Evidence *held* to support conviction of first-degree murder, without recommendation, where defendant shot deceased three times on his refusal to loan defendant money.

In Bank.

Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

John Woods was convicted of first-degree murder, and he appeals.

Judgment affirmed.

W. W. Shea, Public Defender, and H. K. Forsman and R. A. Ferrario, Asst. Public Defenders, all of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Siebert L. Sefton, Deputy Atty. Gen., for the People.

WASTE, Chief Justice.

Defendant John Woods, forty-eight years old, by profession a waiter on the Southern Pacific trains, was charged by information with murder committed in Alameda county on July 26, 1936, and entered a plea of not guilty. The jury returned a verdict of first-degree murder as charged, without recommendation. Defendant moved for a new trial. The motion was denied, and judgment pronounced that he pay the death penalty. He thereupon filed a statement of grounds of appeal and request for transcript, wherein he alleged that the district attorney had been guilty of prejudicial misconduct, and that the court had erred in its rulings during the trial and in directing the jury; also in refusing to reduce the degree of the crime.

An examination of the record shows abundant evidence in support of the verdict, and no error prejudicial to defendant appears. Nor does there appear to be any possible basis for reversal of the judgment or reduction of the degree of the crime.

Early in the evening of July 26, 1936, defendant, the deceased, Henry Shepherd, and others were participants in a card game of blackjack in a house located at 1523 Eighth street, Oakland. The game had been in progress some seventeen hours, and defendant was the loser by about $200. He asked Shepherd to step into the adjoining hall. The two men went into the hall, and defendant asked Shepherd for a loan of $10 "or so" to enable him to continue in the game. Shepherd told defendant he just could not let him have the money. Defendant thereupon drew a pistol and shot Shepherd twice. As Shepherd staggered into the kitchen, defendant followed, and there shot him a third time. The wounds, in right hand, left leg, and abdomen, were fatal. One witness testified that as Shepherd lay prone on the kitchen floor, defendant indicated that he was about to stamp on his face and, upon being dissuaded, used profane language and attempted to shoot the witness. After a further exhibition of uncalled-for profanity, defendant left for his own home where, shortly afterwards, the police found him and received from him the pistol with which he had done the shooting.

Upon trial, defendant made a weak attempt to establish self-defense by testifying that he accused Shepherd of using a marked deck of cards and cheating, whereupon, after an altercation, he testified, Shepherd slapped defendant's face. Defendant shoved him against the wall, and he came back drawing a knife, whereupon defendant pulled his gun and shot twice in the hall, but fired no further shot. The jury could scarcely be expected to believe this testimony, which appeared highly incredible when viewed in the light of the account of the happening given by the several witnesses who were present in the card room and in the house at the time. Such statements were also at variance with defendant's prior admissions with respect to the commission of the crime. We find no basis for a reversal of the judgment or reduction of the degree of the crime committed.

The judgment and the order denying a new trial are, and each is, affirmed.

We concur: SEAWELL, J.; SHENK, J.; THOMPSON, J.; CURTIS, J.; LANGDON, J.; EDMONDS, J.

---

8 Cal.2d 457

KEMP v. LYNCH et al.

L. A. 15454.

Supreme Court of California.

March 24, 1937.

Rehearing Denied April 22, 1937.

1. Fraudulent conveyances ⚷241(2)

Where execution is not stayed pending appeal from judgment, judgment creditor, being in position to levy execution, can bring action to set aside fraudulent conveyance.

2. Fraudulent conveyances ⚷261

Complaint which alleged that conveyances sought to be set aside were executed with intent to hinder, delay, and defraud plaintiff need not allege that grantor was insolvent when conveyances were made, or that conveyances were made in contemplation of insolvency (Civ.Code, § 3439).

3. Fraudulent conveyances ⚷246

Assignments of deeds of trust and notes which deeds secured could be set aside as fraudulent, notwithstanding that assignee was partnership having its headquarters in Nevada, and that deeds and notes may have been located in Nevada, where deeds covered property in California, and members of partnership and assignor appeared generally.

4. Fraudulent conveyances ⚷242(1)

Where judgment creditor obtained judgment setting aside as fraudulent assignments of deeds of trust and notes which deeds secured, whether one such deed and note had been satisfied and discharged could be shown when judgment creditor sought to apply property found to have been fraudulently transferred to satisfaction of her judgment.

5. Fraudulent conveyances ⚷113(1)

Transfer which appears to be a lawful preference is vitiated by fraudulent intent that transfer shall be a mere simulated transfer, and that grantor shall retain full beneficial interest, and that creditor shall not be paid or have further security (Civ. Code, § 3432).

6. Fraudulent conveyances ⚷299(2)

Evidence that defendant transferred his realty by deeds of trust pending action wherein plaintiff sought damages against defendant, with fraudulent intent to hinder, delay, and defraud plaintiff, and with intent that defendant should retain full beneficial interest in such realty, warranted judgment setting aside such deeds as fraudulent.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Helen Kemp against H. L. Lynch and others. From the judgment, the defendants appeal.

Affirmed.

H. L. Lynch, in pro. per.

Charles E. Lynch, in pro. per.

O. K. Clarke, in pro. per.

John S. Holmstrand, in pro. per.

Ida S. Holmstrand, in pro. per.

Davis & Thorne, of Los Angeles, for respondent.

SEAWELL, Justice.

[1] Defendants appeal from a judgment for plaintiff in this action to set aside alleged fraudulent conveyances. Plaintiff, Helen Kemp, is a judgment creditor of defendant H. L. Lynch, having secured judgment against him for $500 compensatory damages and $250 exemplary damages for slander of title of real property owned by her, with $111.45 allowed for costs. Execution issued upon said judgment was returned unsatisfied. When the instant action was begun, an appeal by Lynch was pending from the judgment in favor of Helen Kemp in the slander of title suit. The judgment was subsequently affirmed. Lynch v. Kemp, 4 Cal.(2d) 440, 49 P.(2d) 817. However, execution had not been stayed, and it is the law that in such cases a judgment creditor who is in a position to levy execution may bring an action to set aside fraudulent conveyances. Sewell v. Price, 164 Cal. 265, 128 P. 407; Rossen v. Villanueva, 175 Cal. 632, 166 P. 1004; Thomas v. Lavery, 125 Cal.App. 666, 14 P.(2d) 158; 12 Cal.Jur. 1034.

The claim of Helen Kemp for slander of title was asserted by way of cross-complaint in an action commenced by H. L. Lynch to quiet title. After Helen Kemp, plaintiff herein, had filed said cross-complaint praying that title to the property described in Lynch's complaint be quieted in her and for damages for slander of her title, but before trial, H. L. Lynch made the several transfers of property owned by him which are herein attacked as fraudulent. The first conveyance attacked by plaintiff herein was made on March 14, 1933, the second, on May 3, 1933. Both were recorded on May 3, 1933, and involved several lots in Los Angeles county. The grantee named therein was "O. K. Clarke, trustee." The beneficiary of said trust is not named in said deeds. Lynch also executed an assignment of his interest in three deeds of trust to "O. K. Clarke, trustee," on May 2, 1933, and this assignment was recorded on May 4, 1933.

In August, 1934, the property described in the two deeds was transferred by Clarke to Motor Fuel Association. Said association is a copartnership composed of O. K. Clarke and Charles E. Lynch, brother of H. L. Lynch. An assignment of the three deeds of trust was executed by Clarke to Motor Fuel Association on November 21, 1934. All transfers were recorded. In addition to H. L. Lynch, Clarke, Charles E. Lynch and Motor Fuel Association are named as defendants herein. Said defendants all appeared in the instant action in propria persona.

It is the contention of defendants that H. L. Lynch was indebted to his brother, Charles E. Lynch, upon a secured indebtedness, and that he made the transfer to Clarke as trustee to further secure his brother. O. K. Clarke, trustee, by a power of attorney dated May 15, 1933, authorized H. L. Lynch, the grantor, to do all acts which Clarke as trustee could do. And at about the time of the transfers by Clarke to the Motor Fuel Association, composed of Clarke and Charles E. Lynch, said Charles E. Lynch on behalf of the Motor Fuel Association executed a general power of attorney in favor of H. L. Lynch. H. L. Lynch at all times continued in the management and control of the property transferred by him, but he contends that he was acting as agent for trustee Clarke, and later as agent for the partnership under the above powers of attorney.

Clarke took part in these transactions at the request of H. L. Lynch. He testified that he had contributed not more than $30 to the partnership.

[2] The complaint alleged that the transfers were executed with intent to hinder, delay and defraud plaintiff herein. It was not necessary that the complaint also allege that H. L. Lynch was insolvent when the transfers were made, or that they were made in contemplation of insolvency. Fross v. Wotton, 3 Cal.(2d) 384, 44 P.(2d) 350; Vogel v. Sheridan, 4 Cal.App.(2d) 298, 40 P.(2d) 946; First National Bank v. Maxwell, 123 Cal. 360, 55 P. 980, 69 Am.St.Rep. 64; Bull v. Bray, 89 Cal. 286, 26 P. 873, 13 L.R.A. 576; 12 Cal.Jur. 976; section 3439, Civ.Code. The court found that an actual fraudulent intent existed, and also that the transfers were made in contemplation of insolvency.

[3] There is no merit in defendants' contention that the court was without right to adjudge void the assignments of the three deeds of trust and the notes which they secured, for the reason that the Motor Fuel Association, to which they were assigned, had its partnership headquarters in Nevada, and the notes and deeds of trust may have been there. Each of said deeds of trust covered property in Los Angeles county. The partnership was composed of O. K. Clarke and Charles E. Lynch, and they, as well as H. L. Lynch, appeared generally in this action. The assignments were executed upon the same terms and conditions as the deeds to real property in Los Angeles county which are involved in this action, and as part of the same general transaction.

[4] During the course of his testimony H. L. Lynch stated that one of the notes and deeds of trust had been satisfied and discharged. This matter was not gone into fully. If in fact said note and deed of trust are discharged, that may be shown when plaintiff, pursuant to the judgment herein, seeks to apply the property found to have been fraudulently transferred to the satisfaction of her judgment.

[5] In the instant case the court rejected the contention of defendants that the transfers were made with the bona fide intent of giving Charles E. Lynch additional security upon an indebtedness owing to him from H. L. Lynch. "A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another." Section 3432, Civ.Code; Hibernia Sav. & L. Soc. v. Belcher, 4 Cal. (2d) 268, 48 P.(2d) 681; Joint Pole Ass'n v. Steele, 213 Cal. 233, 2 P.(2d) 335; Ferguson v. Larson, 139 Cal.App. 133, 33 P. (2d) 1061. However, if a transfer while appearing to be a lawful preference is made with actual fraudulent intent that it shall not pay the creditor or give him further security, but with the understanding that it shall be a mere simulated transfer, the grantor retaining the full beneficial interest, such fraudulent intent will vitiate the transfer. McGee v. Allen (Cal.Sup.) 60 P.(2d) 1026; Hanscome-James-Winship v. Ainger, 71 Cal.App. 735, 742, 236 P. 325; Roberts v. Burr, 135 Cal. 156, 67 P. 46; 12 Cal.Jur. 1012, 991.

It appears herein that Charles E. Lynch had made oil leases of lands owned by him to H. L. Lynch upon a royalty basis. Thereafter Charles E. Lynch, lessor, in 1927, transferred to H. L. Lynch one-half of his lessor's royalties to be paid by H. L. Lynch from part of the lands. In consideration thereof H. L. Lynch agreed to make certain monthly money payments to Charles E. Lynch. To secure these money payments H. L. Lynch mortgaged to Charles E. Lynch the oil leasehold interests which he held under lease from Charles E. Lynch.

It is the claim of defendants that the transfers attacked by plaintiff were to further secure these money payments. They were not made in satisfaction of the money payments due under the above contract, since there appears in the record, dated April 14, 1933, an instrument signed by Charles E. Lynch extending the time within which the full amount of these payments should be made and providing for smaller monthly payments in the meantime. There was also testimony from defendants that at the time of the trial herein Charles

E. Lynch was still receiving said payments from the profits of the property transferred by H. L. Lynch.

When H. L. Lynch made the transfers herein attacked in the spring of 1933, which was after Helen Kemp had sued him for slander of title, he transferred to Clarke, as trustee, other property owned by him. He admitted that he transferred all real property in California owned by him. It was not shown that he retained real property or other property of value outside of this state. He claimed that after making the transfer he had in this state cash and stock in the amount of $900 and $1,200, but admitted that at the time of entry of judgment in July, 1934, in the slander of title suit he could not then have satisfied said judgment, and that by August, 1934, he was "down and out." Included in the property transferred was the oil leaseholds already mortgaged to Charles E. Lynch. If Lynch's object was to give additional security to Charles E. Lynch, no reason appears why he should have included in his transfers to Clarke, as trustee, the oil leaseholds upon which Charles E. Lynch already had a mortgage.

The deeds and assignments to O. K. Clarke, trustee, contain no reference to a security transaction. A declaration of trust, executed by the Lynches and Clarke on April 14, 1933, recites the indebtedness of H. L. Lynch to Charles E. Lynch, but is not the usual security deed of trust. It gives C. E. Lynch broad powers inconsistent with his having only a lien for security purposes, including the right, apparently at any time, to require a conveyance to himself, or to the Motor Fuel Association, without regard to whether payments due on the Lynch contract were in default. Transfers to the Motor Fuel Association, a copartnership composed of Charles E. Lynch and O. K. Clarke, were in fact made by Clarke at the request of Charles E. Lynch. By the trust instrument itself it was provided that all powers of the trustee should be delegated to an attorney of fact by power of attorney, and by a separate instrument H. L. Lynch was appointed attorney in fact. He continued in the management of the properties after, as before, his transfers.

[6] Upon the evidence adduced the court was warranted in concluding that the transfers were not bona fide, but made with the actual fraudulent intent on the part of the appealing defendants to hinder, delay, and defraud plaintiff, and with the intent that H. L. Lynch should retain the full beneficial interest. "From the very nature of the action, direct proof of the fraudulent intent of the parties is an impossibility. For this reason and because the real intent of the parties and the facts of the transactions are peculiarly within the knowledge of those sought to be charged with the fraud, proof indicative of fraud must come by inference from the circumstances surrounding the transaction, the relationship and interests of the parties." Fross v. Wotton, 3 Cal.(2d) 384, 393, 44 P.(2d) 350, 354. As in the cited case, so in the instant case, the inference of fraud is reasonable.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.; THOMPSON, J.

19 Cal.App.2d 472

PEOPLE v. PEREZ.

Cr. 1543.

District Court of Appeal, Third District, California.

March 9, 1937.

Rehearing Denied March 24, 1937.

Hearing Denied by Supreme Court April 8, 1937.

1. **Homicide** ⚷254

Evidence *held* sufficient to sustain conviction of second degree murder.

2. **Criminal law** ⚷304(2)

It is common knowledge that it is not very dark at 8:30 o'clock on July evening.

3. **Criminal law** ⚷1159(4)

Credibility of eyewitness of homicide and his testimony as to watching defendant's movements were facts for jury, whose determination thereof adversely to defendant appellate court cannot disturb.

4. **Homicide** ⚷254

Fact that no revolver was found or produced in evidence at murder trial resulting in conviction of second degree murder *held* immaterial, where witnesses testified to hearing shots and seeing flash of exploded cartridges.

5. Homicide 🔑233

Establishment of motive for killing is not essential to support conviction of second degree murder otherwise established by sufficient evidence (Pen.Code, § 188).

6. Homicide 🔑233

Failure to prove motive for killing *held* not to warrant reversal of conviction for second degree murder, where no witness was sufficiently near to hear all that passed between defendant and deceased before shooting, defendant did not testify and verdict was based on direct testimony of eyewitness who heard shooting and watched defendant's movements until he met deceased (Pen. Code, § 188).

7. Homicide 🔑293

Instruction that burden of proving circumstances mitigating, justifying, or excusing homicide, proved to have been committed by defendant, devolves on him, unless prosecution's proof tends to show that crime committed amounted only to manslaughter or was justifiable or excusable, *held* not erroneous or prejudicial to defendant (Pen. Code, § 1105).

8. Criminal law 🔑818

Trial court has right to correct instructions.

9. Criminal law 🔑798½

Trial court's failure to read to jury form of verdict to be used if they found defendant not guilty *held* not error prejudicial to defendant, in view of immediately preceding instruction that jury might find him guilty of first or second degree murder or manslaughter or not guilty and jury's possession of form of verdict of not guilty.

10. Criminal law 🔑778(10)

Instruction that it is conclusively presumed that evidence of prosecuting witness' wife, not called as witness by prosecution, would be adverse to latter and contrary to husband's testimony, *held* properly refused as invading jury's province and taking from jury question whether failure to call her was willful omission.

11. Criminal law 🔑717

District attorney's argument in language of statute that burden of proving circumstances mitigating, justifying, or excusing homicide, proved to have been committed by defendant, devolves on him, unless prosecution's proof tends to show only manslaughter or justifiable or excusable homicide, *held* not prejudicial error (Pen.Code, § 1105).

12. Criminal law 🔑1174(2)

Juror's misconduct in talking for few moments with person who approached jury box during trial *held* not prejudicial error requiring reversal of conviction for second degree murder, in absence of showing that trial was proceeding at time or any testimony being given, what conversation was about, or that any injustice was done accused.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Aurelio Perez was convicted of murder in the second degree, and he appeals.

Affirmed.

Stephen P. Galvin, of Merced, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER, delivered the opinion of the court.

The defendant was found guilty of murder in the second degree upon an information charging that on or about the 25th day of July, 1936, in the county of Merced, state of California, he did willfully, unlawfully, and feloniously kill one Andreas Calderon, with malice aforethought. From the judgment based upon the verdict and the denial of his motion for new trial, the defendant appeals. In his appeal the appellant assigns the following reasons as grounds for reversal: (1) That the verdict is contrary to the evidence; (2) erroneous instructions; (3) erroneous instruction on forms of verdict; (4) refusal to give instructions; (5) prejudicial misconduct of the district attorney; (6) misconduct of the jury.

[1] The appellant's brief contains only an abbreviated summary of the testimony. The respondent's brief, however, sets forth the testimony of an eyewitness which, if believed by the jury, we think amply sufficient to sustain the verdict. The testimony is to the effect that the offense was committed on or about the hour of 8:30 on the evening of July 25th. Several witnesses heard the report of the shooting, indicating that four shots were fired, all taking effect in the body of the deceased. The same witnesses saw the flash of the revolver.

The main testimony, and upon which the respondent relies, and which we think amply sufficient to sustain the verdict, was by an eyewitness named Tranquilino Lopez. His testimony is summarized by the respondent, which we have verified by an examination of the record, and therefore set it forth as sufficient to sustain the verdict. We may premise by saying that the shooting occurred at a point near the railroad tracks a short distance from the business section of the city of Merced.

Mr. Lopez testified that he and his wife, on the evening of July 25, 1936, were returning to their home at 1004 Fourteenth street from the business district of Merced; that at the intersection of O street with the railroad tracks they met one Roberta Gonzales; that while standing there talking he heard several shots, and, looking, observed two persons, and recognized the voice of the decedent, and saw and heard a second person striking him. At that time Lopez and his wife and Gonzales were standing on the south side of the railroad tracks at a signal pole. The deceased and the other man were in a westerly direction from them, standing on a pathway running along the south side of the railroad tracks. The body of the deceased was found to be lying approximately 200 feet from the point where the witness and his wife and Gonzales were standing. Upon hearing the shots Lopez and his wife started for home, proceeding along a diagonal path; thence, along Fifteenth to Q street, and thence down Q street to their home at Fourteenth and Q. Lopez, while walking, continued to watch the two men, and, after seeing the deceased fall, saw the other man leave the scene at a rapid rate of speed, and go west along the path along the south side of the railroad tracks to its intersection with Q street, thence out Q street to a point near Fourteenth and Q streets, where he (the defendant) overtook the witness and his wife. Lopez testified that he identified this man as the defendant. The half blocks between Fifteenth street and the railroad tracks and O and Q streets are vacant, and it is possible to see across the Southern Pacific reservation all the way down Q street. The witness Lopez testified that he watched the man leaving the scene of the shooting, kept him in view all the time until they arrived at the meeting place just designated.

[2] At the time of the shooting the witness and the defendant were only about 200 feet distant, and could be readily seen by each other. The testimony shows that it was not yet very dark. (Outside of this testimony it is common knowledge that it is not very dark at 8:30 o'clock of a July evening.)

Having watched the defendant from the time he left the place of the shooting until he encountered him at the intersection of the street named, it certainly shows that the contention of the appellant that there is no testimony to support the verdict is not well taken, and that any other verdict by the jury than guilty, where nothing further appears, would not have been justified.

The testimony further shows that the witness had an unobstructed view of the defendant during the entire distance that was traveled by the respective parties, from the time of the shooting until they met. There is also testimony that there were street lights at the intersection of Fifteenth and O and Fifteenth and P streets, and at the intersection of the railroad tracks and O street. It further appears from the testimony that at no time were the witness Lopez and the defendant more than 200 or 300 feet apart.

[3] The credibility of this witness and his testimony as to having watched the movements of the defendant were facts to be determined by the jury, and, having determined the same adversely to the contentions of the appellant, this court has no authority to disturb such determination.

[4] The appellant makes the point that no revolver was found or produced in evidence. This point is wholly immaterial. The witnesses testified to hearing the shots and seeing the flash of the exploded cartridges. The finding and producing of the gun that was used in the firing of the bullets would only have been corroborative testimony.

[5, 6] Appellant also contends that no motive for the killing was proved. The establishment of a motive, outside of the actual killing, is not essential to support a conviction where the crime is otherwise established by sufficient evidence. No witness was sufficiently near to hear all that passed between the defendant and the deceased prior to the shooting. The defendant did not take the stand in his own behalf, and consequently there is no explanation of the occurrences which preceded the killing. The contention of the appellant in the particular just mentioned is fully answered by section 188 of the Penal Code. The verdict in this case is not based upon circumstantial evidence, but upon the direct testimony of an eyewitness who

heard the shooting and watched the movements of the defendant until he came in contact with him, as hereinbefore stated.

[7] Passing from the contention that the testimony is insufficient to support the verdict, the appellant alleges prejudicial errors in the giving of an instruction on the burden of proof and justification. At the request of the prosecution the court gave as one of its instructions section 1105 of the Penal Code, to wit: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him [the defendant], unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

The objection to this instruction is based upon the grounds that the defendant offered no evidence, and that the instruction was therefore inapplicable. In making this contention the appellant relies principally upon the case of People v. Tapia, 131 Cal. 647, 63 P. 1001, in which the court holds that, where there is no plea of self-defense or excuse or justification, such an instruction is erroneous. It appears in that case that the holding was had upon the theory that the jury would infer from the instruction that the commission of a homicide by the defendant had been proved.

The court also instructed the jury that, unless they found the defendant guilty beyond a reasonable doubt, a verdict of acquittal should be returned, and that the burden of proving the defendant guilty beyond a reasonable doubt rested upon the prosecution.

If it be admitted that the instruction was inapplicable, and therefore erroneous, it does not follow that the judgment should be disturbed. The case of People v. Tapia, supra, was decided prior to the adoption of section 4½ of article 6 of the Constitution. However, under the following authorities it would appear that the instruction was neither erroneous nor prejudicial.

In People v. Madison, 3 Cal.(2d) 668, 46 P.(2d) 159, 163, the following instruction embodying the question of proof and mitigation, etc., was held not to warrant a reversal, on the ground that it constituted prejudicial error. We quote therefrom as follows: "Pursuant to section 1105 of the Penal Code, the court gave the following instruction: 'The court instructs the jury that up to the moment when the killing is proved, the prosecution must make out its case beyond a reasonable doubt. When the killing is proved, it devolves upon the defendant to show any circumstances in mitigation to excuse or justify the homicide by evidence on his part; that is, the killing being proved, the defendant must make out his case in mitigation, or to excuse or justify it by some proof strong enough to create in the minds of the jury a reasonable doubt of his guilt of the offense charged, unless, as before stated, the proof on the part of the prosecution tends to show the crime committed only amounts to manslaughter, or that the defendant was justified or excused in doing the act.' "

The case of People v. Post, 208 Cal. 433, 281 P. 618, cited by the appellant in this case, is distinguished and shown to be erroneous in that it placed upon the defendant in that case the showing of circumstances of mitigation or excuse by a preponderance of the evidence, instead of simply creating a reasonable doubt as to the same.

The case of People v. Rodriguez, 182 Cal. 197, 187 P. 423, is also likewise a complete answer to the appellant's contention.

In People v. Caballero, 41 Cal.App. 146, 182 P. 321, where the contention of the appellant was that he was not present at the time of the killing, the court gave an identical instruction with the one here challenged, and afterwards ordered the return of the jury, and recalled the instruction. The court held that no prejudice could have followed from the giving of the instruction, although the trial court had the right to recall the same.

From these latter cases it is clear that the case of People v. Tapia, supra, and the case of People v. Miller, 177 Cal. 404, 170 P. 817, are no longer authority for holding that the giving of the instruction according to section 1105, supra, constitutes prejudicial error.

It further appears from the record, when the jury returned for further instructions, the court instructed the jury as follows: "I want to be certain that you understand what is meant by the instruction that was read to you before, and that is, that not only does the actual killing have to be proven, but the killing has to be proven to have been done by the defendant before the burden shifts upon him." There is no showing in the record as to whether this instruction was written or oral, but the record shows that the reporter reduced it to writing, which complies with the holding of the court in the case of People v. Mack, 115 Cal.App. 588, 2 P.(2d) 209.

[8] The court has a right to correct an instruction if upon reflection the court considers that such correction should be made. 15 C.J. p. 1055.

[9] It is further argued that the court committed prejudicial error in submitting forms of verdict to the jury. It appears from the record that the court did not read all of the forms of verdict submitted to the jury, but only read the following: That they might return one of the following verdicts, to wit: Murder in the first degree; murder in the first degree, fixing punishment at imprisonment in the state prison for life; murder in the second degree; and manslaughter; failing to read to the jury in the same instruction that they might return a verdict of not guilty. Immediately preceding this instruction or the submission of the forms of verdict to the jury, the court gave the following instruction: "Under the indictment in this case the jury may, if the evidence warrants it, find the defendant guilty of murder in the first degree, or murder in the second degree, or manslaughter, or not guilty. Should the jury entertain a reasonable doubt as to which of the grades of crime named the defendant may be guilty of, if any, they should give the defendant the benefit of such doubt, and acquit him of the higher offense." The record shows, however, that the jury had with them in the jury room a form of verdict to be used in the event the jury found the defendant not guilty. Without copying herein what is said in the case of People v. Onessimo, 65 Cal.App. 341, 224 P. 101, it is sufficient to say that the opinion in that case completely answers and refutes the contention of the appellant that prejudicial error was committed by the failure of the court to read the form of verdict to be used by the jury, provided they found the defendant not guilty. In that case the court had before it several forms of verdict to be returned by the jury, and failed to read one of them. The omission on the part of the trial court was held not to constitute prejudicial error.

[10] A reading of the rejected instructions asked by the defendant, based upon the failure of the prosecution to call the wife of the witness Lopez, shows that the court committed no error. The concluding portion of the refused instruction is as follows: "I therefore instruct you that it is a conclusive presumption, that is, it must be taken as an admitted fact, that if the wife of Lopez was produced as a witness by the prosecution, her evidence would be adverse to the prosecution and her evidence would not corroborate the testimony of her husband Lopez, and her testimony would be contrary to that of her husband." This is a direct invasion of the province of the jury. However, it may be said there is nothing in the record to indicate that the prosecution willfully failed to call the wife of the witness Lopez. The name indicates the nationality, and it is reasonable to assume that her knowledge of the English language was probably considerably limited. The instruction, of course, takes from the jury the question of whether the failure to call the wife of the witness Lopez was a willful omission.

[11] It is further contended that the conduct of the district attorney constituted prejudicial error. This is based upon the contention that the district attorney in his argument followed the language of section 1105, supra. This contention, of course, is answered by the cases which we have cited, and, furthermore, a reading of the arguments of the district attorney shows no foundation upon which to base a holding of prejudicial error.

[12] It is further contended that the misconduct of one of the jurors demands a reversal of this cause. It appears that one of the jurors, during the course of the trial talked for a few moments with a third party who approached the jury box. It does not appear that the trial was proceeding at that time, or that any testimony was being given. It does not appear what the conversation between the juror and the stranger was, nor does it appear that any injustice was done the accused. Answering the contention of the appellant, the People rely upon the cases of People v. Golsh, 63 Cal.App. 609, 219 P. 456; People v. Henry, 132 Cal.App. 557, 23 P.(2d) 77; People v. Dunne, 80 Cal. 34, 21 P. 1130; People v. Phelan, 123 Cal. 551, 56 P. 424.

There being no showing of anything taking place detrimental to the interests of the defendant, prejudicial error cannot be based upon the alleged misconduct of the juror, although the juror might have rendered himself liable to a reprimand from the trial court.

Finding no reversible error, the order and judgment of the trial court are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

19 Cal.App.2d 62

SAN JOSE ICE & COLD STORAGE CO. v. CITY OF SAN JOSE et al.

Civ. 10303.

District Court of Appeal, First District, Division 2, California.

March 5, 1937.

Hearing Denied by Supreme Court April 1, 1937.

Venue 🔑42

In action against city and others for damages to realty located in city due to change in location of railroad right of way brought in a neutral county, change of venue to county wherein city and realty were located *held* mandatory under statutes, where proper demand therefor was made (Code Civ.Proc. § 392 et seq., as amended; § 396b, as added by St.1933, p. 1842).

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 64 P.(2d) 1099.

Louis Oneal and A. G. Shoup, both of San Jose, and E. J. Foulds, of San Francisco, for appellants.

Norman A. Eisner, of San Francisco, for respondent.

PER CURIAM.

In his petition for a rehearing herein counsel for respondent complains of our treatment of section 392 et seq. of the Code of Civil Procedure (as amended by St. 1933, p. 1837 et seq., St. 1935, p. 1947 et seq.) in regard to the question of jurisdiction—a question which we have deemed as not determinative of this proceeding. We referred to the question because it had been argued in the briefs, but, when we said that these sections had been held jurisdictional "in some cases," we assumed that the implication would follow that there was a division of authority.

Criticism is also made of the expression "when it appears that the action has been commenced in the wrong court a transfer to the 'proper court' is mandatory. Section 396b." A reading of this section enacted in 1933 (St. 1933, p. 1842) will readily disclose the meaning of the statement. It provides that, if an action is commenced in a court having jurisdiction of the subject matter thereof "other than the court *designated as the proper court* for the trial thereof, under the provisions of this title," i. e., section 392 et seq., it may be tried in that county unless the defendant demands a transfer to the proper court. Then follows the language which is entirely new to these sections and upon which we held a transfer to be mandatory. This portion of the section reads: "Upon the hearing of such motion *the court shall, if it appears* that the action or proceeding *was not commenced in the proper court*, order the same transferred to the proper court; provided, however, that the court, in an action for divorce or separate maintenance, may, prior to the determination of such motion, consider and determine a motion for counsel fees and costs, and make all necessary and proper orders in connection therewith; provided, further, that in any case, if an answer be filed, the court may consider opposition to the motion, if any, and may retain the action in the county where commenced if it appears that the convenience of witnesses or the ends of justice will thereby be promoted." (Italics ours.)

There is no uncertainty in this language and no ground for the statement that we held a demand for transfer unnecessary. The section expressly requires a demand, and it also designates but two exceptions to the mandatory requirement for a transfer when such demand is properly made.

Respondent did not bring its case within either of these exceptions and, since it is conceded that proper demand for a transfer was made, we correctly held that a transfer under the facts of this case was mandatory.

The petition for a rehearing is denied.

19 Cal.App.2d 537

PEOPLE v. RILARCOSA.

Cr. No. 199.

District Court of Appeal, Fourth District, California.

March 12, 1937.

1. Homicide ⚷109

What defendant was justified in doing in self-defense depended on his conduct and on conduct of deceased.

2. Criminal law ⚷1159(3)

Where testimony on question of sufficiency of evidence in manslaughter prosecution to show justifiable killing in self defense was in conflict, appellate court could not disturb implied findings of jury on that question.

◆

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Francisco Rilarcosa was convicted of manslaughter, and he appeals.

Judgment affirmed.

Morris B. Chain, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

MARKS, Justice.

This is an appeal from a judgment pronounced after a jury had found defendant guilty of manslaughter and also from an order denying his motion for new trial. Defendant urges that the evidence is conclusive that he acted in self-defense when he shot deceased and complains of one instruction given by the trial judge.

Defendant and deceased attended a dance held in Delano on the evening of September 19, 1936. Defendant left the dance hall first, but waited on the sidewalk nearby. Deceased and several of his friends left the dance hall about thirty minutes later. A few moments before deceased was shot defendant said to him, "Don't come close to me," and, "Get away from me." Defendant took a step backward and shot deceased. There is evidence that deceased was not armed and there is also evidence that he did not stab or threaten defendant. Several persons were standing close to the two men and one of them disarmed defendant. None of the witnesses saw any of these bystanders armed with a knife nor did any of them see any one stab defendant. Defendant and his witnesses testified that deceased was armed with a knife and that he stabbed defendant before the fatal shot was fired. Defendant does not urge that deceased and his friends were acting in concert.

After the shooting, and after defendant was disarmed, he ran across the street and into a çafe. He had blood on his trousers when he entered this building. A brawl took place there between defendant and others. When defendant was arrested in the cafe there were wounds on his back, his thigh, and on his leg. There is uncontradicted evidence that these wounds were inflicted by some sharp instrument like a knife and that they were not inflicted after defendant left the scene of the killing.

[1] What the defendant might have done in self-defense depends, first, upon his own conduct, and, second, upon the conduct of deceased, in the absence of evidence showing that deceased and his companions were acting together. People v. Hecker, 109 Cal. 451, 42 P. 307, 30 L.R.A. 403. There is evidence to the effect that deceased was not armed and that he neither made an attack on defendant nor threatened him in any manner. If the jury believed this evidence and also concluded that defendant was stabbed at the scene of the killing, then that body must have concluded that the knife wounds were inflicted by some undisclosed person other than deceased and that the person wielding the knife was not acting with or for deceased. Of course, this theory, while supported by evidence, is contradicted by defendant and his witnesses.

This constitutes a state of the record somewhat similar to that before the court in the case of People v. Miller, 114 Cal. App. 293, 299 P. 742, 744, where it is said: "The killing being admitted, and the conduct of the defendant prior to the killing being apparently free from fault—it is a question for the jury to decide, from all the circumstances attending the homicide, whether the conduct of the deceased preceding and at the time of the killing was sufficient to justify the defendant in an honest belief, as a reasonable man, that he was in danger of his life or of immediate bodily harm from the hands of the deceased; and if the evidence be substantially conflicting on that question, and the reasonable inference may be drawn therefrom that the killing was not justified, but was the result of passion suddenly inflamed from vile epithets hurled by the deceased at defendant, or that the force used was clearly greater than was necessary and wholly disproportionate to any injury offered or given, and that defendant acted in a spirit of revenge, the verdict is sufficiently supported. People v. Brown, 15 Cal.App. 393, 114 P. 1004; People v. Hecker, supra."

[2] In the instant case the testimony on the question of the sufficiency of the evidence to show a justifiable killing in self-defense being in conflict, we cannot disturb the implied findings of the jury upon that question.

Defendant complains of one instruction given by the trial court on self-defense and relies upon People v. Logan, 175 Cal. 45, 164 P. 1121, to support his argument that the instruction was prejudicially erroneous. The instruction criticized in the Logan Case is not similar to the instruction in question here.

We have examined all of the instructions given and find none of them prejudicially erroneous.

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

---

19 Cal.App.2d 543

DURANTE et al. v. CITY OF OAKLAND.

Civ. 10215.

District Court of Appeal, First District, Division 1, California.

March 15, 1937.

Rehearing Denied April 14, 1937.

Hearing Denied by Supreme Court May 13, 1937.

1. **Municipal corporations** 🔑845(4)

In action against city for damages by water to groceries stored in basement, evidence *held* to sustain conclusion that failure of city properly to seal lateral sewers would permit water in abandoned main sewer, if sufficiently accumulated, to flow back through lateral sewer (St.1923, p. 675).

2. **Municipal corporations** 🔑845(4)

In action against city for damages by water to groceries stored in basement, evidence *held* to support inference that water which entered basement came from old lateral sewer which had been improperly sealed, as result of accumulation of water in old abandoned main sewer (St.1923, p. 675; Code Civ.Proc. § 1826).

3. **Municipal corporations** 🔑845(4)

Ultimate conclusion that flooding of basement was caused by negligence of city in failing to properly seal lateral sewers which ran into abandoned main sewer could be shown from circumstances from which it might reasonably be inferred (Code Civ. Proc. § 1826).

4. **Appeal and error** 🔑994(3)

Finding of trial court based on circumstances from which ultimate conclusion might reasonably be inferred would not be reviewed by appellate court, though different inferences might have been drawn or appellate court might have believed another inference more proper (Code Civ.Proc. § 1826).

5. **Municipal corporations** 🔑736, 831(2)

Municipalities generally have no power to create nuisances, and, where private property is flooded by reason of negligent construction of sewers or their negligent discontinuance, damages may be recovered (St. 1923, p. 675).

6. **Municipal corporations** 🔑747(2)

Failure of city to properly seal lateral sewers so that water in abandoned main sewer flowed back through lateral sewer into plaintiffs' basement *held* to come within provision of public liability act making municipalities liable for negligence of their officers in certain circumstances (St.1923, p. 675).

7. **Municipal corporations** 🔑845(4)

In action against city for damages by water to groceries stored in basement allegedly sustained because of failure of city to properly seal lateral sewers so water in abandoned main sewer flowed back through lateral sewer into plaintiffs' basement, evidence *held* insufficient to support conclusion that plaintiffs were guilty of contributory negligence (St.1923, p. 675).

8. **Appeal and error** 🔑1048(6)

In action against city for damages by water to groceries stored in basement allegedly sustained because of failure of city to properly seal abandoned sewers, that court permitted examination of city superintendent of sewers, under statute permitting examination of adverse party, so as to elicit evidence that sewers were improperly sealed, if error, *held* not so prejudicial as to justify reversal (St.1923, p. 675; Code Civ.Proc. § 2055).

Appeal from Superior Court, Alameda County; Peter J. Crosby, Judge.

Action by Martin Durante and M. C. Ratto, doing business under the firm name and style of C. B. Ratto & Co., against the City of Oakland, a municipal corporation. From a judgment in favor of the plaintiff, the defendant appeals.

Affirmed.

F. Bert Fernhoff, City Atty., and Weinmann, Quayle & Berry, all of Oakland, for appellant.

Glickman & Glickman, of Oakland, for respondents.

PER CURIAM.

The defendant appeals from a judgment awarded plaintiffs for damage to personal property. Defendant concedes that the complaint stated a cause of action under the Public Liability Act of 1923 (Stats. 1923, p. 675). It alleged that defendant used broken and defective sewer pipes in a public sewer system under the surface of Washington street in Oakland, and knowingly maintained the same in a dangerous and defective condition, with the result that plaintiff's basement at 811 Washington street was flooded and their merchandise damaged. It was further alleged that a claim for the damage was duly presented, and this defendant so admitted. With this exception it denied generally the allegations of the complaint, and pleaded as a further defense the contributory negligence of the plaintiffs.

The trial court found that the defendant maintained a sewer system beneath the surface of the street in front of plaintiffs' premises; that Edward Donahoo was the city superintendent of sewers; that plaintiffs used the basement of their premises for storage purposes in conducting a retail grocery business, and that they were not guilty of negligence contributing to the damage alleged. It further found as follows:

"7. It is true that on the 18th day of November, 1934, and for a long time prior thereto and continuously during said period of time defendant permitted an old abandoned public sewer system, consisting of a main line and various laterals leading therefrom, to remain below the surface of Washington street and in front of the plaintiffs' place of business in the city of Oakland. * * *

"8. It is true that on the 18th day of November, 1934, and for a long time prior thereto and continuously during said period of time there existed a dangerous and defective condition in said old abandoned public sewer system below the surface of Washington street from 8th street to 14th street and in front of the place of business of plaintiffs in the city of Oakland. * * * It is true that in 1929 the last mentioned public sewer system was abandoned by defendant, and at the time of the abandonment of said public sewer system by the defendant the laterals connected with said old abandoned main sewer were disconnected by the defendant from the private sewers of the private property owners along said Washington street, including the property occupied by plaintiffs, and at the time of said abandonment and continuously from said time to and including the 18th day of November, 1934, said laterals were not properly sealed by defendant so as to prevent the passage or seepage of water through same, which condition existed on the 18th day of November, 1934. It is true that at said time said abandoned main sewer pipe had a drop or fall of approximately 9 feet from Washington street to 8th street along said Washington street, and that at 8th street just below or south of the place of business of plaintiffs said old abandoned main sewer pipe was closed up so that water could not pass through same; that said old abandoned public sewer system in front of plaintiffs' place of business as aforesaid * * * was so negligently, carelessly and recklessly left in said dangerous and defective condition by defendant on the 18th day of November, 1934, that by reason thereof water accumulated therein and, being unable to flow out of said main abandoned sewer at the lower end thereof at 8th street by reason of said main line being closed up as aforesaid at that point, was ejected therefrom out of one of said laterals which was not properly sealed as aforesaid by defendant in front of the place of business of plaintiffs, below the surface of the street. That as a result thereof the basement of the plaintiffs at said address was flooded with water from said sewer pipes, which damaged the groceries and merchandise of plaintiffs.

* * *

"10. It is true that at all times and dates hereinabove mentioned said defendant and the said superintendent of sewers of said corporate defendant, and each of them, knew of said described and mentioned dangerous and defective condition of said abandoned public sewer system on Washington street and in front of the place of business of plaintiffs. That defendant and said superintendent of sewers and each of them negligently and carelessly failed, omitted and neglected to remedy said defective condition as aforesaid of said abandoned public sewer system or to take such action as should have been necessary to protect the plaintiffs and public against said defective condition within a reasonable time after having knowledge thereof."

The defendant contends that the evidence fails to establish its liability under the act; that the evidence shows that the plaintiffs were guilty of contributory negligence as a matter of law; and that the court erred to defendant's prejudice in permitting its superintendent of sewers to be examined by plaintiffs under section 2055 of the Code of Civil Procedure.

It appears that until 1929 the main sewer on Washington street was a concrete pipe 12 inches in diameter situated 12 feet below the surface. Extending from the main sewer to the premises on each side of the street were laterals or side sewers made of concrete, which were 6 inches in diameter. At the ends of the blocks were catch-basins for surface water, which was conveyed to the main sewer by concrete pipes 10 inches in diameter. In 1929 the defendant installed a new sewer system whereby each side of this street was separately served. Since then the main sewer on the west side of the street—on which side plaintiffs' premises are situated—has been located 2 feet from the curb and 14 inches below the surface. The pipes leading from the catch-basins were connected with the new main sewer, and new laterals were installed from the main sewer to the premises abutting on the street. With the installation of the new system the old was discontinued and abandoned. It was testified by defendant's sewer inspector that when the old system was abandoned the old laterals were not closed with concrete but with burlap and sand tamped in, and that this method would not permanently seal the ends of the laterals, the use of concrete being necessary to have this effect. The inspector could not testify that the lateral in front of plaintiffs' premises had been closed in any way; but, according to other witnesses who examined the lateral after plaintiff's basement was flooded, the end of this lateral was found to be partially filled with gravel and water was flowing therefrom.

[1] This evidence was sufficient to sustain the conclusion of the court that the failure to properly seal the lateral would permit water in the abandoned main sewer, if sufficient accumulated, to flow through the lateral.

With respect to the condition of the abandoned sewer with which the lateral mentioned was connected, the only witness who testified was the defendant's superintendent of sewers, who stated that it was broken at intervals; that at the ends of the other blocks along Washington street it was supposed to have been cemented, but whether this was true he would not state positively. However, it appears to be the view of all parties that the old main sewer was sealed or closed at Eighth street a short distance south of the plaintiffs' store; but whether this was done at the intersections of Ninth, Tenth, Eleventh, Twelfth, and Thirteenth streets, to the north, was left in doubt by the testimony. There was a fall of about 9 feet from Fourteenth to Eighth street, and about 2.31 feet from Ninth street to Eighth street. The partially opened end of the lateral in question was about 7 feet from the curb fronting plaintiffs' premises and below their basement.

Although the testimony was conflicting, sufficient appears to support the conclusion that this lateral inclined from the end nearest plaintiffs' premises toward the old main sewer, and that the incline varied in places from one-quarter of an inch to 12 inches.

[2-4] During the week commencing November 12 there were heavy falls of rain, in the course of which plaintiffs' basement was flooded. Defendant concedes that the flood water came from the street, but denies there was any evidence reasonably supporting the conclusion that it came from the abandoned sewer system. One of defendant's employees testified that shortly after the occurrence, following the directions of Superintendent Donahoo, he caused an excavation to be made in front of plaintiffs' premises. This was 14 feet in

depth, 6 feet in length along the curb and 2 feet in width. He found that near the end of the old lateral, which was 6 feet below the surface, the earth had caved in, leaving a hole 4 feet deep and 3 feet in width, which extended to the wall of the basement, and that some water was then flowing from the end of the lateral. A contractor who, at the request of the owners of the building, examined the basement after the occurrence and who was called as a witness for the defendant, testified that he observed at the southeast corner of the basement an area 2 feet wide and about 2½ feet long in the floor which had been broken, and that fragments of concrete therefrom had been dumped in the broken space. This witness also testified that he found no breaks in the pipes in the basement, and that the broken portion of the floor appeared to have been in that condition for some months. Both plaintiffs testified that they had not previous to the time that the basement was flooded observed any broken space in the floor and that no excavations therein were made by them. As far as appears, no investigation to determine the condition of the old main sewer, or to what extent water had accumulated therein, was made, although the facts in this respect were peculiarly within the knowledge of defendant's officers who had control of the streets, or might readily have been ascertained by them. Enough was shown, however, to support the inference that the water which entered the basement came from the old lateral as the result of the accumulation of water in the old main sewer. Demonstration in this respect was not required, Code Civ. Proc. § 1826; Kennedy v. Minarets, etc., Ry. Co., 90 Cal.App. 563, 266 P. 353; and it was sufficient that it be shown by circumstances from which the ultimate conclusion sought to be proved might reasonably be inferred, Perry v. D. J. & T. Sullivan, Inc., 219 Cal. 384, 391, 26 P.(2d) 485; Paiva v. California Door Co., 75 Cal.App. 323, 325, 330, 242 P. 887; Witney Inc., v. Sierra Ry. Co., 123 Cal.App. 430, 11 P.(2d) 415. Such a finding will not be reviewed although different inferences might have been drawn, or the appellate court might believe another inference more proper. Smith v. Occidental & Oriental S. S. Co., 99 Cal. 462, 34 P. 84; Slaughter v. Van Winkle, 213 Cal. 573, 2 P.(2d) 789; Gerdes v. Pacific Gas & Electric Co., 219 Cal. 459, 27 P.(2d) 365, 90 A.L.R. 1071; Skaggs v. Wiley, 108 Cal. App. 429, 292 P. 132.

[5, 6] The law is well settled that as a general rule municipalities have no power to create nuisances; and, where private property is flooded by reason of the negligent construction of sewers or their negligent discontinuance, damages may be recovered. Perkins v. Blauth, 163 Cal. 782, 127 P. 50; City of Atchison v. Challiss, 9 Kan. 603; Schroeder v. City of Baraboo, 93 Wis. 95, 67 N.W. 27. The defects complained of came fairly within the provisions of the Public Liability Act, and were such that, in the event of heavy rains, injury to adjoining property would follow as a natural and probable consequence, which should have been foreseen by the officers of the municipality.

[7] On the issue of contributory negligence, there is no evidence which would reasonably support the conclusion that the plaintiffs—who were lessees—knew of the dangerous condition of the street, or that the floor of their basement was defective. They denied that they knew of these facts, and we cannot say that the trial court was not warranted in believing their testimony. Nor does the record disclose evidence which would necessitate a finding of a lack of due care on their part, either before or after their basement was flooded.

Defendant relies on Norton v. Ransome-Crummey Co., 173 Cal. 343, 159 P. 1177. There the defendant used due care in the work which it was authorized to perform. While the soil in front of plaintiff's premises was necessarily exposed thereby, a slight rainfall caused water to percolate through the basement wall, which was inadequately constructed. It was held that no negligence on the part of the defendant was shown, there being no evidence of the maintenance of a large body of water exerting pressure against the wall. But, as the rule is declared in the following cases, where municipalities or others construct sewers or drains in such a manner that the surface water of a large territory is gathered into a body and precipitated upon private premises, to the injury of the owner, such persons, other things being equal, are liable: Stanford v. City & County of San Francisco, 111 Cal. 198, 43 P. 605; Shaw v. Town of Sebastopol, 159 Cal. 623, 115 P. 213; Durgin v. Neal, 82 Cal. 595, 23 P. 133; San Gabriel V. C. Club v. Los Angeles County, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200. The evidence in the case at bar was sufficient to bring it within the rule stated.

[8] We find no merit in the claim that defendant had no notice of the dangerous condition which was created by its servants; nor can the fact that the trial court permitted the examination of the defendant's superintendent of sewers under section 2055 of the Code of Civil Procedure, if erroneous, be said to have been prejudicial to a degree which would justify a reversal.

The judgment is affirmed.

19 Cal.App.2d 517

HOFFMAN et al. v. VAN DUZEE et al.

Civ. S. C. 22.

District Court of Appeal, Second District, Division 1, California.

March 12, 1937.

1. **Deeds** 🔑118

In determining width of block at time land was surveyed and platted into lots, court properly assumed that map was correct.

2. **Deeds** 🔑112(2)

When original owner of subdivision conveyed lot by reference to recorded map, map thereby became part of conveyance, so far as location of lot was concerned.

3. **Deeds** 🔑118

Dimensions shown on recorded map used and referred to in conveyances for purposes of description were to be taken as correct until shown by clear proof to be in error.

4. **Deeds** 🔑118

In quiet title action, defendants, who sought to impeach map used and referred to in conveyances for purpose of description, had burden of proving that map was incorrect.

5. **Appeal and error** 🔑1011(1)

In action to quiet title to city lot involving issue as to width of block and proper location of lot, appellate court *held* bound by trial court's implied finding that stakes relied on to show that block had width greater than that shown by recorded map had not been identified as monuments placed in the original survey, where evidence was conflicting and inconclusive (Code Civ.Proc. § 2077, subd. 6).

6. **Quieting title** 🔑44(3)

In action to quiet title to city lot involving issue of width of block, evidence of defendants *held* insufficient to show that plaintiff's lot was located otherwise than as stated in decree.

7. **Boundaries** 🔑55

If block had width greater than that shown by recorded map and original survey, proper allocation of excess could not be determined until owners of all lots in block were brought into court.

8. **Appeal and error** 🔑1026, 1036(3)

In action to quiet title, fact that all parties were not before court who should have been for complete determination of controversy, and fact that evidence was so incomplete as to make full determination impossible, did not furnish ground for reversal.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Fred Hoffman and another against Helen Hubbs Van Duzee and another, individually and as guardians of the estate of Clara R. Hubbs, an incompetent, and others. From an adverse judgment and from an order denying new trial, Clara R. Hubbs, an incompetent, by her guardians, appeals.

Judgment affirmed, and appeal from order dismissed.

Martin M. Levering and Hugh W. Day, both of Los Angeles, for appellants.

Denio, Hart, Taubman & Simpson, of Long Beach, for respondents.

SHINN, Justice pro tem.

Plaintiffs had judgment in an action to quiet title to a city lot and defendants appeal.

According to a map of the Hubbs tract recorded in 1906, there was a block of seven lots facing on Anaheim street in the city of Long Beach between Alamitos avenue on the west and Orange avenue on the east, having a total frontage of 428.95 feet. The lots were numbered consecutively from 1 on the west to 7 on the east; each had a frontage on Anaheim of 60 feet, with the exception of lot 1, which was shown on the map to have a width of 63.95 feet, and lot 7, which was shown to be 65 feet in width. This controversy is between plaintiffs, owners of lot 3, and defendants, owners of lots

1 and 2. It arises out of the claim made by defendants that the block as originally laid out was actually 431.60 feet in length between Alamitos and Orange avenues, or 2.65 feet in excess of the length shown on the map. Defendant Clara R. Hubbs, here represented by her guardians, was the original owner of the subdivision, and the lots sold in the tract, including lot 3, were conveyed by reference to the recorded map.

Defendants contend that such excess of frontage as exists should be allocated to their lot one under rules which it is not necessary to state. Plaintiffs contend, and the court found, that the recorded map was correct and that no such excess existed in the block.

It is evident that the whole case turns upon a question of fact. If the court's finding that the map was not proven to be incorrect is supported by the evidence, the case is disposed of, and it becomes unnecessary to determine how any excess frontage should be allocated as among the owners of the several lots in the block.

[1-4] The contention of defendants is that the map was in error in that it failed to include within the boundaries of the block as delineated all of the land facing Anaheim street between Orange avenue and Alamitos avenue. The question which the court had to decide was the width of the block in 1906, at the time the land was surveyed and platted into lots. The court assumed, to start with, that the map was correct; this was a proper assumption. O'Farrel v. Harney, 51 Cal. 125. When defendant Clara R. Hubbs conveyed plaintiffs' lot three by reference to the recorded map, the map thereby became a part of the conveyance so far as the location of plaintiffs' lot was concerned. Churchill Co. v. Beal, 99 Cal.App. 482, 278 P. 894; Cragin v. Powell, 128 U.S. 691, 696, 9 S.Ct. 203, 32 L.Ed. 566, 568, followed in Kneeland v. Korter, 40 Wash. 359, 82 P. 608, 1 L.R.A.(N.S.) 745; 4 R.C.L. 117; 22 R.C.L. 283. The deed to lot 3 is to be understood as plaintiffs contend, and as the court found, namely, as a conveyance of a parcel of land 60 feet in width on Anaheim street, commencing 123.95 feet east of Alamitos avenue, such being the width of defendants' lots 1 and 2. Dimensions shown on recorded maps used and referred to in conveyances for the purpose of description express the understandings and agreements of the parties with reference to the location and boundaries of the land conveyed. They are to be taken as correct until shown by clear proof to be in error. At the trial plaintiffs relied upon the map and did not have to prove its correctness. The map itself, until shown to be incorrect, furnished proof of the fact that the west line of plaintiffs' lot was 123.95 feet east of the intersection of Alamitos avenue and Anaheim street, that intersection being the northwest corner of the block. In other words, the map which plaintiffs introduced in evidence made out a prima facie case for the relief which they sought. Defendants, who sought to impeach the map, had the burden of proving that it was incorrect. They undertook to prove that the block was 431.60 feet long at the time the land was surveyed and the map was recorded. In their attempt to do this they proved the results of a survey made in December, 1934, by C. W. Cook, a licensed surveyor, who testified as a witness. His testimony related to the distance between the west line of Orange avenue and the east line of Alamitos avenue. The weakness of this evidence is found in the fact that his survey was made from initial points not identified with the original survey. Defendants did not produce the field notes of the original survey, nor did their later survey purport to be a resurvey which used any of the initial points or monuments of the original survey. It was based upon information which Mr. Cook received in the office of the city engineer as to certain monuments which had been set by the city engineer purporting to mark the centers of street intersections of the four streets surrounding the tract. It was not shown when or how these monuments were set, nor were they verified by any kind of proof. Mr. Cook found no stakes or other boundaries marking what he used as the north corners of the block in making his measurement of the length of the block. The trial court was not obliged to find that Mr. Cook's survey was more accurate than the original survey. It could be no better than its starting points, and as the authenticity of these was in doubt, the survey as a whole was inconclusive. As no evidence except the map was offered as to the actual location of the streets in 1906, the proof of defendants failed to show that the distance between the streets as they were located in 1906 was any greater than that shown on the map. Defendants' survey, in so far as it was based upon information obtained from the city engineer's office, was not sufficient to prove

that there was an excess of frontage in the block over that shown on the map. The trial court could not speculate as to matters which the proof left in doubt. Nor can this court weigh the evidence, as appellants desire us to do, and reach a finding contrary to that of the trial court.

Mr. Cook found certain surveyor's stakes, one 305 feet and the other 365 feet west of what Mr. Cook took to be the northeast corner of the block. Mr. Hubbs measured from what he took to be the northeast corner in 1918 and found the same stakes which Mr. Cook discovered. According to the map, these should have marked the north corners of lot 2, and if they were true corners, plaintiffs' lot 3 lay 126.60 instead of 123.95 feet east of Alamitos avenue. These stakes were not identified as original stakes. While they were described as surveyor's old stakes, no one knew when or how they had been placed. Unidentified as they were, they did not prove the original survey to have been in error in its measurement of the length of the block, and, of course, unless shown to have been the original stakes, they could not have been accepted as marking the north boundaries of lot 2 and the north common corner of lots 2 and 3.

[5] Section 2077 of the Code of Civil Procedure provides: "6. When the discription refers to a map, and that reference is inconsistent with other particulars, it controls them if it appear that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars." Here the parties acted with reference to the map; that much is certain, and it does not appear that they acted with reference to any monuments on the ground or to boundaries other than those delineated on the map. It is unnecessary for us to decide what the result would have been if the stakes found by Mr. Cook and Mr. Hubbs had been identified as monuments placed in the original survey. They were not so accepted by the trial court and therefore they did not show plaintiffs' lot to be in a position other than its location as shown on the map. We are bound by the implied finding of the trial court on this point.

[6] The decree quieted plaintiffs' title to "All that portion of the Hubbs Tract, as per map thereof recorded in Book 11, page 129 of Maps, in the office of the County Recorder of Los Angeles County, within the following boundary: Beginning at a point in the most northerly boundary line of said Tract distant 123.95 feet east from Alamitos avenue; thence Easterly along said Northerly line of said Tract, to the Westerly line of Lot Four (4) in said Tract; thence Southerly along said Westerly line of said Lot Four (4) a distance of 100 feet; thence Easterly (sic) and parallel to said Northerly line of said Tract to a point distant 149.53 feet from Alamitos Avenue; thence Northerly to the point of beginning." Plaintiffs were entitled to a decree in this form. The evidence of the defendants was insufficient to show that plaintiffs' lot was located otherwise than as stated in the decree.

[7] Plaintiffs' lot, however, is only 60 feet in width, regardless of its location. It is bounded on the east by lot 4, which is only 60 feet east of lot 2, and the decree does not, as appellants contend, award plaintiffs any excess frontage. Neither plaintiffs nor defendants established any title to parcels of land of greater area than those shown by the dimensions of their respective lots on the map. It is regrettable that the proof was so inconclusive, but there is nothing we can do about it. Further surveys may prove that the length of the block is greater than that shown on the map. If such excess exists and it is found to be due to an error in the original survey, a question would immediately arise as to the proper allocation of this excess. The owners of lots 4, 5, 6, and 7 would have to be brought into court before any final determination could be made as to the proper allocation of any excess that exists. No decree which could be made in this case and which awarded any of the present parties any share of excess frontage would be binding upon the owners of lots 4, 5, 6 and 7. The owners of these lots would be entitled to assert their claims, if any they have, to a proportionate share of such excess land, and it would be necessary for the court to pass upon the merits of their claims, as well as those of the parties to this action.

[8] There is no error in the record justifying a reversal of the judgment. The fact that all the parties were not before the court who should have been before the court for a complete determination of the controversy, and the further fact that the evidence was so incomplete as to make a full determination impossible, furnish insufficient reasons for a reversal. There would be no end to litigation if cases were sent back for retrial for the sole purpose of

allowing a losing party to prove some fact which he had failed to prove upon a former trial.

The judgment is affirmed; the appeal from the order denying a new trial is dismissed.

We concur: YORK, Acting P. J.; DORAN, J.

---

19 Cal.App.2d 540

PEOPLE v. ROWLAND.

Cr. 2926.

District Court of Appeal, Second District, Division 1, California.

March 13, 1937.

Hearing Denied by Supreme Court April 12, 1937.

1. Criminal law 🔑1202(7)

Question of whether a prior conviction was a conviction of felony though sentence was for fine or jail only, by virtue of offense being defined as felony in statute, is an "important question of law" within terms of court rule making cases involving such questions reviewable (Supreme Court Rule 30, § 6).

2. Courts 🔑91(2)

Where Supreme Court denied hearing on decision of Appellate Court, though question involved was an important question of law within court rule, Appellate Court's decision will be most persuasive as a precedent (Supreme Court Rule 30, § 6).

3. Criminal law 🔑1202(1)

Imposition of a penalty other than imprisonment in state prison for violation of section of Vehicle Act *held* to constitute offense a "misdemeanor" for all purposes thereafter, as respects increased punishment on sentence for previous conviction of felony, notwithstanding that section provides that persons committing act prohibited by the section shall be deemed guilty of a felony (St.1931, p. 2133, § 146; St.1935, p. 174, § 503; Pen.Code, § 17).

[Ed. Note.—For other definitions of "Misdemeanor," see Words & Phrases.]

4. Criminal law 🔑1184

Where only question on appeal from a conviction was whether defendant's prior conviction was for a felony as a matter of law, all pertinent facts being stipulated, modified judgment rather than new trial will be ordered on reversal of conviction.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Robert F. Rowland was convicted of violation of section 503 of the Vehicle Code, with prior conviction of a felony, and he appeals.

Reversed and judgment rendered.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

HOUSER, Presiding Justice.

By the terms of an information that was filed against him, in count I thereof defendant was accused of the commission by him of the crime of grand theft; and by count II of the said information he was likewise accused of the violation by him of the provisions of section 503 of the Vehicle Code (St.1935, p. 174). In the same information it was charged that before either of such offenses had been committed defendant had been "convicted of * * * a felony." On the trial of the action the charge contained in count I was dismissed; defendant pleaded "guilty" as to the accusation that was preferred against him in count II; and thereupon waived trial by jury on the charge of "prior conviction of a felony." Following a stipulation that was entered into by respective counsel regarding all facts pertinent to the issue, the trial court found defendant guilty as to the last-mentioned accusation. Defendant's motion for a new trial was denied; whereupon judgment was rendered as for conviction of the felony described in count II, with "prior conviction of a felony." It is from such judgment, as well as from the order by which his motion for a new trial was denied, that defendant has appealed to this court.

It is undisputed that prior to his conviction of the offense specified in the second count of the information, defendant had been convicted of the offense expressly designated as a felony under the provisions of section 146 of the California Vehicle Act (St.1923, p. 564, as amended by St. 1931, p. 2133). But by reason of the fact that in punishment for the commission of that crime the judgment that was rendered against defendant provided that he pay a fine of $1,080, or in default thereof, that he serve a specified term in the county jail, and in connection therewith, in view of the statutory definition (section 17, Pen. Code) of what constitutes a felony, to wit, that a felony is a crime which is punishable with death or by imprisonment in the state prison, and that every other crime is a misdemeanor, it is contended by appellant that defendant was not convicted of a former felony, but of a misdemeanor only.

[1, 2] Were the question thus suggested new to the courts of this state, a discussion of the law deemed applicable thereto might be interesting. But it happens that in the case of People v. Trimble (Cal.App.) 63 P.(2d) 1173, in a situation practically identical with that here presented, it was held that the defendant therein had not suffered a prior conviction of a felony. A petition to the Supreme Court for a hearing of that case was denied. In such circumstances, and especially in consideration of the situation that, because the question upon which the Supreme Court acted constituted an "important question of law" (sec. 6, rule 30, Supreme Court), had the Supreme Court doubted the correctness of the legal conclusion which theretofore had been reached by the District Court of Appeal, it very appropriately might have granted a hearing, if not controlling in subsequent decisions thereafter to be rendered by the courts of this state on the identical question, the judgment which was rendered in the cited case must be considered as "most persuasive."

[3, 4] In reliance upon the correctness of the ruling in the case to which attention has been directed, it is ordered that the judgment and the order by which the motion for a new trial was denied be, and they are, reversed. But in consideration of the stipulation of the parties which embraced all facts that were pertinent to the issue respecting the question of law as to the former offense that concededly was committed by defendant, it becomes unnecessary that any formal new trial be had as to such issue. Instead thereof, on the stipulated facts regarding the issue of whether prior to the date when the information was filed against defendant he had been convicted of a felony, it is ordered that it be adjudged by the trial court that defendant had not been so convicted; that thereupon defendant be arraigned for sentence, and that judgment be pronounced against him as for, and solely on account of, his conviction on count II of the information.

We concur: YORK, J.; DORAN, J.

In re HARRIS' ESTATE.*

HARRIS et al. v. LARTER et al.

Civ. 1663.

District Court of Appeal, Fourth District, California.

March 16, 1937.

Hearing Granted by Supreme Court April 19, 1937.

Executors and administrators 🔑314(12)

Appellate court would not specially consider a particular parcel of realty on appeal from judgment in proceeding for distribution of estate, where no point was raised in connection with such parcel.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

On petition for rehearing.

Petition denied.

Prior opinion, 65 P.(2d) 117.

W. M. Greathouse and C. E. McDowell, both of Los Angeles, and Head, Wellington & Jacobs and Otto A. Jacobs, all of Santa Ana, for appellants.

R. Y. Williams and Charles D. Swanner, both of Santa Ana, for respondents.

PER CURIAM.

In a petition for rehearing the appellants refer to the statement in the opinion that the court had found that eight parcels of real property were acquired by Mrs. Harris after the death of her husband, and state that the finding in question refers to seven parcels only and that this court has mistakenly included "parcel 3" in the real property thus acquired by Mrs. Harris. While the finding referred to covers eight pieces of property, it does not mention "parcel 3" and that parcel was not specially considered in the opinion since no point was raised in connection therewith.

The petition for a rehearing is denied.

---

*For subsequent opinion see 72 P.2d 873.

WEINER v. ROOF et al. *

Civ. S. C. 13.

District Court of Appeal, Second District, Division 1, California.
March 12, 1937.

Hearing Granted by Supreme Court
May 10, 1937.

1. **Principal and agent** 🔑148(4)

Party induced to enter into contract by untrue material representations of other party's agent may rescind contract and recover consideration paid from principal, though party knew, or had reason to know, that agent's statements were not authorized, but cannot sue for fraud and deceit.

2. **Contracts** 🔑108(2)

Principal may, by contract with another, relieve himself of liability in deceit for prior or subsequent frauds of his agent.

3. **Principal and agent** 🔑158

Contract obtained by agent through fraudulent misrepresentations of facts may be rescinded by other party, although contract provides that it shall not be affected by representations not contained therein.

4. **Principal and agent** 🔑158

Provision in contract for sale of realty releasing vendor, which held title as trustee, from liability for agents' representations, even if it was good as between purchaser and beneficiaries of trust as to liability for damages, would not be good in action to recover moneys paid to or for use of beneficiaries after rescission of contract procured by agent's fraud.

5. **Principal and agent** 🔑158

Provision in contract for sale of realty releasing vendor, which held title as trustee, from liability for agents' representations, could not be given effect as between purchaser, whose purchase was induced by agent's fraud, and beneficiaries of trust who were the real principals, even if release had purported to release vendor in capacity as trustee, where release did not purport to apply to beneficiaries.

6. **Appeal and error** 🔑1035

Judgment for purchaser, in action to rescind contract to purchase realty, title to which had been held by vendor as trustee, and for recovery of money paid, against agent, whose fraud had induced contract, and vendor's assignee as trustee, was affirmed, even though contract had not been assigned to assignee as trustee, and assignee had not been sued as trustee, on theory that agent had acted for assignee in its capacity as trustee, and that judgment required payment to purchaser of sum held by assignee for use of beneficiaries, where declaration of trust showed that agent was beneficiaries' agent.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Theodore Weiner against J. B. Roof and another, and the Citizens National Trust & Savings Bank of Los Angeles. From a judgment for plaintiff, the last-named defendant appeals.

Affirmed.

Chandler, Wright & Ward, of Los Angeles, for appellant.

Don Marlin and Isador Gralla, both of Los Angeles, for respondent.

SHINN, Justice pro tem.

Appeal by Citizens National Trust & Savings Bank of Los Angeles from a judgment in plaintiff's favor in an action for rescission of a contract for the purchase of real estate, and for the recovery of money paid thereon.

A brief outline of the facts will suffice for the purposes of this opinion. J. B. Roof, Inc., a corporation, agreed to purchase from one Connolly and to subdivide and sell a parcel of land. Title was conveyed to the Farmers & Merchants National Bank of Los Angeles as trustee under a subdivision trust, Connolly and the Roof company being the beneficiaries of the trust. The Roof company acted as sales agent and the trustee executed all contracts of sale in its own name and collected the sale prices of the lots. Plaintiff agreed to purchase a lot for the sum of $3,500, the purchase being evidenced by a contract between the trustee and plaintiff. This contract was subsequently assigned by the Farmers & Merchants Bank of Los Angeles to appellant Citizens National Trust & Savings Bank of Los Angeles, and thereafter plaintiff paid to the latter bank, as a part of the purchase price, the sum of $1,890. He later rescinded his contract upon the grounds of fraud and failure of consideration. His right to rescind was upheld by the court and is not questioned upon this appeal. Plaintiff was awarded judgment against J. B. Roof and J. B. Roof, Inc., jointly and severally in the sum of $3,807.01, and against Citizens National Trust & Savings Bank, as trustee, in the sum of $1,890. These were the only defendants. The appeal is by the bank from this portion of the judgment; and the other defendants do not appeal.

---

*For subsequent opinion see 74 P.2d 736.

Citizens National Bank was not sued as trustee. It did not in its answer allege that it had acted as trustee nor did it receipt for the moneys paid to it in the capacity of trustee. There was no evidence that it was substituted for the Farmers & Merchants National Bank as trustee nor was the contract assigned to it in a trustee capacity. The court found as a fact that in making the sale to plaintiff, J. B. Roof, Inc., acted as the agent of Citizens National Trust & Savings Bank and Farmers & Merchants National Bank of Los Angeles. Nevertheless, the finding of the court was that the bank received the money paid to it as trustee, and judgment went against it in that capacity.

The briefs are devoted largely to a discussion of the question of the individual liability of Citizens National Trust & Savings Bank, and to the sufficiency of the evidence to support the finding that the Roof company acted as agent of both banks. It is assumed by the parties that the court found that the Roof company was agent of both banks in their individual, as distinguished from their trustee, capacities. If this is a correct construction of the findings as a whole, it is apparent that the finding on the question of agency went one way and the judgment went the other, for appellant was absolved of liability in its individual capacity, notwithstanding the finding that the representations were made by its agent. We would be unable to reconcile the finding that the Roof company acted as agent for both banks in their individual capacities with the finding that Citizens National Trust & Savings Bank received the sum of $1,890 as trustee, nor could we reconcile the judgment with the former finding. Plaintiff, however, is not appealing, and apparently is satisfied with the judgment against appellant in its capacity of trustee.

We proceed to an examination of the basis of the judgment against appellant as trustee. Certain fundamental facts are established by the record: J. B. Roof, Inc., acted as agent in the sale of the property; plaintiff's purchase was induced by the agent's fraud; appellant received the sum of $1,890, and some one was the beneficiary of these payments. Although the court found that the sums paid to appellant were received in its trustee capacity, the nature of the trust was not established by the findings nor was it shown by the evidence. Whatever may have been the terms of the trust, there were beneficiaries thereof and they would necessarily be the persons who were entitled to receive, eventually, the proceeds from sales of lots in the subdivision. The necessary implication from the finding that appellant received the money in the capacity of trustee is that the sum was received for the use and benefit of other persons, although there is no finding which identifies such persons. Appellant did not specify in its bill of exceptions, nor upon this appeal does it urge, the insufficiency of the evidence to support the finding that it received the sum of $1,890 in the capacity of trustee.

The judgment must be construed as one requiring the payment to plaintiff of the sum of $1,890 from funds held by appellant for the use and benefit of the person or persons who were entitled to receive the proceeds of the sales of lots in the subdivision. It is our conclusion, even in view of the confusing state of the record, that the judgment must be affirmed.

[1-3] The law which governs the case is found in Restatement of the Law, Agency, §§ 259, 260, as set out and approved by the Supreme Court in Speck v. Wylie, 1 Cal.(2d) 625, 36 P.(2d) 618, 619, 95 A.L.R. 760, as follows: "Section 259. 'A transaction into which one is induced to enter by reliance upon untrue and material representations as to the subject-matter, made by an agent entrusted with its preliminary or final negotiations, is subject to rescission at the election of the person deceived. * * * Comment: b * * * The rule stated in this section applies although the other party knows or has reason to know that the agent is not authorized to make the statement. By contract with the principal, however, he may agree that the principal is not to be liable because of unauthorized statements of an agent, as stated in section 260. * * * Sec. 260. * * * (1) A principal may, by contract with another, relieve himself of liability in deceit for prior or subsequent frauds of an agent to such other. (2) A contract obtained by an agent through fraudulent misrepresentations of facts may be rescinded by the other party although it provides that it shall not be affected by representations not contained therein.' Without attempting further elaboration we therefore announce that we are in accord with the above statements of the rule which will, all other things being favorable to the complaining party, allow him to rescind and to pursue the principal far enough to secure a return of the consideration paid. But an

action for fraud and deceit will not be allowed him under such conditions."

Appellant relies upon the rule that by contract a principal may be released from liability because of unauthorized statements of an agent, contending that plaintiff by contract did release Farmers & Merchants National Bank, and that by reason thereof appellant also was released from liability. The writings relied upon are found in the contract, as follows: "17. While the party of the first part is in this instrument designated the Seller, it is not to be inferred therefrom that it is the beneficial owner of the property. It is understood and agreed by the party of the second part that the party of the first part simply holds legal title to said premises for the purpose of protecting the beneficial owner of the property, should party of the second part fail to perform its covenants herein contained, and also for the purpose of seeing that the party of the second part receives a clear and unincumbered title to the property which the purchaser has agreed to buy, upon fulfilling all the terms of this contract, and that no party engaged in selling said property is the agent of the party of the first part, and the party of the first part is not to be bound, or in any way held responsible for any statement or representation made by any such selling agent engaged in selling said property," and in a separate writing signed by plaintiff, reading as follows: "I am signing the attached contract covering Lot 109 A & B Block Tract 10146 after a thorough understanding of its conditions. I agree that the seller or its agents are in no manner bound by promises not contained therein nor have they made any verbal promises of resale or other representations."

[4, 5] It may be assumed for the purposes of this decision (disregarding for the moment the finding of agency) that the provisions quoted should be given the effect of releasing Farmers & Merchants National Bank, and appellant as well, from individual liability for the fraud of the agent. But no greater effect than this could be given to the purported release. The writings express no intention to release any one but the party of the first part under the contract, Farmers & Merchants National Bank. Even if the release were good as between plaintiff and the beneficiaries of the trust, as to liability for damages, it would not be good in an action to recover moneys paid to or for the use of the principals, after rescission of the contract procured by the fraud of the agent. Speck v. Wylie, supra; Wedge v. Security-First Nat. Bank, 219 Cal. 113, 25 P.(2d) 411; Curtis v. Title Guarantee & Trust Co., 3 Cal.App.(2d) 612, 40 P.(2d) 562, 42 P.(2d) 323; Lozier v. Janss Investment Co., 1 Cal.(2d) 666, 36 P.(2d) 620; Greenberg v. Du Bain Realty Corp., 2 Cal.(2d) 628, 42 P.(2d) 628. But the fact that neither bank was held individually liable renders it unnecessary to consider the effect of the release as affecting the individual liability of the banks, nor can the release be given effect as between plaintiff and the real principals in the transaction, who are the beneficiaries of the trust. The release does not purport to apply to them, nor does it purport to release the Farmers & Merchants National Bank in a trustee capacity, and if it did, it would be ineffective under the doctrine of the cases we have cited.

[6] Strictly speaking, there is no finding that the Roof company was the agent of the beneficiaries of the trust, but this omission is not fatal to the judgment. The finding that the Roof company was the agent of appellant and that appellant received the sums paid to it in the capacity of trustee, will be construed, in support of the judgment, as a finding that the Roof company was the agent of appellant in its capacity of trustee. This is the logical construction and the only one which is consistent with the evidence. We find in the record the declaration of trust, executed by the Farmers & Merchants National Bank, in which certain beneficiaries are named. The terms of the declaration sufficiently show that J. B. Roof, Inc., was the agent of the beneficiaries in the sale of the lots in the subdivision. Appellant does not dispute this fact but on the contrary tacitly admits it, contending only that the Roof company was not the agent of either bank in its individual capacity.

As far as the record discloses, the sums paid by plaintiff to appellant may still remain in the latter's possession, as trustee for the benefit of those who are entitled to receive the selling price of the lots. Plaintiff is entitled to have his money returned by those who have been unjustly enriched by its receipt. Such, as we understand it, is the theory of the judgment, which limited appellant's liability to that of a trustee. The judgment against it in that capacity was a proper one if, as it contends, it acted throughout merely as trustee. Gist v. Security Trust & Savings Bank, 218 Cal. 581, 24 P.(2d) 153. We do not undertake to define the nature or the limits of appellant's liability as trustee. Appellant does not criticize the judgment because of the absence from the findings and judgment of any declaration as to the nature of the trust, nor does it seek a reversal upon the ground that the judgment is not more specific. The exact nature and extent of appellant's liability as trustee will appear in proceedings in which the facts will be fully disclosed to the court, from which the court will be able to determine what funds, if any, belonging to those who profited by the wrong perpetrated upon plaintiff, should be applied in satisfaction of the judgment.

As defendants J. B. Roof and J. B. Roof, Inc., did not appeal, the question is not before us whether the award against them, which is apparently based upon damages for fraud, is inconsistent with the judgment against appellant in rescission. Appellant does not raise the point of inconsistency in the judgment as affecting the award from which it has appealed.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

---

19 Cal.App.2d 550

In re MATTINGLY'S ESTATE.

Civ. 11348.

District Court of Appeal, Second District, Division 2, California.
March 15, 1937.

Hearing Denied by Supreme Court
May 13, 1937.

1. Homestead 🔑150(1)

Under statute requiring court to set aside homestead for use of surviving spouse if none had been selected, selecting property upon which surviving spouse and decedent had resided rather than property requested by surviving spouse *held* discretionary (Probate Code, §§ 660, 661).

2. Homestead 🔑150(1)

Under statute requiring court to set aside homestead for surviving spouse if none had been selected, that surviving spouse did not petition to have property set aside which court set aside did not entitle surviving spouse to complain of court's selection, which was discretionary (Probate Code, §§ 660, 661).

3. Executors and administrators 🔑177

Amendatory statute providing that court might "in its discretion" set apart to surviving spouse all "or any part of" property of deceased exempt from execution, refusal to set aside furniture bequeathed to deceased's daughters on ground that surviving spouse's home was adequately furnished *held* discretionary (Probate Code, § 660).

Appeal from Superior Court, Los Angeles County; Clemmence Brown, Judge pro tem.

Proceeding by Charles H. Mattingly in the matter of the Estate of Florence M. Mattingly, deceased. From adverse orders, petitioner appeals.

Affirmed.

Charles H. Mattingly, of Los Angeles, in pro. per.

Horace E. Vedder, of Los Angeles, for respondent.

WOOD, Justice.

Petitioner appeals from an order of the probate court denying his petition to have certain property set aside as a homestead. He also appeals from an order denying his petition to have certain personal property exempt from execution set apart to him.

Petitioner is the surviving spouse of Florence M. Mattingly, deceased. In her will Mrs. Mattingly devised a certain lot with a building thereon known as 303 Onyx avenue, Balboa Island, to two adult daughters as joint tenants and also devised to petitioner as residuary devisee, a lot with a building thereon known as 217 West avenue 37 in the city of Los Angeles. The last-mentioned property was at the time of her death and had been for many years the residence of petitioner and the decedent. Petitioner presented to the probate court a petition in which he asked that the Balboa Island property be designated as a homestead for his use as surviving spouse. The court refused to designate the Balboa Island property as a homestead and made an order designating the property at 217 West avenue 37 as a homestead for petitioner's use.

[1] The Probate Code in sections 660 and 661 provides that a homestead must be provided for the surviving spouse. "If none has been selected * * * the court, in the manner hereinafter provided,

must select, designate and set apart and cause to be recorded a homestead for the use of the surviving spouse." (Section 661.) It will be noted that the section does not provide that the court must set aside the parcel of land selected by the surviving spouse. The section merely provides that the court must select "a homestead." In the present case the court did in fact designate a homestead for the surviving spouse and it is not contended that the property designated is not suitable for that purpose. From the wording of the section it is apparent that it was intended that the court could exercise its discretion in designating the property which should be set apart. Petitioner relies upon cases in which the trial courts granted petitions for homesteads from property other than that devised to the petitioners, the rulings of the trial courts being affirmed on appeal. We are referred to no case in which it was held that the court was compelled to permit a surviving spouse to select a homestead from property which had not been devised to him.

[2] Petitioner complains that he did not petition to have the property at West avenue 37 set apart as a homestead. We fail to see how he has been injured by the order made. If he prefers to have this property free from the designation as a homestead the trial court will doubtless grant his request upon receipt of the remittitur.

[3] The testatrix bequeathed her personal property to petitioner with the exception of certain articles of furniture which she bequeathed to her two daughters. Petitioner asked the trial court to set apart to him as surviving spouse the articles of furniture which had been bequeathed to the daughters on the ground that the furniture was exempt from execution. The court, upon sufficient evidence, found that petitioner's home "is completely, adequately and conveniently furnished without the personal property" which is the subject of the petition. It is provided in section 660 of the Probate Code that the court "may in its discretion set apart to the surviving spouse * * * all or any part of the property of the decedent exempt from execution." Before the enactment of the Probate Code in 1931 it was provided in section 1465 of the Code of Civil Procedure that "the court may on petition therefor, set apart * * * all the property exempt from execution." Petitioner cites certain cases construing this section before it was amended and made a part of the Probate Code, from which he argues that the word "may" has been held to be "must." The Legislature in adopting the Probate Code added after the word "may" the words, "in its discretion" and after the word "all" the words "or any part of." The Legislature doubtless intended to give a definite meaning to these added words. It is expressly provided that the court shall exercise its discretion in acting upon petitions of this character. The language of the section is free from ambiguity and needs no interpretation. The order appealed from was made in the exercise of the court's discretion.

The orders are affirmed.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.

PEOPLE v. DUTTON.*

Cr. 2928.

District Court of Appeal, Second District, Division 1, California.
March 22, 1937.

Hearing Granted by Supreme Court April 19, 1937.

1. Criminal law 🔑1202(7)

Findings that accused had suffered prior conviction, in judgment of conviction of violation of statute pertaining to issuing bank check with intent to defraud after prior conviction of forgery in another state, *held* not appealable (Pen.Code, § 476a).

2. Criminal law 🔑1202(6)

Where judgment is pronounced for certain offense and for prior conviction of felony, punishment is not for prior conviction, but for second offense.

3. Criminal law 🔑1202(1)

Accused who pleaded guilty to commission of felony *held* not exempt from increased punishment for commission of such offense after prior conviction of felony because of pardon for prior offense (Pen.Code, § 476a; § 644, as amended by St.1935, p. 1699; § 1203, as amended by St.1935, p. 1706).

*For subsequent opinion see 71 P.2d 218.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Charles Dutton was convicted of the violation of a statute relating to issuing a bank check with intent to defraud after prior conviction of forgery in the state of Wisconsin, and he appeals from the judgment, and attempts an appeal from certain findings in the judgment.

Attempted appeal from findings dismissed, and judgment affirmed.

Morris Lavine, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

DORAN, Justice.

Defendant was charged with the violation of section 476a of the Penal Code after a prior conviction of a felony, to wit, forgery, in the state of Wisconsin.

[1] Defendant pleaded guilty to the alleged offense, but denied the prior conviction on the ground that he had been pardoned by the Governor of Wisconsin. The court found on the trial of this last issue that defendant had theretofore been convicted of the felony alleged, whereupon judgment was then and there pronounced. The appeal is from the judgment, and, also, an attempted appeal is made from the "findings in the judgment that the defendant has suffered a prior conviction." No appeal lies from the findings, and the attempted appeal therefrom is therefore dismissed.

[2, 3] The decisive question involved in the appeal is the effect of the pardon above referred to. Appellant relies chiefly upon the provision of the statute defining the operation and effect of pardons. Stats.1933, c. 945, p. 2476. There appears to be no conflict between this provision, section 1203 of the Penal Code (as amended by St.1935, p. 1706), and other provisions affecting the punishment for second offenders; moreover, it is well settled that where a judgment is pronounced for a certain offense and for a prior conviction of a felony, the punishment is not for the prior conviction but for the second offense. The authorities on the effect of a pardon are somewhat in conflict, but the conclusion reached in People v. Biggs (Cal.App.) 65 P.(2d) 75, 76, appears to be consistent with well-established rules of statutory construction; the court, in that case, held: "After a careful review of these conflicting opinions, we are satisfied this question [of pardon] should be answered in the negative, and the correct rule is that the fact that accused has been pardoned for his prior conviction does not exempt him from the increased punishment prescribed by section 644 of the Penal Code on a subsequent conviction." Appellant in the instant case cites People v. Bowen, 43 Cal. 439, 13 Am.Rep. 148, wherein with respect to this subject the following quotation from 2 Blackstone, page 402, appears: "'The effect of a pardon (under the rules of the common law) is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offense for which he obtains a pardon; it gives him a new credit and capacity.'" The Legislature of this state evidently was less hopeful, for no provision appears in section 1203 of the Penal Code, nor, for example, in the Habitual Criminal Act (section 644, Pen.Code, as amended by St.1935, p. 1699), with reference to pardons where subsequent offenses are involved. Indeed, it requires no effort to reason that the Legislature was skeptical and not concerned with the influences that bring about pardons in the instances in which pardons are obtained, but, on the contrary, was concerned with the public welfare and the disposition of habitual criminals. The Legislature had the power to make the pardoned offenses an exception to the measure of punishment meted out to those convicted of multiple offenses; the court has no such power.

Judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.

---

19 Cal.App.2d 704

VIGEN et ux. v. CASTLE BUILDING CO. et al.

Civ. 10235.

District Court of Appeal, First District, Division 2, California.

March 24, 1937.

1. Bills and notes 🔑**422(1)**

Where defendants, in conditional payment of property, delivered notes of third persons indorsed by defendants, under agreement that they might substitute other notes in order to protect themselves against default of others, their promise to substitute other notes made with full knowledge of plaintiff's failure to present note to maker and make demand for payment was waiver of demand and notice.

2. Bills and notes ⚷422(1)

Where indorsers of notes, both before and after default by maker, promised holder to take care of the obligation, thus leading holder to believe that they would not insist on presentment, they were estopped from denying that they waived demand and notice (Code Civ.Proc. § 1962, subd. 3).

◆

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Elias Vigen and wife against the Castle Building Company, R. C. Lee, G. J. Gensler, and others. From a judgment for the defendants, plaintiffs appeal.

Reversed with directions.

Sol Silverman, George Olshausen, both of San Francisco, for appellants.

B. E. Kragen, of San Francisco (Adrian A. Kragen, of San Francisco, of counsel), for respondents.

NOURSE, Presiding Judge.

In an action upon a promissory note against the makers and indorsers, judgment went for the indorsers.

The defendants Lee and Gensler operated under the name of the Castle Building Company in the purchase and sale of real property. Prior to the execution of the note in suit, they purchased from the plaintiffs certain real property for which they gave them in part payment five promissory notes held by them and indorsed to plaintiffs. One of these defaulted, and these defendants substituted for it the note in suit. This was done under the agreement of the parties reserving to the defendants the right to substitute a second deed of trust and note "conforming to the same requirements as the note" and deed in default "in order to enable them to protect themselves against the default of others or to refinance the property." The note thus substituted, and which is the subject of this action, was made by Charles Thorpe and wife and was indorsed, with recourse, by the three other defendants. It was secured by a deed of trust, and was given in part payment for property sold the Thorpes by these defendants. It was made payable in San Francisco, and, after delivery to the plaintiffs, it was placed for collection in the Seventh and Irving street branch of the American Trust Company, where the Thorpes made regular monthly payments from August 4, 1929, to April 4, 1932. In June, 1932, the plaintiffs first learned that the Thorpes were in default, and they then called upon the defendants who, with full knowledge of the default, of the disappearance of the Thorpes, and of the failure of plaintiffs to make demand and presentment, expressly and unconditionally promised to take care of the obligation by the substitution of one or more secured notes for the note in suit. They also requested the plaintiffs to give them time to contact the makers and to aid them in finding their address. These delays continued over several weeks at the request of these defendants, and, in the meantime, several other notes were offered to the plaintiffs, one of which was already in default and the others were secured by property of little or no value. Finally, the defendants informed plaintiffs that they had run out of notes and mortgages and could not make any substitution. The foregoing facts are all shown by uncontradicted evidence or were stipulated to during the trial.

[1] The defendants relied on the defense of failure of demand and presentment. They offered no evidence contradicting plaintiffs' proof of their express promise to substitute other satisfactory notes, and made no contest of plaintiffs' assertion that none of those offered was sufficient or satisfactory. The trial court failed to find on this issue, but found, as a conclusion of law, that the defendants did not waive presentment. This was error. A finding should have been made in accordance with the undisputed evidence that, with full knowledge of the default and failure of presentation, the defendants promised to substitute another good and sufficient note for the one in default, and this finding should have been followed by the conclusion of law that the defendants thereby waived demand and notice.

The note in suit was given as a conditional payment of the defendants' primary obligation, the condition being that if the makers of the note should fail to keep up their payments, the defendants should have the option of substituting another note or notes "conforming to the same requirements" in order "to enable them to protect themselves against the defaults." These substituted notes should then constitute payment of the original obligation provided they conformed to the requirements of the other note. Thus, by the terms of their contract, the indorsers were permitted to meet their obligation as indorsers either by payment in cash or by means of other notes conforming to the requirements of the one in default.

A promise to pay in cash with full knowledge of the default and failure of presentation would have been a waiver of demand and notice. Fashion Hat Frame Co. v. Ringel, 81 Cal.App. 556, 254 P. 275; 19 Cal.Jur. 915; 3 R.C.L. 1240. When the indorser has the option of substituting other collateral or paying in cash, his promise to substitute takes on the same aspects as a promise to pay in cash, and the same result should follow, i. e., a waiver of demand and notice.

[2] It should be said that this was a ten-year note, payable in monthly installments with the option to the holder to declare the whole principal sum due if any installment should be unpaid within thirty days after it became due. The record is not clear as to when the plaintiffs claimed default, but it is clear that they approached the defendants both before and after the time when demand should have been made upon the makers, and that the promises of the defendants to take care of the obligation were made both before and after the time for presentment. The promises and assurances of the defendants thus led the plaintiffs into a sense of security and led them to believe that the indorsers would not insist upon presentment. They are thus estopped from denying in this action that they waived demand and notice. Section 1962, subd. 3, Code Civ.Proc.

The findings of fact are amended by adding thereto the following: "That, with full knowledge of the default of the makers and of the failure of presentment, the indorsers upon said note, promised to substitute another good and sufficient note for the said note, but failed and refused to do so; and that said indorsers led the plaintiffs to believe that presentment would be unnecessary and would be waived by them." The conclusions of law are amended by striking out all thereof and by inserting in lieu thereof the following: "That defendants Castle Building Co., R. C. Lee and G. J. Gensler all waived presentment of said promissory note to defendants Charles Thorpe and Leona Emily Thorpe. That plaintiffs are entitled to judgment against all defendants in the sum of three thousand five hundred and thirty-five and 93/100 ($3,535.93) dollars, together with interest at one per cent per month from April 4, 1932, and costs of suit. Let judgment be entered accordingly."

The judgment is reversed with directions to enter judgment for plaintiffs as herein stated.

We concur: STURTEVANT, J.; SPENCE, J.

19 Cal.App.2d 425

GOODSPEED et al. v. GREAT WESTERN POWER CO. OF CALIFORNIA et al.

(twenty-two cases).

Civ. 5618, 5690–5710.

District Court of Appeal, Third District, California.

March 5, 1937.

Rehearing Denied April 3, 1937.

Hearing Denied by Supreme Court May 3, 1937.

1. Parties 🔑11

Consolidated action by numerous plaintiffs against two associated corporations for relief against one corporation's alleged fraud in selling stock in the other corporation *held* not a "class case" under statute authorizing one member of a class to sue for benefit of all, where rights and merits of each case rested on different facts and a recovery in one case would not be an adjudication in the other (Civ.Code, § 1711; Code Civ.Proc. § 382).

[Ed. Note.—For other definitions of "Class Suit," see Words & Phrases.]

2. Parties 🔑11

A true "class" within terms of statute authorizing one member of a class to sue for benefit of all is found where one stockholder sues for benefit of all other stockholders or one member of a church for benefit of other members (Civ.Code, § 1711; Code Civ. Proc. § 382).

[Ed. Note.—For other definitions of "Class," see Words & Phrases.]

3. Judges 🔑42

"Interest" in law, as disqualifying a judge, means a definite, material, financial stake in the direct outcome of the particular case, not an interest in a similar suit or in an issue of law or fact as such (Code Civ. Proc. § 170, subds. 2, 5, as amended by St. 1933, p. 1828).

[Ed. Note.—For other definitions of "Interest," see Words & Phrases.]

4. Judges ⚿49(1)

In action for corporation's alleged fraud in selling stock in associated corporation, that judge owned stock in banks that owned similar stock; and had previously negotiated for employment in a similar action and acquired data on the subject matter, but was not retained, and forgetfully failed to describe his previous knowledge in detail when questioned about his qualifications, and signed findings of fact and law that were later set aside, *held* not to disqualify judge for bias or prejudice under statute so as to require grant of motion to change place of trial (Code Civ.Proc. § 170, subds. 2, 5, as amended by St.1933, p. 1828; § 397, subd. 4, as amended by St.1933, p. 1843; § 473, as amended by St.1933, p. 1851).

5. Judges ⚿49(1)

No knowledge, experience, or opinion on the part of a judge can give rise to bias or prejudice so as to disqualify him from hearing case unless it results in hostility or ill will (Code Civ.Proc. § 170, subds. 2, 5, as amended by St.1933, p. 1828).

◆

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Companion actions by Isabelle A. Goodspeed and others against the Great Western Power Company of California and the Western Canal Company. From orders denying motions for change of place of trial, defendants appeal.

Affirmed.

Thos. J. Straub and W. R. Dunn, both of San Francisco, George F. Jones, of Oroville, Jerome D. Peters, of Chico, and W. H. Spaulding, of San Francisco, for appellants.

Ware & Ware, of Chico, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Upon the ground that there was no judge in the county of Butte qualified to act in the above-entitled actions, defendants moved for a change of place of trial. After hearing, the motion was denied and these appeals from those orders were then taken. The specific grounds of objection will be hereinafter mentioned.

Early in this century the predecessors of Great Western Power Company were engaged in the construction of Lake Almanor and in acquiring water rights in connection therewith. The Feather River Canal Company was organized as a public utility in 1908. This company held certain appropriative water rights and a franchise for the construction of canals across the highways and public roads of the county. Later the Feather River Canal Company conveyed all its rights to the Feather River Water Company. In 1915 these two companies conveyed all their canal property to Western Canal Company and all their appropriative rights to the Great Western Power Company. These companies then became engaged in the selling of water to the land holders within its sphere of service, and, under the claim that the Canal Company was a mutual water company, required its patrons to subscribe for shares of stock in the Canal Company. This company continued to operate and distribute water to its subscribers for several years, although the question of its character, whether a mutual or public service company, was at times disputed.

Finally a proceeding was instituted before the Railroad Commission to have the status of the Canal Company determined, and in 1930 the commission held the Canal Company to be a public service corporation, and in Western Canal Company v. Railroad Commission, 216 Cal. 639, 15 P. (2d) 853, where that determination was upheld, will be found a detailed recital of the history of the Canal Company and its various allied interests.

In 1932 the present actions were commenced. The complaint in each case charged that a fraud had been committed, against the persons interested in the lands under the canals, by representations made by defendants herein as to the mutuality of the Canal Company. In 1933 Harry Deirup took the office of the judge of the above-entitled court, and shortly thereafter motions were made in the Goodspeed and Ward Cases to change the place of trial from Butte county to the city and county of San Francisco. These motions were denied by the judge of the court and affirmed by this court. Ward et al. v. Great Western Power Co., etc. (Goodspeed et al. v. Great Western Power Co., etc.), 135 Cal.App 687, 27 P.(2d) 937. Subsequently he overruled demurrers and motions to strike. In January, 1935, the Goodspeed Case was brought to trial. Just prior to the trial, appellants, in a conversation with the judge of the court, suggested to him that he might be disqualified, but, no such disqualification appearing to the judge, he refused to withdraw. Nothing further was done, and the case proceeded to trial and continued for seven weeks, and at the conclusion of the taking of testimony the case was argued and submitted upon briefs, after which the judge of the court decided in favor of plaintiffs. Findings were prepared and submitted but were not signed, pending the trial of certain other cases which began October 1, 1931.

It was during the trial of one of these subsequent cases (Cavassa v. Great Western Power Co. et al.) that appellants assert they came into possession, for the first time, of knowledge that indicated to them that the judge of the court was disqualified, and they thereupon formally challenged the qualification of the judge of the court, and filed notice of motion for change of place of trial. The judicial council assigned Judge Moncur of the county of Plumas to try the motion, and evidence was taken, both oral and documentary, and, after submissions, the motions were, on November 18, 1935, denied. The next day the judge of the court signed findings of fact and conclusions of law, and a judgment for plaintiffs in the Goodspeed Case was duly entered, but later these findings and judgment were, under the provisions of section 473 of the Code of Civil Procedure, as amended by St. 1933, p. 1851, set aside.

Upon the filing of formal objections as to the qualifications of the judge of the court, Judge Moncur was again assigned by the judicial council to pass upon the same, and, after hearing, the judge of the court was found to be qualified and the motions were denied.

These appeals are from the orders in the various consolidated cases denying the motion for change of place of trial. Appellants claim that under subdivision 4 of section 397 of the Code of Civil Procedure, as amended by St.1933, p. 1843, the court must change the place of trial when from any cause there is no judge of that court qualified to act.

It is alleged by appellants that among the various causes disqualifying the judge of the court are:

(1) That he is a stockholder in two banks, which it is claimed are included within the class of persons claimed to have been defrauded, and, as such, had and has an interest in the outcome of the actions, and an interest in points of law to be determined.

(2) That he had and has fixed opinions upon the facts and the legal effect of the facts, which was derived from his own experience and not from evidence.

(3) That he, through his law partner, was legally retained to represent some of the plaintiffs in actions for rescission for fraud upon the same asserted grounds as relied upon in the present actions.

(4) That he failed to make a statement of material facts when questioned by counsel for appellants as to his qualifications.

(5) And that he stood in too close relation to counsel for plaintiffs, as indicated by certain acts of court and counsel and by signing findings of fact and conclusions of law without notice to appellants, after appellants had announced that his qualifications would be challenged.

Taking up these various specifications in the order presented, we will first examine the charge that the judge of the court was interested in the outcome of the action and of the points of law involved. This allegation is based upon the provisions of section 170 of the Code of Civil Procedure, as amended by St.1933, p. 1828. That section provides: "No * * * judge * * * shall sit or act as such in any action or proceeding; * * * 2. In which he is interested as a holder or owner of any capital stock of a corporation; * * * 5. When it is made to appear probable that, by reason of bias or prejudice of such * * * judge * * * a fair and impartial trial cannot be had before him."

It appears that for many years Judge Deirup was, as a practicing attorney, counsel for the First National Trust & Savings Bank of Chico and Peoples Savings & Commercial Bank. In each of these banks he owned stock, which ownership continued after his election and ascension to the bench in January, 1933. In July and August, 1933, these banks went into liquidation, and Judge Deirup was assessed and paid his pro rata of the stock assessments.

The First National Bank at one time loaned money to one Peterson. In 1926, the obligation not having been paid, the bank took over the Peterson lands and in connection with it eighty-eight shares of water stock in Western Canal Company. In October, 1933, this land and stock was sold in liquidation of the bank's assets. As to the Peoples Bank a loan was made in 1928 to Raysford and Mayne. In 1930 the land and a contract to purchase water stock were taken, and in 1934 the lands were sold in liquidation of the bank's assets.

It is the claim of appellants that Judge Deirup, by reason of the ownership of stock in the two banks, is in the class of those injured by the alleged false representations made by the canal company, and was disqualified to preside in the present actions.

The question arises immediately as to what constitutes a disqualifying interest under the law. In 33 Corpus Juris, 992, the rule is laid down that "the interest which disqualifies a judge is a direct pecuniary, or direct property interest or one which involves some individual right or privileged in the subject matter of the litigation whereby a liability or pecuniary gain must occur in the event of the suit." In 14 California Jurisprudence, 813, it is asserted an interest to disqualify must be "a pecuniary one, either direct or indirect, or it must be a personal or property interest—an interest in the event of suit—in the judgment which may be rendered. Where the interest is not affirmatively made out or shown to be a direct or proximate one with regard to the subject matter of pending action, no disqualification exists."

[1] In connection with the foregoing definitions it is to be recalled that no actions have ever been brought by either of the banks in which Judge Deirup owns stock, and it is obvious that, although in this action many cases were consolidated with the case on trial, they are not what is understood as class cases as that term is used in section 1711 of the Civil Code, where a right of action is vested in a particular class of persons. That section reads: "One who practices a deceit with intent to defraud the public, or a particular class of persons, is deemed to have intended to defraud every individual in that class, who is actually misled by the deceit." Section 382 of the Code of Civil Procedure defines class as "* * * when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

In the instant cases the rights and merit of each rest upon different facts, and recovery in one case is not an adjudication in any other. Certain water users must overcome a burden as to notice and limitations; others bought and paid for stock direct from the company, some purchased stock and land from third persons, some acquired stock and rights of possession by succession, and still others might maintain a cause of action by reason of having lent money on land and its fictitious stock.

[2] A true class is found where one stockholder sues in the same action for the benefit of all or where one member of a church sues for the benefit or relief of other members. 20 Cal.Jur. 484.

Perhaps these several causes of action could have been joined under the authority of section 378 of the Code of Civil Procedure, but, if joined, they would still have been separate actions, separately stated and adjudicated upon their separate merits, and judgment in one would by no means have been a judgment in any other.

[3] Interest in law, as applied to a judge, had and must have a highly special and definite meaning. It means as interest direct, proximate, inherent in the instant event. It does not mean an interest in a similar suit against the same or other defendants; it does not mean an interest in a point of law as such, or in an issue of fact as such, or in any general or special phase of the case. It means a definite, material, financial stake in the direct outcome of the particular case.

[4] The case of Lindsay-Strathmore Irrigation District v. Superior Court, 182 Cal. 315, 326, 187 P. 1056, has been cited by both sides. In that case plaintiff sought to enjoin defendant from pumping water which it was claimed would deplete subterranean waters under the lands of the Tulare Irrigation District and many others, including a lot individually owned by Judge Wallace. It was a true class case in which there were many parties involved, and was for the direct benefit of members of the whole class, and in which Judge Wallace might have been named or interviewed or become a party. Under the facts of that case Judge Wallace was held to have a direct property interest in the

outcome and therefore held to be disqualified. In the instant case neither Judge Deirup nor the banks in which he held stock could intervene or would directly profit by any judgment in the Goodspeed Case or any of the other consolidated cases. Merely because some one else had a similar, but wholly separate cause of action, arising in part from the same facts as appeared in the Goodspeed Case, but differing in material aspects, it does not follow that such party was interested in the case at bar, nor extends the interest to all persons.

Defendants have cited the case of Hall v. Superior Court, 198 Cal. 373, 245 P. 814, but in that case the irrigation district was a party and its rights and liabilities were directly involved. The judge in that case was a landowner in the district, and, as such, directly and financially concerned. That case holds in effect that the landowner in a litigant irrigation district bears a relationship to the district analogous to that of a stockholder of a corporation, and, where the district is an actual party, he therefore has an actual disqualifying interest.

The situation here is somewhat analogous to that in the Central Pacific Ry. Co. v. Superior Court, 211 Cal. 706, 719, 296 P. 883. There, the judge of the court was a depositor in the Bank of America, the holder of a mortgage interest in the land to be condemned, and also held stock of the Transamerica Corporation, which corporation owned practically all of the stock of the Bank of America. In an attempt to disqualify the judge of that court from presiding in the matter, the court held that a bare relationship of depositor was not sufficient to disqualify, nor was the fact that the trial judge was a stockholder in a holding corporation sufficient to disqualify him under section 170 of the Code of Civil Procedure, as amended, inasmuch as the corporation was not and could not be made a party to the action and his interest did not appear to be an immediate and direct interest in the outcome of the litigation.

In Lassen Irrigation Company v. Superior Court, 151 Cal. 357, 90 P. 709, an action was brought for damages against the irrigation company for failure to deliver water. One of the decisive issues of fact was whether or not the company had the water and could deliver it. In the answer of the company it was alleged that the plaintiff had only a right to share in the available water, and that a large number of other users, including the judge of that court, had paramount water rights. A challenge was interposed to the qualifications of the judge on the ground of interest, and the court there said:

> "The owners of these paramount rights were not necessary parties to the action. * * *
>
> "It was not an action against him, and no judgment which he could render therein would in the least determine, or affect, his own property rights or interests. The only judgment that could properly be given in the action would be a judgment in favor of the plaintiff for such damages as the court should find he had suffered by the deprivation of the water, or a judgment in favor of the defendant that the plaintiff take nothing. * * *
>
> "The interest in an action which disqualifies a judge who possesses it from trying the cause is a property or personal interest, an interest in the event of the suit, in the judgment which may be rendered therein." Lassen Irrigation Co. v. Superior Court, 151 Cal. 357, 90 P. 709, 710.

In the case of Central Savings Bank of Oakland v. Lake, 201 Cal. 438, 257 P. 521, 524, the trial judge owned stock in a title insurance company which had insured the title of many beneficiaries under the terms of various deeds of trust in the city of Oakland in which appellant's land was situated. Plaintiff was attacking the validity of a deed of trust, and, if successful, then all other similar deeds would fail, and the title insurance company, in which the judge of that court owned stock, would be called upon to respond very heavily in damages. The court there held, however, that the insurance company was not a party to the action nor was it shown that the company had issued a policy of insurance upon the particular property in controversy. The court in ruling against the motion to disqualify the judge held, "The interest so alleged is so indirect, incidental, remote, and contingent as not to bear the slightest resemblance to the direct, measurable, and pecuniary interest in the subject-matter of the action required to be shown in order to disqualify the judge."

We cannot find, under the facts of this particular specification of disqualification, such an interest as in contemplation of law would operate as a disqualification.

It is next asserted the judge of the court had fixed opinions upon the facts and the legal effect thereof, which was derived from his own experience and not from evidence.

One of the important points in the case turns upon the question as to whether or not plaintiffs are barred by the statutes of limitation. An action for fraud, under subdivision 4 of section 338 of the Code of Civil Procedure, is barred after three years unless plaintiff proves good cause for failure to discover the facts within that period. It is charged by appellant that the judge of the court has fixed opinions upon this matter. This opinion is, they claim, the result of the investigations made by the judge while a practicing attorney, and not the result of evidence adduced during the trial. It is stated in an affidavit filed by Mr. Dunn, one of the attorneys for the defendant, that after the conclusion of the trial in the Goodspeed Case and while discussing the proposed findings, that the judge in his chambers then stated that, under the circumstances where the landowner was being financially benefited by the existing arrangement, no reasonable person, as owner of stock in the canal company, would have commenced an action for the recovery of moneys paid by them for such stock. The judge of the court, in his reply affidavit, stated that such was merely an expression of legal opinion based upon the facts of that case and made after decision, and had no general reference to any other case or state of facts.

It is disclosed by the evidence that in 1921, the judge of the court, then a young practicing attorney associated with Mr. Lon Bond, now deceased, in an effort to obtain business, asked one who is now a plaintiff in an action similar to the one now before us, to get water users to sign a contract of employment, whereby for a cash consideration, and a further sum in the event of a successful termination of litigation, the landowner would employ the firm of Bond & Deirup to undertake an action to have the Western Canal Company declared a public utility. No signers were obtained and the matter was dropped. About a year later Mr. Jerome D. Peters, also an attorney in Chico, and one of the present attorneys for defendants here, was negotiating with Western Canal Company to have the minimum charge removed from their contract, and stated to Mr. Bond that he might bring an action to test the mutuality of the canal company, and asked Mr. Bond in case such action were brought if there was any reason why he (Mr. Bond) could not be associated in the case, to which Mr. Bond replied that he would be willing to be associated if such actions were brought. No action of that nature was ever brought, however. It is admitted by the judge of the court that, while an attorney and during the year 1921, he acquired some fragmentary data as to the status of the canal company. Out of the 280 exhibits introduced in these cases the judge had made some examination of seven, none of which were disputed or questioned, and which he avers had not the slightest effect upon his rulings in these cases. These exhibits examined by the judge of the court consisted of the articles of incorporation of the Western Canal Company; the conveyance from the Feather River Canal Company; and the conveyance by the Feather River Canal Company and the Mutual Water Company of their appropriative rights to the power company. He had also read the ordinance granting the franchise to the canal company. He also talked to some of the farmers in the vicinity of Chico, and a former employee of the canal company, while working in a local chamber of commerce drive.

Appellants set forth in considerable detail all the knowledge and sources of knowledge open to the judge of the court prior to the trial of these cases, but such information appears to us to have been only such knowledge as any alert and wide awake citizen of that community would have acquired. More accurate and detailed information than the judge of the court had picked up in his reading was to be gleaned of the litigation involving the canal company and its affiliates, in the printed volumes of the proceedings of our courts, with which every judge and lawyer was presumed to have become familiar.

Considerable emphasis is laid upon the fact that the judge of the court did not immediately recall all of the details of what he did some fifteen years before as an attorney and a citizen of his community, but this does not impress us as unusual. After the various matters were specifically called to his attention and he had an opportunity to refresh his recollection, he very fully and frankly disclosed his connection with the matters in question. It seems more strange to us that Mr. Spaulding, one of the attorneys for defendants, was not reminded of any possible disqualification of the judge of the court until after a decision adverse to the defendants had been entered, for during almost all of the existence of the canal company from 1921 and following he was the president of the canal company, and had actually received, and made notations upon, a copy of the proposed contract of employment prepared by Mr. Deirup. It is claimed, however, that defendants knew nothing of this relationship of Mr. Deirup, the attorney, with the proposed litigation involving the canal company until a copy of a letter was found in a file belonging to Mr. Peters, also an attorney for defendants. This letter was one of several which had been mailed by Mr. Peters to water users, whom he was attempting to interest in contesting certain clauses in the water contract, wherein he stated that Attorneys Bond & Deirup were associated with him in the matter. These letters had been in Mr. Peters' possession at all times since 1923, and were acknowledged by Mr. Peters as having been in his possession all of that time. Mr. Peters, however, in an affidavit, fairly and frankly states that as an attorney he negotiated with the Western Canal Company for the elimination of certain minimum charge provisions in their water contracts, and that during these negotiations he called upon Mr. Bond and asked Mr. Bond if, in the event of the commencement of the action, the firm of Bond & Deirup would become associated as attorneys with him. It is stated that no such action was ever commenced, and at the meetings of the various clients neither Bond nor Deirup attended or otherwise advised with affiant or his clients or took any part in the negotiations, and that he did not communicate any further facts to Mr. Bond nor did he at any time consult with or meet in said matter, Mr. Deirup. Mr. Peters also stated that he never paid any money whatsoever out of his fees to Bond or Deirup on account of said transaction, and that, when he inquired of Mr. Bond as to whether or not Mr. Bond considered his firm was entitled to any compensation, Mr. Bond declared that they were not.

Counsel for both sides have discussed this phase of the case very fully, and we might go into these issues further in great detail, but such a discussion would extend this opinion beyond reasonable limits. We are convinced, however, that the knowledge possessed by the judge of the court was only that of an informed member of the community, and also that such facts were but a very small part of the large mass of the evidence introduced during the trial, and did not weigh with the judge of the court except as and when they were offered in evidence relative to the case as a whole.

[5] There is no evidence except the bare allegation contained in certain affidavits made by some of counsel for defendants that there existed bias or prejudice in the mind of the judge of the court. No knowledge, experience, or opinion can give rise to bias or prejudice unless it results in hostility or ill will, and here no such charge is made or even suggested. Lassen Irrigation Co. v. Superior Court, 151 Cal. 357, 90 P. 709.

As further evidence of prejudice appellants cite the signing of the findings in the Goodspeed Case which were set aside by Judge Moncur. It was during the trial of the Cavassa Case that council for appellants stated they would challenge the qualifications of the judge of the court, and on October 17, 1935, a motion for change of trial upon the ground of disqualification was filed. Judge Moncur was assigned to try that issue and the matter was heard on October 24, 1935, and argued October 29, 1935. On November 16th the motion was denied.

Turning now to the Goodspeed Case, wherein it was alleged the judge of the court indicated his bias or prejudice by signing the findings in question, we find the complaint was filed December 12, 1932 The trial commenced January 22, 1935, and consumed 26 days. On June 5, 1935, the case was reopened by defendant for further evidence, and on September 3, 1935, a memorandum decision in favor of plaintiff was filed. On October 1, 1935, the findings and judgment were submitted to the court and served on opposing counsel. On October 16, 1935, a challenge was interposed in the Cavassa Case to the qualifications of the judge. On November 18th the decision of Judge Moncur held the judge of the court was not disqualified, and on November 19, 1935, findings in the Goodspeed Case were signed and filed.

The record thus discloses that for approximately one and one-half months the findings in the Goodspeed Case had been under submission and no request had been made for a postponement of the signing.

We cannot conclude from the foregoing, either standing alone or in connection with the entire course of conduct of the judge of the court or by his decision or by the record, that the signing of the findings the day after the judge of the court was held not disqualified, indicate any bias or prejudice.

As to the failure of the judge to make a statement of material facts when questioned by counsel for appellants as to his qualifications, but little need be said. This conversation took place prior to the trial of any of these cases. The judge of the court then declared that about fifteen years before he had made some preliminary study of the canal company, but the details were vague and no employment resulted. He then said if there was any question as to his disqualification he would be glad to have the matter determined. The Goodspeed Case was called and occupied several weeks of trial. Some months after the question of disqualification had been thus informally suggested, and during the trial of another case, the judge of the court was then formally challenged.

So also as to the charge of a too close relationship between the attorneys for plaintiff and the judge of the court, we find no merit. Nothing is contained in the affidavits pertaining to that particular charge that merits any further comment or consideration. The briefs submitted together with the affidavits in support of the various charges have been examined and carefully considered. It would be impossible within reasonable limits of an opinion to set forth all of the various charges and accusations made, or to analyze the facts out of which they arose, but we are convinced, as was the judge to whom these matters were first referred, that the judge of the court was not disqualified for these or any reason whatsoever.

The motion to change the place of trial was properly denied, and the orders appealed from are affirmed.

I concur: THOMPSON, J.

PLUMMER, J., deeming himself disqualified, did not participate in this decision.

---

19 Cal.App.2d 583

MASSACHUSETTS BONDING & INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 10395.

District Court of Appeal, First District, Division 2, California.
March 17, 1937.

1. Workmen's compensation ⚷253

Though employment of hostesses in night club to encourage purchase of alcoholic beverages was prohibited by statute, persons so employed *held* entitled to compensation for injuries under Workmen's Compensation Act defining "employee" as meaning every person in service of employer under appointment or contract of hire including minors "whether lawfully or unlawfully employed," the quoted words not being limited to minors (Pen.Code, § 303, as added by St.1935, p. 1576; St.1917, p. 835, § 8(a); p. 877, § 69(a).

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

2. Workmen's compensation ⚷253

Provision of Workmen's Compensation Act defining employee as including persons unlawfully employed covers cases where contract of employment is unlawful merely because of some provision of law dealing with such contracts of employment, and not cases where employee is employed to perform acts violating penal statute (St.1917, p. 835, § 8(a).

3. Insurance ⚷435

Construction of Workmen's Compensation Act as covering persons unlawfully employed does not render insurance contract covering all persons entitled to compensation void as against public policy, it being the declared policy of the act to require employer to secure payment of compensation to all persons entitled thereto (St.1917, p. 835, § 8(a); St.1933, p. 975, § 29; St.1929, p. 1167, § 30; p. 1169, § 31).

4. Insurance ⚷435

Workmen's compensation insurance contract covering employees unlawfully employed was not invalidated as to persons employed contrary to statute by failure of employer to volunteer information to insurer that he had employed or might employ persons contrary to such statute (Pen. Code, § 303, as added by St.1935, p. 1576; St.1933, p. 975, § 29; St.1929, p. 1167, § 30; p. 1169, § 31).

Proceedings by Dorothy Cook, also known as Cooky Rice, and others, claimants, for compensation for injuries under the Workmen's Compensation Act opposed by the Massachusetts Bonding & Insurance Company, insurer. Compensation was awarded by the Industrial Accident Commission, and the insurer petitions for an annulment of the awards.

Awards affirmed.

W. N. Mullen, of San Francisco, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

SPENCE, Justice.

Petitioner seeks the annulment of several awards made by the respondent commission in favor of the remaining respondents.

[1] The several applicants before the commission had suffered injuries in a fire in a night club known as the Club Shamrock. Said applicants were employed either as entertainers or in other capacities at said night club. Petitioner claimed that said applicants were engaged in illegal employments. The commission stated in its findings with respect to the case of respondent Dorothy Cook that "no finding is made upon the issue of illegal employment for the reason that it appears that the employee would not be excluded thereby from coverage, even though such employment had been illegal." In each of the other cases, the commission made a finding that "the evidence is insufficient to establish that applicant's employment was illegal."

The claim of illegality of employment now appears to be directed solely against those employed as entertainers. It is based upon the fact that the evidence showed that it was the duty of said entertainers, while not engaged in singing or dancing in the floor show, to act as "hostesses" and to encourage the patrons to purchase alcoholic beverages. In the case of Dorothy Cook, the evidence clearly showed that she was so employed on a commission basis, receiving a percentage of the amount spent for beverages by the patrons for whom she acted as "hostess." In the cases of the other entertainers, the evidence was not so clear, but owing to the conclusion that we have reached, we deem it unnecessary to discuss such testimony.

Section 303 of the Penal Code (as added by St.1935, p. 1576) provides that it shall be unlawful *"to employ* upon the premises where the alcoholic beverages are sold any person for the purpose of procuring or encouraging the purchase or sale of such beverages, *or to pay* any person a percentage or commission on the sale of such beverages for procuring or encouraging such purchase or sale." (Italics ours.) It will be noted that said section is directed at the acts of the employer and not at the acts of the employee. No statute has been called to our attention which expressly makes it unlawful for the employee to accept such employment or to accept such payment.

In discussing the question of illegality of employment, petitioner contends (1) that the uncontradicted evidence showed that said entertainers were illegally employed; (2) that if said entertainers were illegally employed they were not entitled to the benefits provided in the Workmen's Compensation Act (St.1917, p. 831, as amended); (3) that an insurance policy purporting to cover persons so illegally employed would be void as against public policy; and (4) that the failure of the employer to disclose the nature of the employment to the insurance carrier "prevented a true meeting of minds and the existence of a valid contract."

We will assume, solely for the purposes of this discussion, that the uncontradicted evidence showed that said entertainers were illegally employed in the sense that their employment constituted a violation of section 303 of the Penal Code on the part of their employer. Despite this assumption, we are nevertheless of the opinion that said employees were entitled to the benefits provided in the act.

Prior to 1917, there was no provision of our Workmen's Compensation Act relating to this subject. A review of the authorities in the several states shows that there had been much diversity of opinion as to the effect of so-called illegal or unlawful employment. The question had arisen in such cases as those involving contracts for the employment of minors made in violation of law, contracts of employment requiring work on Sunday in violation of law, and contracts of employment made in violation of the provisions of the civil service laws. Section 8 (a) of our act was amended in 1917 to read: "The term 'employee' as used in sections six to thirty-one, inclusive, of this act shall be construed to mean: every person in the service of an employer as defined by section seven hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including * * * minors, whether lawfully or unlawfully employed." Stats.1917, c. 586, p. 835. This amendment was apparently designed to set at rest such questions as the one before us, but petitioner insists that the clause "whether lawfully or unlawfully employed," as found in said amendment, must be interpreted as qualifying only the phrase "and including minors," and not as qualifying the other phrases preceding it. The most that can be said is that some doubt may exist as to the intention of the Legislature as expressed in said amendment and therefore this court, in interpreting said amendment, must be guided by section 69 (a) of the act, which provides: "Whenever this act, or any part or section thereof, is interpreted by a court, it shall be liberally construed by such court with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment." We therefore conclude that the phrase under discussion qualified all that preceded it in said section. This view that the illegality of employment, under the facts before us, did not deprive the employee of the benefits of the act finds further support in a recent work in which it is said: "It is not a defense to liability, or a bar to the jurisdiction of the commission, to show that the injured person was a minor, illegally employed in violation of the Child Labor Law, or that the civil service, or other law, was violated." Campbell on Workmen's Compensation, § 492.

[2] Petitioner argues that such interpretation of the amendment necessarily leads to the conclusion that if the employer hired a person "to act as gunman and rob the patrons or dynamite the building of a competitor," such employee would be entitled to compensation in the event of injury. We cannot agree that this conclusion necessarily follows. As we view the situation, the amendment is intended to cover those cases in which the contract of employment is unlawful merely because of some provision of law dealing with such contracts of employment and is not intended to cover cases where the contract of employment is unlawful for the reason that it requires the employee to perform acts constituting violations on his part of the express provisions of our penal statutes. The supposititious cases mentioned by petitioner are in line with the cases cited by petitioners in which it was held that bartenders, employed and subsequently injured during the prohibition era, were not entitled to compensation. Snyder v. Morgan, 154 A. 525, 9 N.J.Misc. 293; Herbold v. Neff, 200 App.Div. 244, 193 N.Y.S. 244; Swihura v. Horowitz, 215 App.Div. 740, 212 N.Y.S. 926. But in each of said cases the contract of employment required the employee to do acts constituting violations on his part of the express provisions of the penal statutes while here, section 303 of the Penal Code merely deals with the contract of employment and, as pointed out above, it is directed solely at the employer and not at the employee. We therefore conclude that our Workmen's Compensation Act imposed upon the employer the obligation to pay to said employees the benefits provided in said act even though said employer violated said section 303 in employing said employees.

[3, 4] We are further of the opinion that petitioner's above-mentioned contentions with respect to the invalidity of the insurance contract are likewise without merit. The petitioner agreed with the employer "to pay promptly to any person entitled thereto under the Workmen's Compensation Law * * * the entire amount of any sum due * * * to any such person because of the obligation for compensation * * * imposed upon * * * this employer under * * * the Workmen's Compensation Law." It further agreed that the "Workmen's Compensation Law * * * shall be and remain a part of this contract as fully and completely as if written herein." Under the act, the employer was under obligation to pay compensation benefits to employees "whether lawfully or unlawfully employed" and there was nothing in the insurance contract which purported to limit the coverage to those lawfully employed. It appears to be the declared policy of the act to require the employer to secure the payment of compensation to all persons entitled thereto (section 29 [as amended by St.1933, p. 975], section 30 [as amended by St.1929, p. 1167], and section 31 [as amended by St.1929, p. 1169]), and it cannot be said that an insurance contract covering all persons entitled to compensation under the act is

void as against public policy where a contrary policy is expressed in the act itself. As the insurance contract by its terms covered all employees "whether lawfully or unlawfully employed" and as said contract was not against public policy, it follows that the mere failure of the employer to volunteer the information to the insurance carrier that he had employed or might subsequently employ persons contrary to section 303 of the Penal Code would not be sufficient to invalidate the contract.

The petitioner makes the further contention that the insurance contract was invalid because the assured represented himself to be the sole owner of the business, whereas petitioner claims that the evidence shows that the assured was but one member of a copartnership owning said business. It is sufficient to state with respect to this contention that there was ample evidence to support the commission's findings to the effect that the assured was the sole owner of said business.

The awards are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

---

20 Cal.App.2d 7

STRAUSS v. BUCKLEY et al.

Civ. 10345.

District Court of Appeal, First District, Division 2, California.

March 25, 1937.

Rehearing Denied April 24, 1937.

1. Automobiles ⇨249

Punitive damages are not recoverable in action for injuries sustained in collision with automobile driven by drunken defendant, since drunkenness is an offense in itself for which punishment may be imposed in ordinary course of law.

2. Automobiles ⇨243(3)

In action for injuries sustained in collision with automobile driven by drunken defendant, evidence of drunkenness may be offered to show defendant's negligence, but it may not be used to enhance award of damages beyond that which will fairly compensate plaintiff for injuries suffered.

3. New trial ⇨76(4)

$5,000 to traveling salesman selling women's apparel, who was injured in collision with automobile driven by drunken defendant, *held* so excessive as to show passion and prejudice, where salesman's hospital, nursing, and doctors' bills totaled $330, his injuries consisted of scalp wound, bruises on nose and arm, and sprained ankle, and where salesman, within 19 days after accident, resumed calling on customers, drove his automobile as soon as it came from repair shop, and increased his business about 50 per cent. over previous year.

4. Witnesses ⇨330(1)

Where loss of income as result of injuries sustained in automobile collision was principal item of damage claimed by salesman who testified that he had never been sick at any other time, questions as to whether salesman had not had influenza recently and collected therefor from health association *held* proper cross-examination directed to discredit salesman's testimony and to discredit him as a witness, since such matters could have been contradicted by defendants with difficulty, and they were entitled to liberality in cross-examination.

◆

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Action by Julien Strauss against Stafford Buckley, and another. From a judgment for plaintiff, defendants appeal.

Reversed.

Redman, Alexander & Bacon, of San Francisco, Harold Huovinen, of Oakland, and Herbert Chamberlin, of San Francisco, for appellants.

H. Raymond Hall and William P. Schwartz, both of Oakland, for respondent.

NOURSE, Presiding Justice.

On a trial before a jury in an action for personal injuries, plaintiff had a verdict upon which a judgment followed for $5,000. At about 6:30 a. m. of December 17, 1935, plaintiff was driving an automobile northerly on San Pablo avenue in Berkeley, and defendant Stafford Buckley was driving southerly along the same street. As plaintiff passed the intersection of Oregon street, he saw defendants' car swerve suddenly to the left and then turn sharply to the right. Plaintiff turned to his left, and the cars came in collision on the westerly side of the highway. The point of impact of each car was the right front portion, approximately at or above the right front wheel. The highway was a wide boulevard with room for six lanes of traffic. The defendant Stafford Buckley was intoxicated at the time, and his negligence is not disputed. The other defendant is held because of her ownership of or interest in the car.

[1-3] The judgment for $5,000 is manifestly excessive, and can be accounted for only through the prejudice and passion of the jury aroused by the frequent references to the drunken condition of the driver or through the errors in the cross-examination of the plaintiff. In either case the judgment must be reversed. The damages recoverable in a case of this kind are to be compensatory only; punitive damages are not recoverable because of the drunkenness of the defendant. That is an offense in itself for which punishment may be imposed in the ordinary course of law. Evidence of the drunkenness may be offered, of course, to show the negligence of the driver, but it may not be used to enhance the award of damages beyond that which will fairly compensate the plaintiff for the injuries suffered.

The collision occurred on December 17, 1935. The plaintiff was taken to a hospital where he remained eight days. His hospital bill was $135; his bill for nursing was $60; that for two doctors was $135. His injuries consisted of a scalp wound, bruises on the nose and arm, and a sprained ankle. He suffered no broken bones and no permanent injuries. The scar on his scalp had healed at the time of the trial in June, 1936. Plaintiff was a traveling salesman selling women's apparel. Within nineteen days after the accident he resumed calling on his customers, drove his automobile as soon as it came from the repair shop, and increased his business about 50 per cent. over the previous year. On direct examination he testified that his average earnings during this part of the season were from $25 to $100 a day, but that from the date of the accident to January 20, 1936, he was unable to earn more than $25 for the entire period, that the winter and spring of 1936 was an exceptionally good season in his line of business, but that he was unable to profit by it because of his injuries. He also testified that, except through the accident, he had never been sick and had not had any trouble at any other time. On cross-examination he admitted that he had not made any income tax return, state or federal, for the year 1935, and no federal return for the year 1934.

[4] The loss of income as a result of the injuries was one of the principal items of damage claimed, and the defendants sought to cross-examine plaintiff on this issue to disprove his testimony that he had not suffered from other injury or illness, but that his loss of income was due solely to the injuries received in this accident. For this purpose he was asked the following questions, objections to all of which were sustained:

"Q. You had the flu this year didn't you? A. No, I had a little cold.

"Q. You collected insurance benefits for that didn't you, for the flu? * * *

"Q. Is it not a fact in February of this year you had the flu and because of that disability you put in and collected a claim from the insurance company? * * * Is it not a fact you made a statement to the Travelers Health Association and another statement to the Illinois Commercial Travelers Association in February of this year that you had the flu and collected benefits from them for that? * * * Is it not a fact you wrote to those companies you had been laid up with the flu? * * * Isn't it a fact you made a claim and collected from the Iowa State Travelers Association? * * * Is it not a fact in February of this year you made a claim and collected for sickness, influenza, from the Travelers Health Association? * * * And at the same time collected, made a claim and collected from the Illinois Commercial Travelers Association?"

These questions were proper cross-examination directed to discredit plaintiff's testimony relating to his loss of earning capacity and the exaggeration of his physical injuries, as well as to discredit him as a witness. These were matters which the defendants could with great difficulty contradict by other witnesses, and, under such circumstances, great liberality should have been allowed in the cross-examination. The rule applicable is stated in McFadden v. Santa Ana, etc., Ry. Co., 87 Cal. 464, 470, 25 P. 681, 11 L.R.A. 252.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

19 Cal.App.2d 606

MAXFIELD WILTON & ASSOCIATES, Inc., v. INDUSTRIAL ACCIDENT COMMISSION.

Civ. 11207.

District Court of Appeal, Second District, Division 2, California.

March 18, 1937.

Hearing Denied by Supreme Court May 17, 1937.

1. **Insurance** 🔑146(1)

Contracts of insurance are subject to same general rules which pertain to all contracts and must be so interpreted as to give effect to mutual intent of parties (Civ.Code, § 1636).

2. **Insurance** 🔑146(1), 152(3)

Policy of workmen's compensation insurance must be read as a whole and must be construed with reference to provisions of Compensation Act (St.1917, p. 831, as amended; Civ.Code, § 1647).

3. **Insurance** 🔑146(3)

Any uncertainty which is caused by wording of policy of workmen's compensation insurance should be construed most strongly against person who prepared policy and caused the uncertainty to exist (Civ. Code, § 1654).

4. **Insurance** 🔑349(1)

Where, on December 24, 1935, insurer delivered workmen's compensation insurance policy providing that it should be in force from December 24, 1935, to December 24, 1936, and providing that policy should be void unless total initial premium was paid on or before January 3, 1936, payment of premium on or before January 3 was condition precedent to continuation of risk assumed by insurer, but insurer extended credit for amount of premium during the 10-day period.

5. **Insurance** 🔑349(1)

Where insurer on December 24, 1935, delivered workmen's compensation insurance policy providing that policy should be in force from December 24, 1935, to December 24, 1936, and providing that policy should be void unless total initial premium was paid on or before January 3, 1936, insurer *held* liable for injury, occurring on December 27, 1935, to employee covered by policy, notwithstanding premium was not paid on or before January 3, since failure to pay premium did not efface insurer's liability which had been incurred.

6. **Insurance** 🔑389(1)

Express provision in policy that insurer shall not be liable on policy unless premium is actually paid is waived by unconditional delivery of policy to insured as completed and executed contract, under express or implied agreement that credit shall be given for the premium, and in such case insurer is liable for loss which occurs during period of credit.

◆

Proceeding by Maxfield Wilton & Associates, Inc., to annul an award of the Industrial Accident Commission, and to have liability for injuries sustained by John F. Willis, employee, imposed on the Colonial Mutual Compensation Insurance Company, Limited.

Award annulled, and case returned to the industrial Commission, with directions.

A. P. G. Steffes, of Los Angeles, for petitioner.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, and Walter L. Bowers, and W. Wallace Trau, both of Los Angeles, for respondent.

WOOD, Justice.

The petitioner, an employer, seeks to have annulled an award made by respondent Industrial Accident Commission and to have liability imposed upon respondent Colonial Mutual Compensation Insurance Company, Limited.

The petitioner was engaged in the business of building maintenance and employed a number of workmen. One John F. Willis was employed by petitioner to do painting on an apartment house and suffered injuries which occurred in the course of and arose out of his employment. He filed an application with respondent commission to obtain an award against petitioner and respondent insurance company. The commission made an award against petitioner only, making the finding that "at the said time said employer was not insured as alleged herein." The insurance company contended before the commission, and contends now, that the type of work performed by the employee was not covered by the insurance policy, and also that the insurance policy was not in force at the time the injuries were suffered. In its answer to the petition for a writ of review the commission states: "However, since we agree with petitioner's contention that if there had been a valid policy of compensation insurance that the policy in question would have protected petitioner in the present case, it is unnecessary to further consider the question of coverage, in so far as it would be applicable to the injured employee John F. Willis. It is the position of the commission that there was no policy of compensation insurance in effect at the time Willis sustained his injuries, for the reason that petitioner did not pay the initial premium on or before January 3rd, 1936." Although there is no express finding that petitioner was protected by the policy as regards the injuries of Mr. Willis, it is apparent from this statement that such a finding would have been made but for the conclusion reached by the commission on the question whether the policy was in force for any purpose. There is substantial evidence in the record to sustain such a finding if it had been made.

Petitioner applied to respondent insurance carrier for a policy covering all of its employees, and on December 24, 1935, there was delivered to petitioner a policy of insurance which provided: "The period during which the policy shall remain in force * * * shall be from December 24, 1935 to December 24, 1936. * * *" The policy also contained the following provision: "As a condition precedent this policy is null and void unless the total initial premium stated herein is paid to the Insurance Holding Company, Inc., at its office in Los Angeles on or before January 3, 1936." The employee was injured December 27, 1935. Immediately thereafter petitioner's attorney had a conversation with the vice-president of the insurance carrier. The carrier positively denied liability, placing its denial upon the sole ground that the work done by Mr. Willis did not come within the classification which was covered by the policy and claiming that coverage of Mr. Willis' work would have called for a higher rate of premium. Petitioner's attorney then requested that petitioner be billed for a premium at the higher rate and offered to pay the premium at the higher rate. This offer was refused by the insurance carrier. Petitioner did not pay the premium during the period ending January 3, 1936, and thereafter the carrier wrote to petitioner that "the policy became null and void from the inception date 12/34/35."

[1-5] Contracts of insurance are subject to the same general rules which pertain to all contracts. Boyer v. United States F. & G. Co., 206 Cal. 273, 274 P. 57. A contract must be so interpreted as to give effect to the mutual intent of the parties. Civ.Code, § 1636. A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates. Civ.Code, § 1647. The policy must be read as a whole, and in the case of a policy given pursuant to the terms of the Workmen's Compensation Act it must be construed with reference to the provisions of the Compensation Act (St.1917, p. 831, as amended). Any uncertainty which is caused by the wording of the policy should be construed most strongly against the person who prepared the policy and caused the uncertainty to exist. Civ.Code, § 1654; Ocean. etc., Corp. Ltd., v. Ind. Acc. Comm., 194 Cal 127, 228 P. 1; Maryland Casualty Co. v Ind. Acc. Comm., 178 Cal. 491, 173 P. 993 Bearing these rules in mind, we are forced to the conclusion that petitioner was protected by the policy. It was doubtless the intention of the parties to insure petitioner's employees for one year beginning December 24, 1935. It was expressly so stated in the policy, and it is unreasonable to argue that the parties intended to leave a period of ten days in which petitioner was not covered by insurance. An uncertainty arises from the language in the policy by which payment of the premium is made "a condition precedent." By executing and delivering the policy to petitioner containing a provision permitting payment of the premium any time within the succeeding ten days, the carrier extended credit for the amount of the premium during that period. The payment of the premium on or before January 3d was a condition precedent to a continuation of the risk assumed by the carrier. If the hearing had been conducted by the commission on the day following the accident, it could not have been successfully contended that the policy was not then in force. Failure to pay the premium thereafter did not efface the liability which had been incurred.

[6] The rule is well stated in Farnum v. Phoenix Insurance Co., 83 Cal. 246, 23 P. 869, 871, 17 Am.St.Rep. 233: "It seems to be settled by a controlling preponderance of authority that an express provision in a policy of insurance that the company shall not be liable on the policy until the premium be actually paid, is waived by the unconditional delivery of the policy to the assured as a completed and executed contract, under an express or implied agreement that a cred-

it shall be given for the premium; and that in such case the company is liable for a loss which may occur during the period of the credit."

In its answer the commission refers to the case of Whipple v. Ind. Acc. Comm., 113 Cal.App. 535, 298 P. 832, and states: "We submit that the Whipple Case is authority for the finding of the commission that the policy in question was null and void, since the initial premium was not paid by January 3, 1936." The facts in the Whipple Case are different from the facts of the case now before us. In the Whipple Case the accident occurred May 7, 1930. It was provided that the policy should be null and void unless the initial premium should be paid on or before May 2, 1930. The premium was not paid, and on May 6, 1930, the carrier mailed formal notice to the employer that by reason of nonpayment of the premium the policy had become null and void.

The award is annulled, and the matter is returned to the Industrial Accident Commission for further proceedings not inconsistent with this opinion.

We concur: CRAIL, P. J.; McCOMB, Justice pro tem.

---

19 Cal.App.2d 691

PACIFIC STATES SAVINGS & LOAN CO. v. WORKMAN et al.

Civ. 1793.

District Court of Appeal, Fourth District, California.

March 23, 1937.

Mortgages 🔑372(4)

Judgment for plaintiff, in action for restitution and possession of premises purchased by plaintiff at sale under trust deed held by plaintiff, must be affirmed, where testimony as to whether payment to bank in satisfaction of defendants' obligation by purchaser of crops, proceeds of which defendants assigned to plaintiff as security for past due payments on trust deed, was made with defendants' knowledge and consent, was conflicting, and defendants' contention that plaintiff failed to use due diligence to collect moneys due under assignment was not supported by answer or evidence.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by the Pacific States Savings & Loan Company against Esau Workman and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Albert Peterson, of Hanford, for appellants.

John L. Mace, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

The plaintiff held a trust deed on real property owned by the defendants, and which they had leased for the year 1933 on a share basis. The defendants, assigned their interest in the proceeds of the crop to the plaintiff, as security for certain payments on the trust deed which were due March 1, 1933, and which were in default. The plaintiff received from these proceeds a sufficient sum to take care of the payments just mentioned, but the defendants failed to make other payments which became due on November 1, 1933. As a result of this default, after proper proceedings, the property was sold under the provisions of the trust deed on July 7, 1934, and was purchased by the plaintiff. On November 9, 1935, the plaintiff brought this action for restitution and possession of the premises. In their answer, the defendants affirmatively allege that the plaintiff accepted the assignment of their share of the 1933 crop "in lieu of payments due to said plaintiff in 1933," that all of such rental was paid to the plaintiff, and that the plaintiff received therefrom a sum in excess of any and all payments coming due during the year 1933. The court found in all respects in favor of the plaintiff and this appeal followed the judgment.

The appellants now concede that the respondent did not accept the assignment of rental as a payment on the trust deed, but argues that it was negligent in failing to enforce its right under the assignment; that it knew that the purchaser of the crop paid $480 of the rental share to a certain bank; that this payment was made without the knowledge or consent of the appellants; that this amount, if collected by the respondent, would have been sufficient to meet the payments which became due on November 1, 1933, and to have prevented the default which resulted in the sale of the property; and that this sale was, therefore, void.

It appears that the $480 in question was paid to the bank in payment of an obligation of the appellants. While the first-named appellant testified that this payment was made without his knowledge or consent, this was flatly contradicted by another witness who testified that the amount in question was paid with the consent and at the direction of Mr. Workman.

Nothing more than a conflict appears, and it may also be observed that while the appellants contend that the respondent failed to use due diligence in endeavoring to collect the moneys coming due under the assignment of rental this contention is supported neither by the allegations of the answer nor by any evidence which is called to our attention.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

JONES v. WILTON. [*]

Civ. 11251.

District Court of Appeal, Second District, Division 2, California.

March 1, 1937.

Rehearing Denied March 24, 1937.

Hearing Granted by Supreme Court April 29, 1937.

1. Pleading 🔑248(2)

Amended complaint does not state a new cause of action where original complaint and complaint as amended have identical purpose or deal with same subject-matter.

2. Limitation of actions 🔑127(13)

Amended complaint based on account stated September 5, 1928, supported by written agreement executed by defendant on same date, and amplifying allegations in complaint, *held* not to state a new and different cause of action from that alleged in complaint, which was based on same primary right, as respects running of statute of limitations, where agreement would have been admissible under allegations of either pleading (Code Civ.Proc. § 337, as amended by St.1935, p. 1740, § 2).

3. Contracts 🔑277(1)

Obligation in contract containing acceleration clause does not mature upon default of condition precedent to operation of such clause, unless promisee elects to declare obligation due.

4. Limitation of actions 🔑46(6), 85(2)

Agreement in contract, made in 1928 and promising to pay plaintiff certain sum on September 5, 1931, that if defendant failed to deliver certain mortgages within six months from date of contract sum would be due on demand, was an acceleration clause for plaintiff's benefit, and hence plaintiff's action, begun on October 1, 1935, was not barred, where plaintiff never elected to exercise rights under clause, and defendant had been absent from state for 166 days between October, 1932, and September, 1935 (Code Civ.Proc. § 337, as amended by St.1935, p. 1740, § 2).

5. Limitation of actions 🔑127(2)

Where complaint as amended did not state a new or different cause of action from that alleged in original complaint, date of filing of original complaint was determinative date as regards running of statute of limitations (Code Civ.Proc. § 337, as amended by St.1935, p. 1740, § 2).

◆

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Mark F. Jones against Hugh Wilton. From a judgment for defendant, plaintiff appeals.

Reversed.

W. L. Engelhardt and A. G. Divet, both of Los Angeles, for appellant.

A. P. G. Steffes, of Los Angeles, for respondent.

McCOMB, Justice pro tem.

Plaintiff appeals from a judgment in favor of defendant after the trial court sitting without a jury held the cause of action alleged in the complaint as amended was barred by the Statute of Limitations. Section 337, Code Civ.Proc. (as amended by St.1935, p. 1740, § 2).

The essential facts are these:

---

[*] For subsequent opinion see 75 P.2d 593.

A. Pleadings.

Material facts alleged in the original complaint filed October 1, 1935.	Material facts alleged in the Amended Complaint filed April 10, 1936.
III	III
"That on the 5th day of September, 1928, an account was stated between the Plaintiff and Defendant at which time the Defendant executed an agreement in writing by the terms of which agreement the Defendant promised and agreed to pay to Plaintiff the sum of Twenty Thousand Dollars ($20,000.00), for and in consideration of the services so rendered by the Plaintiff at the instance and request of the Defendant."	"That on the 5th day of September, 1928, an account was stated between the plaintiff and defendant and said Los Angeles Housing Corporation and said Gibraltar Title Company, at which time the defendant and said Los Angeles Housing Corporation and said Gibraltar Title Company, executed an agreement in writing by the terms of which agreement the defendant and the said Los Angeles Housing Corporation and the said Gibraltar Title Company agreed that they were indebted to the plaintiff in the sum of Twenty Thousand ($20,000.00) Dollars, for and on account of said services so rendered by the plaintiff to the defendant and said Los Angeles Housing Corporation and said Gibraltar Title Company. That by the terms and conditions of said agreement and for the purpose of securing the payment of said sum of Twenty Thousand ($20,000.00) Dollars, the defendant and the said Los Angeles Housing Corporation and said Gibraltar Title Company agreed to assign to the plaintiff trust deeds from time to time until the total assignments to plaintiff of such trust deeds should aggregate the sum of $50,000.00."
IV	IV
"That by the terms and conditions of said written agreement so executed by the Defendant, Defendant promised, undertook and guaranteed that said sum of Twenty Thousand Dollars ($20,000.00) together with interest thereon at the rate of Six Percent (6%) per annum would be paid to the Plaintiff on or before three years from and after September 5th, 1928."	"That the defendant and the said Los Angeles Housing Corporation and said Gibraltar Title Company, by the terms and conditions of said agreement, jointly and severally, undertook and agreed and guaranteed that the plaintiff would receive from said trust deeds the sum of $20,000.00 and interest at the rate of six (6%) per cent per annum from September 5th, 1928 within thirty-six (36) months from and after September 5th, 1928 and that the defendant and the said Los Angeles Housing Corporation and said Gibraltar Title Company, by the terms and conditions of said agreement further, jointly and severally, guaranteed the payment of said $20,000.00 with interest thereon at the rate of six (6%) per cent per annum from the date thereof until paid irrespective of whether plaintiff received anything from said trust deeds."

VI

"That no part of said sum of Twenty Thousand Dollars ($20,000.00) or said interest has been paid, or in any manner satisfied."

VII

"That after said agreement was so executed and in the year 1929 the Defendant left the State of California, and remained out of and was absent from the State of California for a period of approximately four years."

VI

"That pursuant to said agreement the defendant did assign or cause to be assigned to the plaintiff a certain trust deed in the principal sum of $10,000.00, which said trust deed or other security assigned to the plaintiff by the defendant or the said Los Angeles Housing Corporation or said Gibraltar Title Company to secure the payment of said obligation in the sum of Twenty Thousand ($20,000.00) Dollars. That long prior to the commencement of this action said trust deed, which was a prior lien to the trust deed so given to the plaintiff, was foreclosed and said property was sold under said prior trust deed, and the security of said trust deed so assigned to the plaintiff was wholly lost and destroyed and said trust deed thereupon and thereafter had no value whatever."

VII

"That there was unpaid to the plaintiff the said sum of Twenty Thousand ($20,000.00) Dollars, or any part thereof, within the said period of thirty-six (36) months, from and after September 5th, 1928, and that no part of said sum of $20,000.00, or of the interest thereof, has at any time or in any manner ever been satisfied or paid. That the plaintiff did not receive any sum whatever from said trust deed so assigned to the plaintiff, as aforesaid, and no part of said indebtedness of Twenty Thousand ($20,000.00) Dollars was in any manner liquidated."

IX

"That plaintiff is informed and believes and therefore alleges the fact to be that after September 5th, 1931, the defendant left the State of California and remained out of and was absent from the State of California for a period of more than fifty-five days between the 5th day of September, 1931, and the 5th day of September, 1935."

B. Evidence.

Introduced at the trial was evidence of the absence of defendant from the State of California for 166 days during the period from October 28, 1932, to September 5, 1935, and of an agreement signed by defendant, upon which plaintiff bases his cause of action reading in part thus:

"Los Angeles, California,
"September 5th, 1928.

"Mark F. Jones, Esq.,
"Los Angeles, Cal.
"Dear Sir:

"Confirming our conversation of August 27th, 1928, please be advised that in view of the fact that you have rendered various and divers services to the Los Angeles Housing Corporation, Gabraltar Title Company and to Hugh Wilton, over a period of some two years, and in view of the fact that we have not paid you for your services, and in accordance with the adjustment of said indebtedness which we have made, and the account which we have stated and agreed upon, we hereby agree as follows:

"That outside of the fee due you in the case of Wilton v. Spalding, we hereby admit that we are indebted to you in the sum of $20,000.00. As a means of paying you, and liquidating said indebtedness, I agree to assign to you a one-half interest in a $7,000 equity in the Normandie Street first trust deed which I will have in payment of my services in erecting a building upon said premises, and which premises are known as 1814 North Normandie Street, in the City of Los Angeles, California; and I also agree to assign to you a one-half right, title and interest in my equity in any other first trust deeds which I maye take for my services in constructing buildings from time to time until the total assignments to you of said interest aggregate $50,000. * * *

"And I further guarantee that you will receive from said trust deeds at least $20,000 and interest at 6% per annum from date hereof, within 36 months from date hereof, and in the event that there is not paid from said assignments to you the last named sum within said time, then we hereby jointly and severally agree to pay you any deficiency so as to make the total payments received by you from said trust deeds at least $20,000 and interest thereon at 6% per annum from date until paid. And we hereby jointly and severally guarantee the payment of said $20,000 with interest thereon at the rate of 6% per annum from the date hereof until paid, irrespective of whether you ever receive anything from said assignments; and we jointly and severally hereby waive any notice of non-payment of any sums due and owing you on said assignments, and guarantee the payment of the same up to the extent of $20,000.00 and interest thereon at the rate of 6% per annum from date, * * *

"If I, we or any of us, fail to deliver to you $50,000 worth in interest in first mortgages or trust deeds as above stated, on or before six months from the date hereof, then we agree to pay you upon your demand the sum of $20,000 together with interest thereon at the rate of 6% per annum from date hereof. * * *

"Very truly,
Hugh Wilton
"[Seal] Los Angeles Housing Corporation
"By Hugh Wilton, Pres.
"C. Taylor, Secy.
"Gibraltar Title Company
"By Hugh Wilton, Pres.
"C. Taylor, Secy."

The questions presented for our determination are these:

First: Did the complaint as amended state a new and different cause of action from that alleged in the complaint?

Second: Did the Statute of Limitations commence to run March 5, 1929, that is 6 months after the date of the execution of the contract hereinbefore set forth, or September 5, 1931, 36 months after the execution of the contract?

[1,2] The first question must be answered in the negative. The rule is that an amended complaint does not state a new cause of action if both the complaint and the complaint as amended have the same, identical purpose or deal with the same subject-matter. 16 Cal.Jur. 547; Hemmeon v. Amalgamated Copper Mines Co., 95 Cal.App. 400, 403, 273 P. 74. It is patent from a reading of the complaint and complaint as amended that each is based on the same primary right, to wit, an account stated September 5, 1928, supported by an agreement executed by the defendant on the same date. The allegations in the complaint as amended are no more nor less than an amplification of similar allegations in the complaint. The contract executed by defendant would have

been admissible under the allegations of either pleading.

As to the second question defendant's contract read in part as follows:

> "And I further guarantee that you will receive from said trust deeds at least $20,000 and interest at 6% per annum from date hereof within 36 months from date hereof and in the event that there is not paid from said assignments to you the last named sum within said time then we hereby jointly and severally agree to pay you any deficiency so as to make the total payments received by you from said trust deeds at least $20,000 and interest thereon at 6% *per annum* from date until paid * * *
>
> "If I * * * fail to deliver to you $50,000 worth in interest in first mortgages or trust deeds * * *, *on or before six months from the date hereof,* then we agree to pay you *upon your demand* the sum of $20,000 together with interest thereon at the rate of 6% per annum from date hereof." (Italics ours.)

[3-5] It seems clear from a reading of the entire contract that the first provision quoted, supra, constituted a promise upon the part of defendant to pay to plaintiff $20,000 thirty-six months after the date of the execution of the agreement, to wit, September 5, 1931, while the second paragraph quoted was an acceleration clause for the benefit of plaintiff. The rule is settled in California that the obligation in a contract containing an acceleration clause does not mature upon default of the condition precedent to the operation of such clause, unless the promisee elects to declare the obligation due. Congregational Church Bldg. Society v. Osborn, 153 Cal. 197, 200, 94 P. 881; Moore v. Russell, 133 Cal. 297, 300, 65 P. 624, 85 Am. St.Rep. 166; Richards v. Daley, 116 Cal. 336, 338, 48 P. 220; Mason v. Luce, 116 Cal. 232, 235, 48 P. 72; Belloc v. Davis, 38 Cal. 242, 249; Andrews v. Zook, 125 Cal.App. 19, 21, 13 P.(2d) 518.

In the present case there is no evidence that plaintiff ever elected to exercise his rights under the acceleration clause. Therefore, since the obligation did not mature until September 5, 1931, and the uncontradicted evidence disclosed that defendant had been absent from the State of California 166 days between October 28, 1932, and September 5, 1935, the Statute of Limitations (section 337 Code Civ. Proc.) had not run at the time of the filing of the complaint on October 1, 1935. In view of the fact that the complaint as amended did not state a new and different cause of action from that alleged in the complaint, the determinative date is October 1, 1935, and not April 10, 1936, the date the complaint as amended was filed.

The judgment is reversed.

We concur: CRAIL, P. J.; WOOD, J.

---

19 Cal.App.2d 579

SMITH v. BANK OF CALIFORNIA, NAT. ASS'N, et al.

Civ. 10090.

District Court of Appeal, First District, Division 1, California.

March 17, 1937.

1. Action ⚷6

Where will gave residue of estate in trust to pay one-fourth of income to son for life, to his lawful issue per stirpes, and, in default of lawful issue, to the lawful issue of the testatrix, alleged daughter of the son could not maintain suit for declaratory judgment establishing her status as such, against other children of the son and the trustees, without joining those entitled in case of the death of all the son's children, as they would have interest in questioning plaintiff's legitimacy and trustees would be precluded, as against plaintiff, but not protected as against such persons.

2. Bastards ⚷12

Children born out of wedlock, whose parents subsequently intermarried, were lawful issue of their father (Civ.Code, § 215).

3. Appeal and error ⚷1071(6)

In suit for declaratory judgment establishing plaintiff's contingent interest under a testamentary trust as lawful issue of her father, in which plaintiff alleged that certain minor defendants appearing by guardian had no interest, where there was evidence which, if true, showed them to be lawful issue of such father, the issue as to their right was material, and failure to find thereon was prejudicial error.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Proceeding for a declaratory judgment by Elaine Grace Smith, a minor, by Elaine Smith, the guardian of her person and estate, against the Bank of California, National Association, and others. From a judgment for plaintiff, defendants appeal.

Reversed.

Pillsbury, Madison & Sutro and Eugene D. Bennett, all of San Francisco, for appellants Bank of California, etc., and Felix T. Smith.

John Elliott Cook, of San Francisco, for appellant guardian ad litem and appellants Betty, Henry, and Donna Smith.

Treadwell, Laughlin & Treadwell, of San Francisco, for respondent.

PER CURIAM.

A proceeding for a declaratory judgment construing a trust created by the will of Cora B. Smith, deceased.

The testatrix left surviving her three sons, namely, J. R. Pringle, Sidney V. Smith, Jr., and Felix T. Smith, and Cora Goold, a daughter. There also survived her four grandchildren, namely, Sidney V. Smith, 3d, and Cora H. B. Smith, the children of Sidney V. Smith, Jr.; Felix T. Smith, Jr., the son of Felix T. Smith; and Cora B. Smith, the daughter of Cora Goold. After making provision in her will for the support and education of Sidney V. Smith, 3d, and Cora H. B. Smith from specified portions of her estate, she devised the residue to trustees, directing payment of the income therefrom to her children in like proportions during their lives. With respect to the interest of Sidney V. Smith, Jr., in the residue, it was provided that the trustees should pay "* * * one-fourth of the income of said estate to my son Sidney during his life, and upon his death to pay such one-fourth of said income to my son Sidney's lawful issue then alive per stirpes, and, in default of such lawful issue, of my son Sidney, to my lawful issue then alive per stirpes." The will contained similar provisions with respect to Felix T. Smith and Cora Goold. It was further provided that the trust income from the residue should terminate upon the death of the longest liver of the testatrix' children above named, and the corpus then vest in her lawful issue then living per stirpes. The estate was distributed to the trustees accordingly.

The above action was brought by Elaine Grace Smith, a minor, by her guardian Elaine Smith; the latter being the divorced wife of Sidney V. Smith, Jr. Her complaint alleged that Smith intermarried with Elaine Trenberth, and that she with Sidney V. Smith IV and Cora H. Butterworth Smith are the lawful issue of the marriage. The two last named were joined as defendants with the trustees and three minors named Betty, Henry, and Donna Smith. The complaint alleged that the three minors last mentioned—who appear by their guardian—have no interest in the trust estate. It was also alleged that plaintiff is the owner of the right to one-third of the income of the trust property contingent upon her surviving said Sidney V. Smith, Jr., but that the defendants deny that she is a beneficiary as alleged and that a controversy exists between the parties as to her rights therein; further, that unless her right is now determined the evidence thereof may be lost, all to her irreparable injury, and that she has no adequate remedy in the ordinary course of law.

It is admitted that the children of said Felix T. Smith are Felix T. Smith, Jr., Nathan S. Smith, and Lawrence H. Smith; and of said Cora Goold are Mary Goold and Louise Goold. The defendants pleaded the nonjoinder of these children, alleging that they are interested in the matters set forth in the complaint and are necessary parties to their determination. The complaint also alleged that plaintiff is a child born in lawful wedlock, the lawful issue of Sidney V. Smith, Jr., and Elaine Trenberth Smith. This question was put in issue by the answer of the trustees and the three minor children, represented by their guardian ad litem, and plaintiff's status in this respect appeared as one of the important issues in the case, although the parties to the appeal do not now appear to question plaintiff's status in that respect.

With the exception hereinafter to be considered, the trial court found according to the allegations of the complaint and entered its decree, adjudging the plaintiff to be the lawful issue of Sidney V. Smith, Jr., and Elaine Trenberth Smith, and as such entitled to an interest in the trust given under the will to Smith's lawful issue; further, that the judgment should be without prejudice to the rights of any of the beneficiaries under the will, and that "nothing should be deemed to be determined by the judgment except the status of said plaintiff as lawful issue of said Sidney V. Smith, Jr., and Elaine Trenberth Smith with respect to said trust estate."

[1] The trustees, who appeal, complain that no actual controvery existed, and that they are not protected by the judgment as against the persons mentioned who are interested in the trust but have not been joined as defendants. It is admitted by plaintiff's counsel that should the other persons, who claim to be the lawful issue of Sidney V. Smith, Jr., die, and the plaintiff become the only person making such claim, the others not joined in the action would have an interest in questioning her legitimacy. They suggest, however, that this contingency is too remote to be considered, and that in any event another decree in a suit to which the trustees will be parties will protect them. However, as urged by the trustees, as between the plaintiff and themselves they will be precluded by the present decree as to plaintiff's status, while this is not true of others not joined who might eventually raise the question.

While there is sufficient evidence to support the trial court's conclusion that an actual controversy existed, it appears to us that the contingency mentioned is by no means remote. It is not contrary to the nature of things that such a situation might arise, resulting in expense and possible loss to the trustees. The action involves the rights of the beneficiaries, not only as between themselves, but also as between them and the trustees. This being so, the latter are entitled to protection against further litigation, and to have the rights of all interested in this portion of the trust estate finally determined. McBrown v. Dalton, 70 Cal. 89, 11 P. 583; Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 6 L.R.A. (N.S.) 275; Hutchins v. Security Trust & Savings Bank, 208 Cal. 463, 281 P. 1026, 65 A.L.R. 1059.

[2, 3] As stated, the complaint alleged that the minors Betty, Henry, and Donna Smith have no interest in the trust, but no finding upon this issue was made. They also have appealed from the judgment. There was evidence that these are the children of Sidney V. Smith, Jr., and Irene Ozalli, born out of wedlock, whose parents subsequently intermarried. The facts in evidence, if true, show them to be Smith's lawful issue (Civ.Code, § 215; Wolf v. Gall, 32 Cal.App. 286, 295, 163 P. 346, 350), and, as urged by their counsel the issue was material and they were entitled to a finding thereon. Being material, the failure to find constituted prejudicial error. 2 Cal.Jur., Appeal and Error, § 614, 1032.

For the reasons stated the judgment is reversed.

---

19 Cal.App.2d 589

CLAY v. CLAY.

Civ. 11341.

District Court of Appeal, Second District, Division 2, California.

March 17, 1937.

1. Courts 🔑105

Statement that plaintiff and defendant had stipulated that judgment for plaintiff in divorce action should be reversed *held* sufficient compliance with constitutional provision requiring Court of Appeals to state reasons for decision in writing (Const. art. 6, § 2).

2. Divorce 🔑186

On reversal of judgment for plaintiff in divorce action pursuant to stipulation of parties, reviewing court would not direct trial court to enter judgment for defendant as provided by stipulation, but trial court would be permitted to exercise its authority in premises after trial or hearing on a motion.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson and Robert W. Kenny, Judges.

Divorce action by Velma L. Clay against James A. Clay. Judgment for plaintiff, and defendant appeals.

Reversed.

Oscar L. Horn and W. B. Etheridge, both of Pasadena, for appellant.

James E. Neville, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff and against the defendant.

[1] It is a sufficient compliance with the constitutional provision, which requires us to state the reasons for our decisions in writing (Const. art. 6, § 2), to say in this case that the appellant and respondent have stipulated that the decision herein be rendered.

[2] The stipulation also provides that this court direct the trial court to enter judgment for the defendant. But this we refuse to do. This is a divorce case and the trial court may well exercise its authority in the premises after trial or after hearing on a motion.

The judgment is reversed. Each party is to pay his or her own costs on appeal. Let remittitur issue forthwith.

We concur: WOOD, J.; McCOMB, Justice pro tem.

---

22 Cal.App.2d Supp. 735

LEACH v. DINSMORE et al.

C. A. 3415.

Appellate Department, Superior Court, Los Angeles County, California.

March 6, 1937.

1. Bail 🔑73

Cash bail deposited with municipal court clerk and declared forfeited was not a "collected forfeiture" within statute relating to disposition of collected forfeitures by municipal court clerk, where forfeiture was ordered exonerated on appearance of defendant within ninety days after forfeiture, notwithstanding condition of discharge of forfeiture that defendant pay municipal court costs, since cash bail could become a "collected forfeiture" only on some final determination of right of defendant to recover forfeited bail (Pen.Code, § 1305, and § 1463, as amended by St.1929, p. 1383).

2. Bail 🔑79(2)

Statute providing for discharge of forfeited bail on appearance within ninety days after forfeiture, of defendant in criminal proceeding, who must satisfactorily excuse his neglect to appear on required day, does not require appearance of defendant and setting aside of forfeiture within ninety days after forfeiture, but requires only that such appearance and showing be made within such ninety-day period (Pen.Code, §§ 1305, 1307).

3. Statutes 🔑205

Generally, statute should be considered as a whole.

4. Statutes 🔑225

In construing one section of a code, other sections on the same subject may properly be considered.

5. Bail 🔑79(2)

Under statute, defendant in criminal proceeding who deposits bail money can appear within ninety days after forfeiture of such money and explain his neglect to appear on required day, and court can hold matter under submission beyond such ninety days and thereafter make valid order in the premises (Pen.Code, § 1305).

6. Bail 🔑79(2)

Where forfeiture of bail money is conditionally discharged within ninety days after forfeiture, condition, unless otherwise limited, can thereafter be met (Pen.Code, § 1305).

7. Bail 🔑79(2)

Order discharging forfeiture of $2,000 municipal court bail on condition that $500 court costs be paid would be presumed, in absence of provision as to time within which condition could be complied with, to have contemplated that $500 of $2,000 bail would be immediately applied by municipal court clerk in satisfaction of costs, or that there should be no limitation short of time prescribed by statute for claiming bail money ordered returned by court (Pen.Code, § 1305, and § 1463, as amended by St.1929, p. 1383).

8. Bail 🔑73

Statute providing for payment to county treasurer of forfeited municipal court bail which had not been claimed within one year after bail had been ordered returned to owner was applicable where bail money never attained status of "collected forfeiture" within statute relating to payment of collected forfeitures to county treasurer (Pen.Code, § 1305, and § 1463, as amended by St.1929, p. 1383).

9. Bail ⚷73

Statute requiring clerk of court to pay bail money to county treasurer within thirty days of forfeiture of such money is not controlling over statute providing for payment to county treasurer of forfeited municipal court bail not claimed within one year after bail has been ordered returned to owner (Pen.Code, § 1305, and § 1463, as amended by St.1929, p. 1383).

10. Bail ⚷73

Under statute, municipal court clerk who deposited cash bail which had not become a "collected forfeiture," in trust account with county treasurer, was required to keep bail in such account for one year after order for exoneration and implied return of such cash bail, unless cash bail was sooner claimed (Pen.Code, § 1305, and § 1463, as amended by St.1929, p. 1383).

11. Bail ⚷73

Where forfeiture of municipal court bail money which had been deposited by municipal court clerk in trust account with county treasurer, was timely exonerated on condition that municipal court costs be paid, and persons entitled to money demanded, within one year after such discharge, return of bail money less costs, or return of entire amount of bail money accompanied by tender of court costs; bail money should have been repaid by county treasurer through county auditor's warrant drawn on requisition of municipal court clerk (Pen.Code, § 1305, and § 1463, as amended by St.1929, p. 1383).

12. Bail ⚷73

In action to recover municipal court bail money conditionally exonerated after forfeiture, county treasurer with whom municipal court clerk had deposited bail money was not liable, since treasurer acted merely as administrative officer without discretion, and was bound to either accept and deposit money when transmitted to him by clerk, or to honor requisition of clerk directing disposition of money (Pen.Code, § 1305, and § 1463, as amended by St.1929, p. 1383).

13. Counties ⚷146

County's liability for municipal court bail money which municipal court clerk wrongfully declined to refund after forfeiture thereof was exonerated, could rest only on theory of money had and received (Pen. Code, § 1305, and § 1463, as amended by St. 1929, p. 1383).

14. Counties ⚷146

County would not be liable for torts committed by county officers in connection with refusal to refund municipal court bail after forfeiture thereof was exonerated, since county was in legal effect but a governmental agency of the state in respect to bail, and county officers were, so far as responsibility was concerned, not agents of county but merely servants of law under direction of which, rather than of county, they were required to act in respect to such bail (Pen.Code, § 1305, and § 1463, as amended by St.1929, p. 1383).

15. Clerks of courts ⚷70
Counties ⚷146
Municipal corporations ⚷747(1)

Until municipal court bail money becomes a collected forfeiture and is apportioned to and paid into treasuries of city and county, duties of clerk of municipal court, county auditor, and county treasurer in regard to such money are prescribed by law, and neither city nor county is responsible for their acts, even though, by reason of their failure to comply with law, they may become personally liable for conversion (Pen.Code, § 1305, and § 1463, as amended by St.1929, p. 1383).

16. Bail ⚷73

Where municipal court bail money is apportioned and divided between city and county, each is liable in action for money had and received, to any one legally entitled to such money, for such part thereof as city or county may have received (Pen. Code, § 1463, as amended by St.1929, p. 1383).

17. Bail ⚷73

City alone was liable, on theory of money had and received, for municipal court bail money which had been apportioned between county and city after municipal court clerk's wrongful refusal to refund bail money on exoneration of forfeiture thereof, since items wrongfully included in apportionment would be presumed to constitute part of fund apportioned to city, where city was not entitled to anything under statute until 75 per cent. of cost of conducting criminal departments of municipal court had been repaid to city (Pen.Code, § 1305, and § 1463, as amended by St.1929, p. 1383).

◆

Appeal from Municipal Court of Los Angeles; William R. McKay, Judge.

Action by Mary E. Leach against W. S. Dinsmore, individually and as clerk of the municipal court of the city of Los Angeles, a municipal corporation, and others, to recover money deposited in lieu of bail and conditionally ordered exonerated after forfeiture. Judgment for the defendants, and the plaintiff appeals.

Partly affirmed and partly reversed and remanded for new trial.

Eckman & Lindstrom and Morton L. Barker, all of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, Fred M. Cross, Deputy Co. Counsel, and Ray L. Chesebro, City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, for respondents.

SCHAUER, Judge.

Plaintiff's assignor, who was the defendant in a criminal proceeding pending in the municipal court of the city of Los Angeles, deposited the sum of $2,000 as cash bail with the defendant W. S. Dinsmore as clerk of the said municipal court. On April 29, 1935, such assignor having failed to appear as required, the court ordered entries in its minutes appropriate to declaration of bail forfeiture pursuant to the provisions of section 1305 Penal Code, which in material part reads as follows:

"If, without sufficient excuse, the defendant neglects to appear * * * when his presence in court is lawfully required * * * the court must direct the fact to be entered upon its minutes, and the undertaking of bail, or the money deposited instead of bail, as the case may be, must thereupon be declared forfeited. But if at any time within ninety days after such entry in the minutes, the defendant and his bail appear and satisfactorily excuse his neglect, and show to the satisfaction of the court that the absence of the defendant was not with the connivance of the bail, the court may direct the forfeiture of the undertaking or the deposit to be discharged upon such terms as may be just."

On July 17, 1935, the defendant in the above-mentioned criminal action appeared and proceedings were had under said section 1305 of the Penal Code, with the result that the court on that day made an order that "the bail forfeiture entered on the minutes of this Court on April 29, 1935, be vacated and set aside and Bond ordered exonerated upon the condition that the sum of $500.00 costs is first paid to the Municipal Court." Within ten days thereafter plaintiff's assignor, through his attorney, interviewed the defendant clerk with regard to procuring the return of the $2,000 deposit, less the $500 ordered paid as costs. The clerk declined to make any refund unless and until *an additional* $500 was paid to him in satisfaction of the costs assessed by the court as above mentioned. On August 15, 1935, plaintiff by assignment became the owner of the funds in question; thereafter formal written demands were served upon each of the defendants, demanding in the alternative either the payment of $1,500, being the $2,000 deposited less the $500 charged as costs, or the payment of the full $2,000 upon acceptance of an additional $500 then tendered. All demands were refused; this action was brought to recover the balance of $1,500 allegedly due plaintiff; judgment was rendered in favor of all defendants and from it this appeal is prosecuted.

Relative to the handling of deposited bail money and collected fines and forfeitures, section 1463 of the Penal Code, as amended by St.1929, p. 1383, as it existed prior to the amendments of the year 1935 (St.1935, p. 1204), required deposit with the county treasurer of "moneys deposited as bail" and directed that "except where otherwise specifically provided by law all fines and forfeitures collected upon conviction or upon the forfeiture of bail in any municipal court shall be paid to the county treasurer of the county in which such court is situated." This statute declared the purpose of partially reimbursing the county for the cost of operating criminal departments of the municipal court and went on to provide that the "county treasurer shall withhold monthly out of the total amount of such fines and forfeitures collected during the preceding calendar month a sum equal to seventy-five per cent of the total monthly cost of maintaining and operating such departments of said court while acting in the exercise of its criminal jurisdiction in misdemeanor cases" and that "the remainder of such total amount of such fines and forfeitures shall, at least once a month be paid over to the treasurer of the city for which such court is established by warrant of the county auditor which shall be drawn upon the requisition of the clerk of said court."

It appears from the record that the $2,000 cash bail was deposited with the defendant W. S. Dinsmore as clerk of the municipal court on April 19, 1935, and on that day he in turn deposited said money in a trust account with the defendant H. L. Byram, as treasurer of the county of Los Angeles. This trust account apparently was maintained by the defendant clerk as a depository for money "deposited as bail," which he was in duty bound to hold in trust for the benefit of its owner or depositor or whoever might become entitled thereto, including in the last category, in the event of ultimate forfeiture, the county, and possibly the city, of Los Angeles. The money here involved remained in this trust account until August 1, 1935, when said clerk withdrew said fund and redeposited it with the county treasurer, in a "Fines and Forfeitures account," which latter account, on September 1, 1935, showed $56,895.30 as the total amount of collections of fines and forfeitures (other than vehicle cases) for the month of August, 1935. On September 7, 1935, there was charged to this account the sum of $20,446.71, being the computed 75 per cent. of misdemeanor operation cost of the municipal court for the preceding month, and the balance, amounting to $36,488.59, was transferred to the defendant city of Los Angeles. This division of funds we assume was intended to be in compliance with a construction by the officers concerned of the provisions of section 1463 of the Penal Code hereinabove referred to and quoted.

[1] The defendant clerk of the municipal court evidently did not on April 29, 1935, at the time the court ordered the bail forfeited, or at any time prior to August 1, 1935, consider that the $2,000 which had been "deposited as bail" had reached the status of "forfeitures collected," within the meaning of said section 1463. When and if it ever became a "collected" forfeiture, the duty devolved upon him to account for it to the city treasurer during the next ensuing calendar month. To the extent that the diligent clerk, perplexed by the difficulty of interpretation of sections 1305 and 1463, Penal Code, declined to treat the money involved in this litigation as a "collected" forfeiture, he was correct, but we cannot sustain his actions on and subsequent to August 1st. In our opinion, the bail deposited by plaintiff's assignor has never reached the status of a "collected" forfeiture. It could do so only upon some final determination of the right of the owner to recover it, as by the expiration of the time limited for making application for relief from the forfeiture without such application being made or by the subsequent final denial of any application which was pending at the time the period expired.

[2] Contrary to defendants' contention, section 1305, Penal Code, does *not* require "the appearance of the defendant *and* the setting aside of the forfeiture within ninety days after the order of forfeiture." It requires only that the *appearance and showing* be made (possibly only commenced) within the ninety-day period.

The provision here as to the time limit for action is cast in a form quite similar to that of section 473, Code of Civil Procedure, which is construed to mean that if the application for relief is made within the time specified, the action of the court thereon may be taken after that time has expired. See 14 Cal.Jur. 1069, 1070; In re Yoder (1926) 199 Cal. 699, 702, 251 P. 205; Wolff & Co. v. Canadian Pac. Ry. Co. (1899) 123 Cal. 535, 56 P. 453. The same rule was applied when terms of court were recognized and a motion to vacate a judgment was made during the term but not decided until after adjournment. Osmont v. All Persons (1913) 165 Cal. 587, 591, 133 P. 480. In this connection it is interesting, and perhaps of some significance, to note that section 1305 as originally enacted in 1872 provided that application to set aside a forfeiture of bail bond or bail money could be made "at any time before the final adjournment of the court." In congruence with the reasoning in the case last cited, it would seem that an application to vacate a forfeiture, if made before, could have been granted after "final adjournment."

[3, 4] That it was the understanding and intention of the Legislature that the provision in section 1305 of the Penal Code limiting the time within which the party could apply for relief from his default should not chop off the power of the court to act upon an application validly made within the prescribed time is further suggested by a consideration of the significance of section 1307, Penal Code, in its relation to section 1305 as the latter existed prior to its last amendment. In the year 1905 (Statutes of 1905, pp. 701, 702), the Legislature amended both sections 1305 and 1307 and from that amendment of the year 1905 up to the year 1927 (St.1927, p. 1386) said section 1305 allowed only *twenty* days for the defendant to appear and move to vacate an order of forfeiture of money deposited instead of bail while during all of

the same period section 1307 clearly contemplated that the court had at least thirty days within which to act upon the application, its language being as follows: "If, by reason of the neglect of the defendant to appear, money deposited instead of bail is forfeited, and the forfeiture is not discharged or remitted, the clerk with whom it is deposited must, at the end of thirty days, unless the court has before that time discharged the forfeiture, pay over the money deposited to the county treasurer." It is a general rule of statutory construction that a statute should be considered as a whole [People v. Pereles (1932) 125 Cal.App.(Supp.) 787, 790, 12 P.(2d) 1093; People v. Frost (1932) 125 Cal.App.(Supp.) 794, 795, 12 P.(2d) 1096] and in construing one section of a code other sections on the same subject may properly be considered [23 Cal.Jur. 761, 762; Seaboard Surety Corp. v. Municipal Court (1929) 208 Cal. 596, 597, 283 P. 289; Pacific Ind. Co. v. Myers (1931) 211 Cal. 635, 641, 296 P. 1084].

[5-7] Applying the rules of construction heretofore discussed, we think the appearance and showing on the part of the defendant depositor of bail money might be had within the period limited by the statute and the court could hold the matter under submission beyond that time, retaining full power to make a valid order in the premises. Likewise, having made a valid conditional order within that period, the condition, unless otherwise limited, could thereafter be met. The order made in this case did not expressly state the time within which the condition could be complied with, and in the absence of such expression it will be presumed that the court either contemplated that the clerk should immediately apply $500 of the $2,000 then on deposit, in satisfaction of the costs, as we think could have been done (see Mundell v. Wells (1919) 181 Cal. 398, 184 P. 666, 7 A.L.R. 383) or it intended that there should be no limitation short of the time prescribed by the statute (section 1463, Penal Code) for claiming money deposited as bail after final disposition of the case in which it was deposited or after order of court for its return.

[8] Since the money deposited in this case did not attain the status of a "collected" forfeiture, we think that the provisions of the last paragraph of section 1463, Penal Code (as it read at the time involved), were applicable to it. That paragraph, in material part, was as follows: "All money deposited as bail which has not been claimed within one year after the final disposition of the case in which such money was deposited, or within one year after an order made by the court for the return or delivery of such money to any person, shall be paid * * * to the general fund of the county and * * * apportioned between the city and county and paid in the manner hereinabove provided for the apportionment of fines and forfeitures." Also pertinent is the immediately preceding paragraph: "*Any money deposited with such court or with the clerk thereof* which, by order of the court * * * should be returned in whole or in part to any person * * * shall be paid to such person * * * by warrant of the county auditor, which shall be drawn upon the requisition of the clerk of such court."

[9] We do not regard the provisions of section 1307, Penal Code, requiring the clerk to "pay over" to the county treasurer "money deposited instead of bail," when it has been forfeited, "at the end of thirty days, unless the court has before that time discharged the forfeiture," as controlling over section 1463 or as having any significance in this case other than the interpretative implication previously discussed. The meaning of section 1307, which as hereinbefore mentioned was amended to its present form in the year 1905, has been rendered somewhat doubtful by the amendment in 1927 of section 1305. In that year the twenty-day period of limitation upon a party and his bail within which application to set aside a forfeiture could be made was increased to ninety days, but no corresponding amendment was made in section 1307. Section 1463 was enacted in 1925 (St.1925, p. 949) and deals specifically with bail in municipal courts. It controls in this case.

[10, 11] It will be observed that all provisions of said section 1463 relating to the handling and disposition of "fines and forfeitures" specifically identify the subject-matter referred to as "*such* fines and forfeitures" (italics ours), thereby limiting the applicability of such provisions to the "*collected*" fines and forfeitures described in the first sentence of that code section. Under the law as quoted, and the circumstances shown in this case, it was the duty of the defendant clerk to hold on deposit with the county treasurer the "money de-

posited as bail" which had not become a "collected" forfeiture, for one year after the order for its exoneration and implied return, unless it was sooner claimed. It was sooner claimed and should have been repaid by the county treasurer through the county auditor's warrant drawn upon requisition of the defendant clerk. Which of the two demands, the first for $1,500 or the later one for $2,000 accompanied by express tender of $500 should have been honored is immaterial upon this appeal as even the later one was not beyond any time limited either by the order or by law.

[12] Nothing appears in the record which requires a reversal of the judgment as to any of the several individual defendants, either personally or in an official capacity, except the defendant W. S. Dinsmore. With the single exception noted, the acts of the individual defendants were performed by them in their respective official capacities in compliance with the mandate of the law. They acted merely as administrative officers, had no discretion in the premises, and were bound at their peril to honor the requisition of the clerk or accept and deposit the funds transmitted, in accordance with the duties of their respective offices. See Mundell v. Wells (1919) 181 Cal. 398, 400, 401, 184 P. 666, 7 A.L.R. 383.

[13, 14] The liability of the county of Los Angeles to plaintiff, if any exists, can rest only upon the theory of money had and received. The county was in legal effect but a governmental agency of the state in this matter and the various county officers were, so far as responsibility is concerned, not agents of the county but merely servants of the law, under the direction of which, rather than of the county, they were required to act, and the county therefore would not be liable for any torts committed by them in that connection, even if they disobeyed the law. Sherbourne v. Yuba County (1862) 21 Cal. 113, 81 Am.Dec. 151; Crowell v. Sonoma County (1864) 25 Cal. 313; Sievers v. City and County of San Francisco (1896) 115 Cal. 648, 654–656, 47 P. 687, 56 Am.St.Rep. 153; Municipal Bond Co. v. Riverside (1934) 138 Cal. App. 267, 274, 32 P.(2d) 661; Union Bank & Trust Co. v. Los Angeles County (1934) 2 Cal.App.(2d) 600, 38 P.(2d) 442. In the case last cited, where plaintiff sought to recover from the county money filed in court as an exhibit, and which had been embezzled by a deputy county clerk, the court said, 2 CalApp.(2d) 600, at page 610, 38 P.(2d) 442, 446: "The liability of the county for the return of this money can only be based on allegations and proof of receipt thereof or a conversion thereof to the use or benefit of the county. [Citing cases.] And under the allegations it is made clear that the clerk of the court did not receive it as the agent of the county nor in any way for it, or on its behalf. Therefore the county did not become the debtor for this money, nor liable to recovery thereof as of moneys had and received to and for its use and benefit." While there are exceptions to this rule of nonliability of a county for torts of its officers, as where the county is acting in a proprietary capacity [see Chafor v. City of Long Beach (1917) 174 Cal. 478, 483, 484, 163 P. 670, L.R.A.1917E, 685, Ann.Cas. 1918D, 106; Morrison v. Smith Bros., Inc., (1930) 211 Cal. 36, 39, 293 P. 53] or where the act complained of is really a taking of private property for public use [see Cal. Const. § 14, art. 1; Tyler v. Tehama County (1895) 109 Cal. 618, 42 P. 240; Elliott v. County of Los Angeles (1920) 183 Cal. 472, 191 P. 899], this is because the county in such a case is acting quoad hoc as a private corporation or because the case comes within some constitutional or statutory provision which has no application here.

[15] Until bail money becomes a collected forfeiture, as hereinbefore defined, and has been apportioned to and paid into the treasuries of the city and county respectively, the duties of the clerk of the municipal court, the county auditor, and the county treasurer in regard to it are those prescribed by the various sections of the Penal Code above cited and perhaps other sections and statutes, and under the rule above stated the county is not responsible for their acts even though they (or one of them) by reason of failure to comply with the law may become personally liable for a conversion. The same principles exempt the city from liability up to that time.

[16, 17] Upon such apportionment and division, any bail money included therein passes either to the city or to the county, or partly to each, as city or county funds and from that time on each of them is liable, in an action for money had and received, to any one legally entitled to such money for such part thereof as it may have received. We have already held that plain-

tiff is entitled to the money here in question. By what entity was it received upon the apportionment of funds in which it was included? Under the terms of Penal Code, § 1463, as amended in 1935 (St.1935, p. 1204), the answer to this question would be easy, depending merely on the identity of the employer of the officer or person who filed the complaint against the person for whom the bail was deposited. Under that section as previously existing, the question is more complicated, but we think an answer may be found, upon the facts of this case. All valid collected fines and forfeitures up to 75 per cent. of the cost of conducting the criminal departments of the court belonged to the county. If no more than that amount was apportioned, all went to the county and it received every forfeiture included in the apportionment, whether rightly or wrongly. But when more was collected, since the county was entitled to this definite sum before the city got anything, we think it inevitably follows from the fact that there was a surplus that the county's reimbursing share came out of the money which was properly subject to distribution; and if any item was wrongly included in the apportionment, it must be considered as constituting a part of the excess (to the extent thereof) which went to the city, because until the county had received its fixed amount there could be no surplus for payment to the city. Upon returning such item to its true owner, the city would occupy the same situation as if the apportionment had been made in accordance with the true rights of the parties. The county, on the other hand, if it were held to have received any wrongfully apportioned item under such circumstances, would, upon being required to return it to the true owner, find a deficiency in the reimbursement which the Legislature positively declared it should have, although the fund provided for that purpose was ample. It results from these considerations that in this case the city is and the county is not liable to refund to plaintiff the money in question.

The judgment in so far as it is against plaintiff and in favor of the defendants city of Los Angeles, a municipal corporation, and W. S. Dinsmore, individually and as clerk of the municipal court of the city of Los Angeles, is reversed and the cause remanded to the municipal court of the city of Los Angeles for a new trial, appellant to recover her costs of appeal. As to all other defendants and respondents, the judgment is affirmed, such respondents to have their costs of appeal.

EMMET H. WILSON, Judge pro tem. I concur.

SHAW, Presiding Judge.

I concur, but I agree to the holding that the power of the court to act on an application for relief from a bail forfeiture continues after the expiration of ninety days from the forfeiture, only in so far as it applies to a case where money deposited in lieu of bail has been forfeited. As to such a case, I agree that there is nothing in the law to cut off at the end of ninety days the power of the court to act on such an application. But where the forfeiture of a bail bond is in question, the provisions of section 1463 of the Penal Code which are relied on as extending the time do not apply, and section 1306 of the same code as amended in 1927 (St.1927, p. 1385), must be considered and construed with section 1305. When this is done, the provisions of section 1306 for entering judgment on a forfeited bail bond on the ninety-first day after a forfeiture may perhaps be regarded as ending at that time the power of the court to set aside the forfeiture. This question is not now before us, but if it should be presented, this decision should not be regarded as determinative of it.

21 Cal.App.2d Supp. 765

O'BRIEN v. THOMAS, Marshal.

Civ. A. 3545.

Appellate Department, Superior Court, Los Angeles County, California.

March 2, 1937.

Sheriffs and constables 🔑118

Marshal of municipal court *held* not liable to attachment creditor for releasing attached money to a third party in good faith reliance on court order, though the order was later reversed and marshal's deputy told attachment creditor that the money would not be released pending appeal, where attachment creditor made no application for any modifying or saving order, since order

for relief was jurisdictionally within court's power and regular on its face, deputy could not bind marshal to disobey it; and deputy being a civil service appointee, marshal would not be liable for any tort comprised in the deputy's conduct (Code Civ.Proc. § 689, as amended by St.1933, p. 1887; Pol. Code, § 4168).

◆

Appeal from Municipal Court of City of Los Angeles; Edward R. Brand, Judge.

Action by E. O'Brien, judgment creditor, against Charles R. Thomas, Marshal of the Municipal Court of the City of Los Angeles, to recover damages for alleged unlawful release of attached personal property pending appeal from judgment determining title in a proceeding under Code Civ.Proc. § 689. From a judgment of the Municipal Court for defendant, plaintiff appeals.

Affirmed.

George P. Cook, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, both of Los Angeles, for respondent.

SCHAUER, Judge.

Plaintiff, who was an attaching and is now an unsatisfied judgment creditor in the case of O'Brien v. Friedman, No. 373472 in the municipal court of the city of Los Angeles, in this action sues the marshal of such municipal court for damages for allegedly unlawfully releasing to a third party claimant a sum of money which had been paid into the custody of said marshal under a writ of attachment levied in such prior action, and from a judgment in favor of the defendant marshal prosecutes this appeal.

The money had been garnisheed as a debt owing to the attachment action defendant Friedman by one Thomas B. White who paid it to the marshal under plaintiff's writ, and it was then claimed by the third party Davidson. Plaintiff resisted Davidson's claim, required the marshal to hold the money, and deposited the undertaking to that end provided for by section 689 of the Code of Civil Procedure, as amended by St.1933, p. 1887. Thereafter a trial to determine title was held pursuant to the provisions of said section 689, and the court adjudged that the title involved was vested in the third party claimant at the time the writ of attachment was levied. Immediately after rendering the judgment determining title, the court made a separate written order directing the marshal "to release and pay over to the Third Party claimant" the money in question. No appeal was taken from this order, but plaintiff, upon being advised by a deputy marshal of the fact of rendition of such order, told the deputy that he intended to appeal from the judgment and was told by the deputy that "they would hold the money under attachment and await the outcome of the appeal." Plaintiff successfully prosecuted such an appeal, the judgment was reversed, and on the new trial a judgment, which is now final, was rendered decreeing that the money in controversy was the property of the attachment action defendant. It was therefore properly subject to plaintiff's writ. In the meantime plaintiff had also recovered judgment on his original cause of action. After securing the judgment determining that title to the attached money reposed in the defendant Friedman, he caused a writ of execution to be issued and placed in the hands of the marshal for partial satisfaction out of the attached money and then learned that such money had been released by the marshal to the third party claimant pursuant to the original order of the court on the day it was rendered and prior to the appeal from the judgment. He thereupon brought this action against the marshal seeking recovery of the amount of money so attached and released.

The marshal justifies his act of releasing the attached money by producing the original judgment of the municipal court purporting to determine that at the time the attachment was levied the title to said money was vested in said Davidson, the third party claimant, and he exhibits also the order of the municipal court, bearing the same date as the judgment mentioned, directing him "to release and pay over to the Third Party claimant" the attached money. There is no question but that pursuant to this order and without awaiting expiration of the time for appeal, the marshal did in good faith surrender said money to said claimant.

Section 689 of the Code of Civil Procedure as it read at the time of the events in controversy (June, 1935), provided as follows:

"If the property levied on is claimed by a third person as his property by a written claim verified by his oath or that of his agent, setting out his right to the possession thereof, and served upon the officer making the levy, such officer must release the property if the plaintiff, or the person in whose favor the writ of execution runs, fails within five days after written demand, to give such officer an undertaking. * * *

"If such undertaking be given, such officer, shall hold the property. * * *

"Whenever a verified third party claim is served as herein provided, upon levy of execution or attachment, the plaintiff, or the person in whose favor the writ of execution runs (whether any undertaking hereinabove mentioned, be given or not), shall be entitled to a hearing within twenty days from the filing of the application or petition hereinafter mentioned, before the court having jurisdiction of the action, in order to determine title to the property in question, which hearing must be granted by the said court upon the filing of an application or petition therefor. * * * If the plaintiff, or the person in whose favor the writ of execution runs, gives the undertaking * * * such third person may initiate similar proceedings to determine title. *The court* * * * *may, by order, forbid a transfer or other disposition of the property until the proceeding, herein provided, for the determination of such title, can be commenced, and prosecuted to termination. Such order may be modified or vacated by the judge granting the same, or by the court in which the proceeding is pending at any time, upon such terms as may be just.* Upon the termination of such proceedings the court may make all proper orders for the disposition of such property or proceeds." (Emphasis ours.)

It thus appears that "the court in which the proceeding is [was] pending" at all times during the pendency of the proceeding involved had jurisdiction and power to "forbid a transfer or other disposition of the property" until such proceeding was "prosecuted to termination." Appellant made no application to such court for any order of modification, vacation, stay of execution, or other saving order. He took the appeal from the judgment determining that title was vested in the third party claimant but with knowledge of such judgment and of the court's order that the money be released he made no effort to preserve the status quo other than to tell a deputy marshal that an appeal would be taken from the judgment. A conversation with a deputy marshal cannot fulfill the function of an application to and order by the court.

Whether the order for release of the property was or was not in itself an appealable order we need not here determine. It was jurisdictionally within the power of the court, was regular on its face, and the marshal was justified in obeying it regardless of the fact that eventually it was upon appeal from the judgment resultantly determined to be erroneous. Section 4168, Political Code; Sparks v. Buckner (1936) 14 Cal.App.(2d) 213, 220, 57 P.(2d) 1395; First Nat. Bank v. McCoy (1931) 112 Cal. App. 665, 670, 297 P. 571; Burlingame v. Traeger (1929) 101 Cal.App. 365, 369, 370, 281 P. 1051. The deputy marshal obviously could have no power to bind the marshal to disobey the court's order. There is no suggestion of any lack of good faith on the part of the marshal, and if any tort can be construed out of the conduct of the deputy the marshal is not liable therefor, it having been stipulated that the deputy was employed under civil service regulations. Van Vorce v. Thomas (Cal.App. 1937) 64 P.(2d) 772; Lorah v. Biscailuz (1936) 12 Cal.App.(2d) 100, 54 P.(2d) 1125.

The judgment is affirmed, respondent to recover his costs of appeal.

We concur: SHAW, P. J.; WILSON, Judge pro tem.

CALIFORNIA REPORTER

IN VOLUME

66 PACIFIC REPORTER

SECOND SERIES

8 Cal.2d 455

WILLIAMS v. CHAPPELL, City Clerk.

S. F. 15828.

Supreme Court of California.

March 24, 1937.

Mandamus 🔑74(3)

Under city charter covering election of officers and requiring that candidates be citizens and qualified electors and statute relating to registration of electors and to change of surname between time of last registration and time of closing of registration, and providing that no person who has changed name shall register except as provided therein and on production of certified copy of judgment of superior court directing such entry, petition for an order requiring city clerk to omit from ballot name of candidate for office of city auditor who was known by name of "David Adams" or "David Axelrod" *held* required to be granted (Pol.Code, § 1097, subds. 4, 5).

In Bank.

Original proceeding by Harry G. Williams for a writ of mandate against W. W. Chappell, City Clerk of the City of Oakland.

Petition granted.

Fitzgerald, Abbott & Beardsley, of Oakland, for petitioner.

F. B. Fernhoff, City Atty., and Hilton J. Melby, Asst. City Atty., both of Oakland, for respondent city clerk.

A. Grossman and Gladstein & Grossman, all of San Francisco, for David Adams.

PER CURIAM.

At the close of the argument the Chief Justice announced the opinion and judgment of the court:

We have carefully considered the argument relating to the application of section 10 of the charter of the city of Oakland, which covers the election of officers and is pertinent to the office of auditor, and which requires that candidates must be citizens and qualified electors, and section 1097 of the Political Code, relating to the registration of electors, and the application of subdivisions 4 and 5 of that section, one relating to a change of surname between the time of last registration and the time for the closing of registration, and what shall be done, and the next subdivision providing that no one who has changed his or her name shall register except as provided in subdivision 4, and unless upon the production of a certified copy of a judgment of the superior court directing such entry.

Basing our decision on those provisions, we are of the view that the petition for order requiring the city clerk to omit from the ballot the name of David Adams or David Axelrod, whichever name he is to be known by, will have to be, and is, granted.

* * *

8 Cal.2d 453

COMEY v. COMEY.

L. A. 16039.

Supreme Court of California.

March 18, 1937.

1. Divorce 🔑182, 184(5)

Granting or denying wife's application in divorce proceeding for additional attorneys' fees, alimony, and costs on appeal rested in sound discretion of trial court whose decision would not be disturbed in absence of showing of abuse of discretion.

2. Divorce 🔑182

Order denying wife's application in divorce proceeding for additional attorneys' fees, alimony, and costs on appeal *held* discretionary, where transcript merely contained affidavits and counter affidavits relating to application, counter affidavits supported order, and application was evidently made to recoup costs and expenses incurred in prosecution of three prior appeals, which were dismissed.

In Bank.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Divorce proceeding by Jessie E. Comey against Albert Allison Comey. From an adverse order, plaintiff appeals, and defendant moves to dismiss the appeal or to affirm the order.

Affirmed.

A. P. Michael Narlian, of Los Angeles (William E. Prather, of Los Angeles, of counsel), for appellant.

David R. Faries, McIntyre Faries, and J. Clifford Argue, all of Los Angeles, for respondent.

WASTE, Chief Justice.

Motion to dismiss or affirm order. Three prior appeals (Nos. L.A.15925, L.A. 15789, and L.A.15848), growing out of this cross-action for divorce, have already been dismissed by this court, as hereinafter shown. The present, fourth, appeal is from an order denying allowance of additional attorneys' fees, costs, and alimony pending appeal. Defendant asks that this appeal also be dismissed.

The first appeal, from the interlocutory judgment, was dismissed because of failure to file a transcript within the required time. The second appeal, from an order refusing to vacate the judgment and grant a new trial under section 953e of the Code of Civil Procedure, and the third appeal, from the order terminating proceedings for preparation of clerk's and reporter's transcript, were, and each was, dismissed for the following reasons: There was a lack of diligence on the part of plaintiff in attempting to procure a record on appeal during the lifetime of the reporter; the latter's death made it impossible to secure a satisfactory reporter's transcript; plaintiff did not even seasonably procure and file a clerk's transcript, which would have supported a judgment roll appeal; and, lastly, there was no showing whatever of abuse of discretion on the part of the court below in making the orders appealed from.

[1, 2] The present appeal is from an order denying plaintiff's application for additional attorneys' fees, alimony, and costs on appeal. The granting or denial of this application was a matter resting in the sound discretion of the trial court, and its conclusion will not be disturbed unless there is a showing that the court abused such discretion. Kellett v. Kellett, 2 Cal. (2d) 45, 48, 39 P.(2d) 203; Gay v. Gay, 146 Cal. 237, 240, 79 P. 885. The record before us contains no showing whatsoever of abuse of discretion. The transcript, a clerk's transcript, contains merely the affidavits in support of and counter affidavits opposing the application for additional attorneys' fees, alimony, and costs. These affidavits are in sharp conflict. However, the showing made in the counter affidavits, considered in connection with the history of the three prior appeals, affords ample support for the conclusion that the court below exercised a sound discretion in making its order denying plaintiff's application. The motion was evidently made for the purpose of recouping costs and expenses already incurred in the prosecution of the three appeals here noted as having been dismissed. This appeal is without merit.

The order appealed from is affirmed.

We concur: CURTIS, J.; LANGDON, J.; EDMONDS, J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.

8 Cal.2d 469

PILLSBURY v. SUPERIOR COURT IN AND FOR ORANGE COUNTY.

L. A. 16072.

Supreme Court of California.

March 26, 1937.

Rehearing Denied April 22, 1937.

1. Appeal and error 🔑1201(1)

Trial court has jurisdiction to permit filing of amended pleadings after reversal of its judgment and remand of case by reviewing court, in absence of limitation by language of latter court's decision.

2. Judgment 🔑948(1)

Plea of res judicata must be affirmatively relied on and presents question for determination by trial court in exercise of its jurisdiction.

3. Judgment 🔑564(1)

Ordinarily, res judicata doctrine applies to issues determined by final judgment in another action and is not effective before final judgment on all issues between parties.

4. Appeal and error 🔑1195(1), 1201(3)

Decision of District Court of Appeal, reversing portion of trial court's judgment and remanding cause for further proceedings, is law of case and governs its subsequent course on undetermined issues so far as same facts and legal principles are concerned, but is not adjudication in same sense as final judgment and imposes no limit on trial court's power to permit further amendments of pleadings, in absence of express direction to enter specified judgment.

5. Appeal and error 🔑1201(3)

Fact that only portion of trial court's judgment was appealed from did not divest such court of its jurisdiction to decide effect of finality of portion not appealed from on parties' right to amend pleadings after reversal of former portion and remand of case by District Court of Appeal.

6. Prohibition 🔑10(2)

Whether trial court properly exercised its jurisdiction in permitting amendment of complaint after decision of District Court of Appeal, reversing portion of judgment for defendant and remanding cause for further proceedings, *held* not open for consideration on application for writ of prohibition restraining trial court from determining issues raised by amended complaint.

In Bank.

Original proceeding by Louise Pillsbury for a writ of prohibition to the Superior Court of the state of California, in and for Orange County.

Alternative writ discharged and application for peremptory writ denied.

Prior opinion, 60 P.(2d) 173.

E. C. Bowen and Albert E. Coger, both of Los Angeles, for petitioner.

William L. Waters, of Fullerton, for respondent.

SHENK, Justice.

This is an application for the writ of prohibition to restrain the respondent superior court from entertaining jurisdiction to hear evidence and determine issues raised by an amended complaint filed by its permission after appeal from and reversal of a portion of the judgment in the action.

In 1933 the petitioner, Louise Pillsbury, filed an action for divorce against William Pillsbury. She also sought a division of the community property. The alleged community property consisted of three pieces of real property conveyed in August of that year to William Pillsbury by Laura Belle Resh in consideration of commissions owing to him from real estate transactions conducted while he was in the employ of Mrs. Resh. The latter was joined as a defendant in the divorce action for the purpose of determining the ownership of the property involved. Mrs. Resh filed an answer claiming sole ownership. She also commenced a separate action to quiet title to the same property, naming the Pillsburys, husband and wife, as defendants. Louise Pillsbury answered in that action, setting up the claimed community interest. The issues in the two actions affecting the ownership of the real property were consolidated for trial. The court adjudged that by unqualified grant deeds executed by Mrs. Resh to William Pillsbury on August 3, 1933, and delivered to him, title to the property passed to Pillsbury, but that by virtue of a collateral oral agreement a life interest was retained by Mrs. Resh. Louise Pillsbury appealed from that portion of the judgment which decreed that a life interest was retained by Mrs. Resh. On the appeal the portion of the judgment appealed from was reversed on the ground that evidence of the contemporaneous oral agreement was inadmissible and ineffectual under the issues to change the solemn declaration of the grant deeds. Resh v. Pillsbury, 12 Cal.App.(2d) 226, 55 P.(2d) 264, 267. The judgment of the District Court of Appeal was as follows: "The portions of the judgment appealed from are reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed."

After the going down of the remittitur, Laura Belle Resh was granted leave to file and did file an amended complaint setting forth a cause of action for reformation of the deeds to conform to the alleged true intent and understanding of the parties to preserve to her a life interest in said properties, and which was allegedly not carried out through mutual mistake of law and fact. Whereupon the petitioner herein, Louise Pillsbury, filed her application for the writ of prohibition, and an alternative writ was issued.

[1] The restraint on any exercise of jurisdiction by the respondent court in proceeding to try the issues offered by the amended complaint is sought on the ground that upon the going down of the remittitur after reversal of the portion of the judgment appealed from, the respondent court had no jurisdiction to proceed in any manner except by the entry of a judgment that the property constituted the community property of the spouses without the reservation of any interest in Mrs. Resh. This contention is based on the petitioner's view of the necessary interpretation and application by the respondent court of the order of reversal. The petitioner urges that the order of reversal is tantamount to a reversal "with directions to enter judgment for the appellant," and leaves the respondent court without jurisdiction to proceed in any other manner.

But this is not necessarily the effect of the reviewing court's order. If it were, then, pursuant to such cases as Keller v. Lewis, 56 Cal. 466, Lial v. Superior Court, 133 Cal. App. 31, 23 P.(2d) 795, and Fair Haven & W. R. Co. v. City of New Haven, 77 Conn. 667, 60 A. 651, we could say there is merit to the petitioner's asserted right to a writ prohibiting the court from acting in any manner except in conformity with such a direction. But proceedings not inconsistent with the views expressed by the District Court of Appeal may in a proper case contemplate the granting of permission to file an amended pleading. In the absence of any limitation imposed by the language of the decision of the reviewing court, the trial court has jurisdiction to permit amended pleadings to be filed. Gould v. Stafford, 101 Cal. 32, 35 P. 429; 2 Cal.Jur. pp. 1053, 1054; Stusser v. Gottstein (Wash.) 61 P.(2d) 149.

[2-6] The petitioner seeks to apply the tests inherent in the doctrine of res judicata. Such a plea where appropriate must be affirmatively relied upon and presents questions for the determination of the trial court in the exercise of its jurisdiction. Baird v. Superior Court, 204 Cal. 408, 268 P. 640. Ordinarily, that doctrine is applicable to issues which have been determined by final judgment in another action. It is

not effective when there has been as yet no final judgment on all the issues between the parties. Here the decision of the District Court of Appeal is the law of the case and governs its subsequent course on the undetermined issues in so far as the same facts and principles of law are concerned. But it is not an adjudication in the same sense as a final judgment in the action. Without an express direction to enter a specified judgment, it does not impose a limit upon the power of the court to permit further amendments. Ellis v. Witmer, 148 Cal. 528, 83 P. 800. The fact that only a portion of the judgment was appealed from in this case does not serve to divest the court of its jurisdiction to decide the question of the effect of the finality of the portion of the judgment not appealed from on the right of the parties further to amend. Whether the court has properly exercised its jurisdiction in the conduct of the proceedings subsequent to the reviewing court's decision is therefore not a question which may be inquired into on an application for a writ of prohibition on the case here presented. Harris v. Hensley, 214 Cal. 420, 6 P.(2d) 253; Brown v. Superior Court, 13 Cal.App. (2d) 693, 57 P.(2d) 965.

The alternative writ is discharged and the application for a peremptory writ is denied.

We concur: WASTE, C. J.; SEAWELL, J.; EDMONDS, J.; LANGDON, J.; CURTIS, J.; THOMPSON, J.

* * *

18 Cal.App.2d 671

TOMLINSON v. LAMPTON et al.

Civ. 11223.

Supreme Court of California.

March 25, 1937.

Mandamus 🔑3(11)

Petitioner, who Supreme Court had decided was entitled to sum deposited with clerk of superior court, *held* not entitled to writ of mandate to require clerk to pay over such sum, where third party had served garnishment on clerk, since petitioner had adequate legal remedy through intervention in garnishment action.

In Bank.

Petition for writ of mandate by Howard Tomlinson against L. E. Lampton, Clerk of the Superior Court of Los Angeles County, and the Superior Court of Los Angeles County, Hon. Robert W. Kenny, Judge presiding, to require payment to petitioner of a sum of money held by virtue of a writ of attachment, in accordance with a decision of the Supreme Court, to which the respondent filed a demurrer. N. F. Weston served a garnishment on respondent clerk attaching such sum of money. On petitioner's petition for hearing after decision by the District Court of Appeal sustaining the demurrer and denying the writ, 64 P.(2d) 443.

Petition for hearing denied.

George L. Hampton and W. W. Middlecoff, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles, for respondents.

PER CURIAM.

The petition for hearing after decision by the District Court of Appeal of the Second Appellate District, Division 2, is denied.

In denying said petition for hearing, we withhold approval of the statement that section 549 of the Code of Civil Procedure as amended by St.1933, p. 1865, and section 689, as amended by St.1935, p. 1958, are available to petitioner in the present proceeding. Petitioner has an adequate legal remedy, namely, intervention in the other action, and accordingly it is not proper to issue the writ.

* * *

19 Cal.App.2d 668

WEINER et al. v. LUSCOMBE et al.

Civ. 10459.

District Court of Appeal, First District, Division 2, California.

March 22, 1937.

As Amended April 8, 1937.

1. Trial 🔑105(2)

In action to quiet title, under allegation that creditor claiming judgment lien held judgment against landowners, testimony of creditor that party who obtained judgment against landowners was creditor's assignee for collection, which testimony was not objected to and was uncontradicted, *held* to require findings thereon.

2. Judgment 🔑792

In action to quiet title wherein creditor claimed judgment lien, evidence that party who obtained judgment against landowners was creditor's assignee for collection *held* not to sustain finding that creditor did not recover judgment against landowners.

3. Evidence 🔑271(18)

In action to quiet title wherein creditor claimed judgment lien, contract between landowners and creditor's attorney for satisfaction of judgment, which, contract recited, was assigned to creditor by party obtaining judgment, *held* incompetent to establish such assignment when offered by landowners, as being self-serving.

4. Attorney and client 🔑98

Debtors *held* entitled to credit for payments made to attorney empowered by creditor to collect claim, regardless of how attorney applied payments (Code Civ.Proc. § 283).

5. Judgment 🔑754

Where creditor assigned claim for collection, assignee obtained judgment, debtors had notice of nature of assignment, negotiated with creditor's attorney at creditor's suggestion, and agreed to satisfy judgment by making certain payments and conveying realty to creditor, and conveyance was never made, creditor could claim judgment lien, as against contention creditor could look only to assignee, since assignee was merely trustee for creditor, who could show she was real party in interest (Code Civ.Proc. § 369).

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Harry H. Weiner and others against L. S. Luscombe and others. From a judgment for plaintiffs, defendant Helen C. O'Connor appeals.

Reversed.

Joseph F. O'Malley, of San Francisco, for appellant Helen C. O'Connor.

W. H. Morrissey, of Redwood City, for respondents.

STURTEVANT, Justice.

In an action to quiet title, the trial court made findings of fact in favor of the plaintiffs, and from the judgment entered Helen C. O'Connor, one of the defendants, has appealed.

Mrs. O'Connor states that heretofore Mr. and Mrs. Weiner were indebted to her in the sum of $700; that she employed D. Herndon, another of the defendants, to act as her attorney; and that he induced her to assign her claim to L. S. Luscombe, his secretary, another defendant, solely for collection. She also claims that the suit was brought in the municipal court of San Francisco in the name of Miss Luscombe, that the plaintiff was successful, and that later an abstract of the judgment was recorded in the office of the recorder in the county of San Mateo. Continuing, she asserts that without her knowledge or consent Mr. Herndon attempted to compromise her claim by accepting $100 in cash, a promissory note in the sum of $50, and a deed purporting to convey to her some lands in San Mateo county. She then asserts that Mr. Herndon, as her attorney, had no right to compromise her claim; that she assigned it to Miss Luscombe solely for collection; and that the latter held the claim and the judgment evidencing it solely as her trustee.

[1, 2] But the plaintiffs call to our attention the fact that the defendant did not plead those facts in her answer, did not offer to amend, and submitted the case on different issues. Those facts are true in part. She alleged she obtained a judgment against the plaintiffs and introduced in evidence the judgment in favor of Miss Luscombe. She took the stand and, without objection, she testified to the facts regarding her assignment to Miss Luscombe, and no witness contradicted her. While it would have been better practice if the defendant had pleaded the facts showing she was the owner and that Miss Luscombe was merely an assignee for collection, the facts came out during the trial and the trial court should have made findings thereon. Sun-Maid Raisin Growers v. Papazian, 74 Cal. App. 231, 240 P. 47. It found the fact to be that Miss Luscombe recovered a judgment, but it did not continue and find that she did so as the assignee of this defendant for collection. It found that this defendant did not recover a judgment against the plaintiffs. As we have shown above, she did recover a judgment in the name of Miss Luscombe and the latter was acting merely as her trusted agent. The finding last mentioned is not sustained by the evidence.

[3] Over the objection of the defendant, the plaintiff introduced in evidence a contract signed by the plaintiffs and Mr. Hern-

don for the satisfaction of said judgment. That document recites that on November 25, 1933, Miss Luscombe assigned the judgment "to Helen O'Connor, her attorney, D. Herndon." The meaning of those words does not appear. However, the document was merely a self-serving declaration of these plaintiffs and of Mr. Herndon, who was not, at the time of the trial, a party to the suit. No other evidence of such assignment was introduced. Therefore the finding of the court that such assignment was made was not supported by any evidence.

[4] In the record there is evidence that the plaintiffs paid to Mr. Herndon $150, but there is no evidence that they have executed a deed to this defendant. As the action must go back for another trial, it is proper to say that from the uncontradicted evidence it appears this defendant placed in the hands of Mr. Herndon, as her attorney, a claim for collection and that he accepted the employment. As such agent, it is clear he was authorized to collect said claim and these plaintiffs were within their rights in making payments to him. Code Civ.Proc. § 283, subd. 2. As to how he applied said payments, if any, the plaintiffs were not concerned. They were entitled to credits for payments made. The trial court made a finding that the above-mentioned judgment has been paid. The finding is too broad and is not sustained by the evidence, as only a part has been paid.

As Mr. Herndon was employed to collect this defendant's claim, it is clear he had power to receive payment of the whole or any part of the amount due. Code Civ.Proc. § 283. But it is statutory that he did not have power under his employment to satisfy said judgment for a sum less than that shown on its face without first obtaining the consent of his client. Code Civ.Proc. § 283, subd. 2; Preston v. Hill, 50 Cal. 43, 19 Am.Rep. 647.

The plaintiffs contend that the facts present a controversy between this defendant and her assignee, and that with that subject the plaintiffs are not interested. Continuing, they claim the said assignment passed the legal title and, in the absence of fraud or mistake, they are not concerned.

[5] Prior to April 26, 1934, no payments had been made to anybody. But prior to that date the plaintiffs knew this defendant was the real party in interest and Mr. Weiner called on her and offered to make payments on the judgment. Mrs. O'Connor told him she would do nothing except through the advice of her attorney. Mr. Weiner then called on Mr. Herndon, her attorney, paid him $100 down and later $50 in installments, and an executory contract to satisfy the judgment was executed by the plaintiffs and by Mr. Herndon. As shown above, that agreement recites that Mrs. O'Connor is the assignee of the judgment. That contract recited that a part of the consideration was a conveyance of certain real property by the plaintiffs to Mrs. O'Connor. It was stipulated during the argument that said conveyance was never executed. Giving due consideration to all of said facts, Miss Luscombe, as assignee for collection, was the trustee of an express trust (Elam v. Arzaga, 122 Cal.App. 742, 747, 10 P.(2d) 805), and as such she had the right to maintain the action on the assigned claim (Code Civ.Proc., § 369). Mrs. O'Connor had the right to prove that she, as assignor, was the real party in interest. Firth v. Richter, 49 Cal.App. 545, 548, 196 P. 277; 1 Cal.Jur. 854, Agency, § 131. Furthermore, it will be noted that the facts present no question as to the rights of these plaintiffs which arose before they had notice of the nature of the assignment by this defendant to Miss Luscombe. We think it is clear, therefore, that the contentions of the plaintiffs that they are not interested in the claim of this defendant may not be sustained. They are interested in the amount which is still owing to her on the judgment rendered in favor of L. S. Luscombe, her assignee.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

RAYMOND v. STAPLES et al.

Civ. 1830.

District Court of Appeal, Fourth District, California.

March 23, 1937.

Petitions for Rehearing and Modification of Opinion Denied April 20, 1937.

Hearing Granted by Supreme Court May 20, 1937.

1. Appeal and error 🔑989

On appeal from judgment on directed verdict for defendants, reviewing court would disregard evidence which was merely in conflict with other evidence more favorable to plaintiff.

2. Mines and minerals ⟹62(1)

Purported lease for five years of mines and mining claims *held* not severable from other covenants of contract, and hence lease assignee was not entitled to possession of premises without complying with covenants unless compliance was prevented by other parties to contract, where assignee agreed to take out greatest amount of ore possible, first payment was considered part of purchase price under provision for option to purchase, and consideration for lease included compliance with "covenants and agreements."

3. Mines and minerals ⟹64

In action by assignee of mining lease to recover possession of mines and mining claims and for accounting with respect to value of ores removed from premises and for damages, whether assignee's failure to make certain payments placed him in default *held* for jury under conflicting evidence.

4. Mines and minerals ⟹64

In action by assignee of mining lease to recover possession of mines and mining claims, for an accounting, and for damages, whether assignee's failure to make payment on certain date as required by contract was excused and prevented by acts of lessors and their transferees *held* for jury.

5. Mines and minerals ⟹64

Whether mining lease assignee forfeited rights thereunder because of failure to impound certain percentage of royalty until amount was produced sufficient to pay accrued taxes and other liens which failure could not, under contract, constitute ground of forfeiture until amount of royalties or net returns equaled certain sum, *held* for jury.

6. Mines and minerals ⟹64

Whether assignee of lease of mines and mining claims was entitled to accounting with respect to value of ores removed from premises *held* for jury, where assignee's evidence justified judgment for him in some amount.

7. Trial ⟹139(3)

In action by assignee of lease of mines and mining claims to recover possession of property, for accounting, and for damages, parties who agreed with assignee to handle certain ores and to account to him for proceeds and who paid such proceeds to others without assignee's consent were not entitled to directed verdict, where full settlement of all issues involved required continued presence of such parties.

Appeal from Superior Court, Kern County; William D. Dehy, Judge.

Action by Walter W. Raymond against Paul Staples and others. From a judgment on directed verdict for defendants, plaintiff appeals.

Reversed.

John W. Preston, C. A. A. McGee, and Robert Lee Collins, all of Los Angeles, Brittan & Mack, of Bakersfield, and Daly B. Robnett, of Los Angeles, for appellant.

Frank S. Hutton, of Los Angeles, and Alfred H. McAdoo and Harvey, Johnston & Baker, all of Bakersfield, for respondents Staples, Hales, and Fisher, Goodwin J. Knight, L. J. Knight and others.

John L. Schaefer, of Los Angeles, for respondents Burton Bros., Inc.

BARNARD, Presiding Judge.

In this action the plaintiff sought to recover possession of certain mines and mining claims and also asked for an accounting with respect to the value of any ores or minerals removed from the premises, and for damages. In answering, the defendants set up failure to perform and abandonment of the project on the part of the plaintiff, and among the main issues thus presented were: (1) Whether the plaintiff was in default under the contract under which he claimed; (2) if he was in default, whether his failure to perform was caused by fraud and conspiracy among and on the part of the defendants, as a result of which facts were concealed from the plaintiff and certain quantities of ore were taken and withheld from him; (3) whether, if a default existed, performance on the part of the plaintiff had been prevented or waived by acts and conduct on the part of the defendants and by failure on their part to perform conditions precedent. At the conclusion of a trial before a jury the court granted a motion for a directed verdict and this appeal is from the judgment which followed.

Two groups of mines or mining claims are involved here. One group was owned by the respondent Staples and the other by the respondent Fisher. On July 30, 1932, Fisher gave to the respondent Hales a lease on the property owned by him with an option to purchase on certain terms. On the same day Staples executed and delivered to Hales a similar lease and option covering the claims owned by him.

On August 1, 1932, Hales as first party, and one Harper as second party, executed an instrument entitled "Lease and option to purchase" covering all of these properties, which was under the same date assigned to the appellant. This instrument, Exhibit 1 in the record, after reciting that the first party is the owner of a lease and option to purchase two groups of mining claims, as described therein, and that the first party is desirous of leasing said claims to the second party and granting to the second party an option to purchase the same, provides that in consideration of $5,000, the receipt of which is acknowledged, and the performance of the "covenants and agreements hereinafter expressed," the first party leases to the second party these mining claims, including machinery and equipment, for the term ending August 1, 1937, "unless sooner forfeited or determined through the violation of any covenant hereinafter against said tenant." It is then stated that the parties agree "as follows:" Ten numbered paragraphs then follow, only the material parts of which will be here summarized. In (1) the second party agrees to so work the premises as to take out the greatest amount of ore possible with due regard to the development and preservation of the premises as a workable mine. In (3) the second party agrees to begin work within thirty days and to perform a certain amount of work per month. In (4) the second party agrees to pay all current taxes upon the property. Paragraph (5) provides that in consideration of the "foregoing lease, and the expenditures to be made thereunder, and the faithful performance of the covenants thereof," the second party is given the option to purchase the properties for $120,000, payable as follows: 15 per cent. of the gross bullion or net smelter returns of all ores mined to be applied upon the purchase price and in the event such royalties shall not amount to $3,500 by January 1, 1933, the second party is to make up and pay the difference to the first party. Other payments at subsequent dates are then provided for, and the paragraph closes with a provision "that the payments in this paragraph specified shall be subject to the provisions in the forfeiture clause hereinafter in this instrument specified." In (6) it is agreed that upon full payment the first party will execute and deliver a deed conveying the premises to the second party. It is then agreed that deeds "signed by the owners of the said mining claims" shall be placed in escrow with a named trust company, with instructions to deliver the same to the second party or his order on full payment of the purchase price "as specified in this lease and option." In (7) it is agreed that the failure of the second party to comply with the conditions of this agreement shall, upon written notice given the second party by the first party, operate as a forfeiture of this agreement, provided that no forfeiture "shall be declared by the party of the first part, or effected by him," until sixty days after the receipt of a written notice, during which period the second party may make up any deficiency in performance. Paragraph (8) reads as follows:

"It is understood and agreed between the parties hereto that until the royalties, to-wit, 15 per cent. of the net returns payable to the party of the first part, shall have amounted to the sum of Two Thousand One Hundred Dollars ($2,100.00), the forfeiture clause next above shall not be operative, save and except for failure to employ the minimum number of shifts hereinbefore set forth in this agreement, and it is further provided and specifically agreed that the party of the first part represents that, save and except for the unpaid taxes on the mining claims known as Soledad and Echo, comprising a portion of what is known and designated herein as the Grey Eagle Group, the title to said property, as of the date hereof, is vested in the said party of the first part, W. E. Hales, free and clear of any liens, encumbrances and/or claims of whatsoever nature.

"Wherefore, it is specifically agreed that the said fifteen percent (15%) royalty herein provided to be paid under the terms hereof to the party of the first part by the party of the second part and/or his assigns, shall be impounded and held in trust by the party of the second part, or his assigns, until an amount sufficient to pay and discharge all accrued taxes, and all other liens, encumbrances or claims now due or past due, has been accumulated in said fund, at which time the party of the second part, or his assigns, is authorized, out of said fund, to pay said taxes and/or other liens, encumbrances or claims, for and on behalf of said party of the first part, and all such payments so made by the said party of the second part on account of royalty payments to be made in contemplation of this agreement."

In (10) it is provided that this agreement is to be binding upon the parties thereto and their assigns and that the second party may lease or sublease all or any part of the properties and may assign, sell or otherwise dispose of "all rights, titles and interest which he may have or enjoy under and by virtue of this agreement, not only as to the lease, but likewise as to the bond, without the consent" of the first party, but that any such lease, sublease, or transfer shall be subject to all of the conditions "of this lease."

On August 20, 1933, Staples and Fisher each signed a statement to the effect that he had full knowledge of the above agreement, and that said agreement was "hereby authorized and approved." These statements are Exhibits 3 and 4. On the same day the five parties so far mentioned signed a notice stating that Staples and Fisher, as owners of the respective properties, had given leases and options to purchase to Hales, that Hales had given a lease with an option to purchase to Harper, that Harper had assigned the latter instrument to Raymond, and that Raymond had taken possession of the properties through Harper, as his manager. This notice was recorded on August 22, 1932.

It appears from the evidence that the appellant took charge of these properties on August 20, 1932, with Harper as his superintendent; that the appellant remained in Los Angeles except for occasional trips to the property; that Staples repeatedly informed the appellant that Harper was not properly operating the mines and that he (Staples) could produce better results; that the appellant installed Staples as superintendent on or about November 1, 1932; and that the amount of returns from the mines decreased from that time. During the fall of 1932 and for some time prior thereto two methods of mining had been carried on upon this property. In addition to the mining operations carried on by the lessees other operations were carried on by sublessees or so-called "leasers," who received a certain proportion of the proceeds for their work. A part of the ore was handled in a mill upon the property and the rest was milled by the respondents Burton Brothers, who ran an independent mill. On September 6, 1932, the appellant gave written notice to Burton Brothers that the proceeds of all ore from these properties were to be sent to him. The appellant received certain proceeds up to January 1, 1933, but none thereafter.

On January 1, 1933, because of labor troubles and the inability to get money with which to operate, the appellant closed the mill and ceased the mining operations which he had been directly carrying on, but continued the operations through the "leasers." At the same time Staples agreed to remain as superintendent to look after the property and the work done by the leasers with the understanding that he would charge his salary on the books, but that he could not be paid unless the property was sold. The appellant continued to write to Staples, addressing him as superintendent, and on several occasions sent prospective purchasers with directions to Staples to show them the property. Staples received from Burton Brothers the proceeds of all ores taken from the property which he originally owned. He testified that the appellant told him to take these proceeds and use them in keeping the properties going. It does not appear why he needed to use these proceeds, since the leasers were paying the expenses of their own mining. Fisher notified Burton Brothers that all of the proceeds from ore taken from the property which he originally owned must be retained for him and none of such proceeds were ever paid to the appellant. On June 26, 1933, Burton Brothers wrote the appellant that all royalty coming from the Fisher property was being held by them pending the outcome of a settlement between him and Fisher. Some time in November, 1933, these proceeds were paid to Fisher and certain other proceeds paid to Staples by Burton Brothers on the verbal statements of Staples and Fisher to the effect that the appellant was "out."

In the meantime and about the middle of May, 1933, one of the leasers ran into what is called a "hot spot" from which ore of an unusual value was taken, which strike was never reported to the appellant. On May 12, 1933, Staples and Fisher gave notice to Hales that he was in default in his payments, and otherwise, under their leases to him. On May 15, 1933, Hales served written notice on the appellant that he was in default under the provisions of Exhibit 1, in that he had failed to pay the $3,500 due on January 1, 1933, and that he had failed to impound 15 per cent. of the net returns and apply the same as provided therein. He was further notified that unless he remedied these defaults within sixty days his rights in the lease and option would terminate without further notice. Staples ceased making charges on the books for his salary after July 15, 1933. The appellant continued to send prospective purchasers to the premises asking Staples to show them the property and about October, 1933, Staples and Fisher gave an option to a third party to purchase the property under an arrangement under which the appellant was to share in the proceeds. About November 1, 1933, L. J. Knight and Goodwin J. Knight showed an interest in purchasing these claims and the appellant sent L. J. Knight to Staples with the request that he show him the property. Shortly thereafter L. J. Knight and Goodwin J. Knight entered into new agreements with Staples and with Fisher to purchase the property, under which they took possession and have since continued operation of the properties. This action followed and the respondents contend that the appellant had forfeited all interest in the properties and the proceeds therefrom and that his rights were terminated when he failed to meet the requirements of the 60-day notice which was served upon him.

[1] The briefs are voluminous, a large number of points are raised, and the respondents in particular quote and rely upon as conclusive a great deal of evidence which is merely conflicting and which must be disregarded under familiar rules, since the judgment here in question rests upon a directed verdict. It is impractical and unnecessary to consider all of the points raised and we therefore confine ourselves to the more important and controlling issues, disregarding evidence which is merely in conflict with other evidence more favorable to the appellant.

The respondents contend that the appellant was under obligation to comply with the provisions of Exhibit 1 and also to comply with the terms of the prior contracts under which Hales derived his rights from Staples and Fisher. The appellant contends that a surrender of Hales' title occurred by operation of law when Staples and Fisher authorized and approved the execution of Exhibit 1 by signing Exhibits 3 and 4 or that, under the circumstances, Hales must be taken to have been acting as the agent of Staples and Fisher in executing Exhibit 1, with the result that Exhibit 1 must be considered as being a contract between Staples and Fisher on the one hand and the appellant on the other. If the terms of all of the contracts had been performed in their entirety Hales would have received from the appellant more than twice the amount he was called upon to pay under his contracts with Staples and Fisher. There was no surrender of title by Hales within the meaning of the cases cited by the appellant nor does any agency relationship appear between Hales and his predecessors in interest. On the other hand, the evidence shows that Exhibits 3 and 4 were signed by Staples and Fisher upon the demand of the appellant, in order that he might be assured that he would get title to the properties if he complied with the terms of Exhibit 1. It follows that Exhibit 1 measures the rights and liabilities of the appellant and the three respondents just mentioned. It also measures the rights and liabilities of the respondents Knight since the evidence discloses that they contracted with Staples and Fisher with knowledge, both actual and constructive, of the interests of the appellant.

One of the main questions raised relates to the interpretation of Exhibit 1. The appellant maintains that this is a severable agreement containing a straight lease for five years with a separate and independent option to purchase. It is therefore argued that the appellant was entitled to possession of these premises and to share in the proceeds therefrom irrespective of whether or not he was in default in either of the respects set forth in the notice of forfeiture.

[2] While some of the language used in Exhibit 1 seems to support the contention thus made, we are of the opinion that the two portions of this agreement referred to are so interrelated as to constitute one agreement and that the forfeiture provisions thereof, except as otherwise provided therein, apply to the contract as a whole. It is customary in such mining agreements to provide for possession by the other party for a sufficient length of time to enable him to determine whether or not he desires to exercise the option to purchase. While such an agreement might be so drawn as to constitute a lease for a definite time without regard to whether or not the option to purchase

was exercised, we think the agreement in question cannot be so interpreted. The fact that the appellant agreed to take out the greatest amount of ore possible is inconsistent with the idea that the first payment of $5,000 was intended to cover the rental for a full five years without regard to the exercise of the option and the making of the other payments in connection therewith. While the purchase price named is $120,000, the payments named in the option provision amount to $115,000 showing that the first payment was considered a part of the purchase price. After the first payment of $3,500 on January 1, 1933, the payments named in the option provision extend over the same period mentioned in the lease, the last payment being on August 1, 1937. All of these payments are to be paid by applying 15 per cent. of the gross bullion or net smelter returns of all ore extracted, and it is further agreed that in the event such royalties are insufficient to meet the payments at specified dates throughout this term of five years the appellant shall make up any deficiency. The consideration for the lease is not merely $5,000 but also includes compliance with the "covenants and agreements hereinafter expressed." The provision that the second party shall have and hold the property for the term ending August 1, 1937, is immediately qualified by the provision "unless sooner forfeited or determined through the violation of any covenant hereinafter against said tenant." The covenants which follow that provision are set forth in paragraphs numbered from 1 to 10. The option agreement, with the forfeiture clauses, are among the covenants thus set forth. The forfeiture clause refers to "this agreement" and "this contract" and not merely to the option portion thereof. Viewing this agreement as a whole, we feel it must be held that the purported lease for five years is not severable from the other covenants set forth and that the appellant was not entitled to possession of the premises for that term in the absence of compliance with the other provisions of the contract, unless compliance therewith was waived or prevented by acts of the other parties thereto.

Under this view of the contract, the next question is whether it must be said that the appellant failed to perform the contract in the respects set forth in the forfeiture notice. According to that notice the only default or failure to perform claimed is that the appellant failed to pay $3,500 on January 1, 1933, and that he failed to impound 15 per cent. of the net returns and apply the same as provided in the agreement. It is conceded that the $3,500 was not paid on January 1, 1933, and the question is whether the failure to make this payment placed the appellant in default.

[3] Paragraph 8 of Exhibit 1 provides that the forfeiture clause shall not be operative until 15 per cent. "of the net returns payable to" the appellant shall have amounted to $2,100, save and except for failure to do the minimum amount of work required by the agreement. The notice of forfeiture made no claim that the minimum amount of work had not been done and the most that can be said of the evidence in that regard is that it is in conflict. There is direct evidence that 15 per cent. of the net returns payable to the appellant amounted to $1,312.31 up to the time it is claimed the forfeiture took effect. This omits certain royalties which Staples received from the strike in the "hot spot" which he secreted and for which he failed to account to the appellant. If those royalties be added there is evidence that the total amount did not equal $2,100.

While the respondents point to certain other evidence indicating total net returns payable to the appellant in excess of $2,100, that evidence merely raises a conflict. Not only did this present a question of fact, but the evidence thus relied on by respondents includes returns which became payable in May, June, and July, 1933, after the notice of default was given, although such returns were not actually received by the appellant. It would seem to appear, even from the evidence relied upon by the respondents, that 15 per cent. of the net returns had not amounted to $2,100 at the time notice of default was served on May 5, 1933. If the appellant was not then in default the notice was ineffective. That notice did not purport to specify that 15 per cent. of the net returns then amounted to $2,100 or that any payments had then become due, other than that the appellant was in default in that he had "failed to make the payment of $3500 which was due and payable on January 1st, 1933." While that amount was due and payable on that date, a forfeiture for failure to pay could not be declared, under the plain provisions of the contract, until something else occurred. It is clear that no right of forfeiture existed on January 1, 1933. If such a right ever accrued it was because of something that occurred after that date. It may be seriously questioned whether a valid notice of default and forfeiture was ever served, under the facts now appearing in the record.

[4] It should be further observed in this connection that other evidence raises the question whether performance by the appellant, in making payments called for by the contract, was not excused and prevented by acts on the part of the respondents. The requirement of the contract that deeds signed by the owners of the mining claims should be placed in escrow with a named trust company was not complied with. While the respondents seek to excuse their failure to perform this covenant a question of fact was presented as to whether they were not themselves in default. There is also evidence that Burton Brothers, apparently upon demand of Fisher, withheld certain moneys from the appellant which should have been paid to him; that Staples concealed from the appellant knowledge of large amounts of ore taken out and retained the proceeds therefrom; and that both Burton Brothers and Staples failed to make reports to the appellant which they had agreed to make relative to the amount of ore taken out and the disposition of the proceeds therefrom. While the respondents point to other evidence on these matters, the resulting conflicts merely present questions of fact. Under the entire evidence the question of whether the appellant was in default at all, in failing to make any payment required by the contract, is a question of fact.

[5] The other ground of forfeiture set forth in the notice, a failure to impound the 15 per cent. royalty until an amount was produced sufficient to pay and discharge accrued taxes and other liens, could not, under the provisions of the contract, constitute a ground of forfeiture until the amount of royalties or net returns equalled the sum of $2,100. It may be further observed that the situation in this respect is also affected by the failure of the respondents to pay over to the appellant certain moneys to which he was entitled, according to the evidence favorable to him, as well as by the acts of Staples in concealing and retaining certain proceeds.

[6] Another question of fact is presented with relation to the accounting asked for by the appellant. In any event, the evidence on behalf of the appellant, if believed, would justify and support a judgment for him in some amount and the court erred in treating this evidence as entirely insufficient to sustain any judgment.

[7] The respondents Burton Brothers contend that the directed verdict was proper and should be sustained in so far as they are concerned. Aside from any other consideration, there is evidence that they agreed with the appellant to handle certain ores from these properties and to account to him for the proceeds; that they handled large amounts of such ore; that they failed to make full reports and accounts to the appellant; that they wrote him that all royalty coming from the Fisher property was being held by them pending the outcome of a settlement between him and Fisher; and that later they paid these proceeds to Fisher and certain other proceeds to Staples without the consent of the appellant on the verbal assurance of Staples and Fisher that the appellant had no further interest in the matter. A full settlement of all of the issues involved in this action requires the continued presence of these parties.

The rules governing the directing of verdicts are well settled and need not be here repeated. In our opinion, the evidence in the record discloses a number of questions of fact which should have been passed upon as such and which require a retrial of the action.

For the reasons given the judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

19 Cal.App.2d 633

COUCH et al. v. McGREGOR et al.

Civ. 5832.

District Court of Appeal, Third District, California.

March 18, 1937.

1. Appeal and error 🔑78(3), 102

An appeal will not lie from an order sustaining a demurrer to a portion of the whole of a pleading, or dismissing it in whole or in part, nor will appeal lie from the order overruling a demurrer, since such orders are interlocutory in character and are not mentioned among those in the statute which are made the subject of appeal (Code Civ.Proc. § 963, as amended by St. 1933, p. 2472).

2. Appeal and error ⚷102, 103

Appeal *held* not to lie from orders of superior court striking from record demurrer to, and also a motion to strike out, portions of an answer filed in the cause (Code Civ. Proc. § 963, as amended by St.1933, p. 2472).

◆

Appeal from Superior Court, Sierra County; Raglan Tuttle, Judge pro tempore.

Action by Henry James Couch and others against Norman E. McGregor and another, wherein the defendants brought a cross-action against the plaintiffs and against M. W. Beale and Walter Gould Lincoln, trustees acting under the common name of Blue Lead Mining Company, a trust estate. On motion by the cross-complainants to dismiss an appeal by M. W. Beale and Walter Gould Lincoln from two orders of the superior court.

Motion granted, and appeal dismissed.

Walter Gould Lincoln, of Los Angeles, for appellants.

Carlo S. Morbio and Carl A. Onkka, both of San Francisco, for respondents.

PER CURIAM.

This cause is before us upon motion of the respondents to dismiss an appeal taken by M. W. Beale and Walter Gould Lincoln, in their respective capacities as trustees of a certain so-called common-law trust.

The appeal purports to be taken from two orders made by the superior court on the 13th day of November, 1936, striking from the records of the court a demurrer to, and also a certain motion to strike out portions of an answer filed in said cause. The demurrer was to an answer filed by Norman E. McGregor and C. J. Carey, administrator with the will annexed of the estate of Sarah Virginia Heintzen, and also, to strike out certain portions of the answer filed by said parties.

The motion to dismiss the appeal was made on the ground that no appeal lies from the order of the court striking such papers from the files in said cause.

Section 963 of the Code of Civil Procedure (as amended by St.1933, p. 2472) schedules the orders from which an appeal may be taken. Neither the action of the court in relation to a demurrer nor a motion to strike out portions of a pleading is mentioned in said section.

[1] In 2 California Jurisprudence, p. 156, the rule is thus stated: "It is well established that no appeal will lie from an order sustaining a demurrer to a portion of the whole of a pleading, or dismissing it in whole or in part. Neither will an appeal lie from the order overruling a demurrer. Such orders are interlocutory in character, and are not mentioned among those in the statute which are made the subject of appeal." On the same page, supra, the rule is set forth showing that such orders are reviewable on appeal from the final judgment.

The clerk's certificate in this cause shows that the only proceedings had in relation to the two orders above mentioned is the ruling of the court just stated. No final judgment has been entered.

In the case of Jordan v. Associated Discount Corporation, 10 Cal.App.(2d) 96, 51 P.(2d) 1108, this court had before it a similar question, and in dismissing the appeal in that cause used the following language: "This is an appeal from the order of the superior court sustaining defendant Harold Fisch's motion to strike and demurrer to plaintiff's second amended complaint, without leave to amend. No appeal lies from such order. Section 963, Code Civ.Proc.; Braren v. Reliable Carpet Works, Inc., 125 Cal.App. 489, 13 P.(2d) 972, and cases cited. Appeal dismissed."

[2] To the same effect is the case of Yandell v. City of Los Angeles, 214 Cal. 234, 4 P.(2d) 947. See, also, the case of Craig v. San Fernando Furniture Co., 89 Cal.App. 167, 264 P. 784. Other authorities might be cited but the foregoing are conclusive.

The respondents' motion is granted, and the appeal is dismissed.

19 Cal.App.2d 599

PEOPLE v. MARTINEZ et al.

Cr. 343.

District Court of Appeal, Fourth District, California.

March 17, 1937.

1. Criminal law ⟹511(2)

Evidence corroborative of an accomplice's testimony implicating a defendant on the commission of a crime is not required of itself to establish guilt or to extend to every detail included in the accomplice's testimony, but is sufficient if, standing alone, it tends to connect defendant with the commission of the offense charged (Pen.Code, § 1111).

2. Criminal law ⟹511(4)

Evidence corroborative of alleged accomplice's testimony *held* sufficient to sustain burglary conviction where whisky in defendant's possession was from burglarized store, blood was found on glass of broken window of burglarized store, and defendant had cut on hand (Pen.Code, § 1111).

◆

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Albert Martinez and others were convicted of burglary, and the named defendant appeals.

Attempted appeal from verdict of conviction dismissed, and judgment and order appealed from affirmed.

P. E. Bingman, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

JENNINGS, Justice.

The defendants Albert Martinez, Raymond Garcia, and Julian Jacques were jointly accused by information of having committed the crime of burglary. Each defendant, on arraignment, entered a plea of not guilty, and they were thereafter jointly tried before a jury, which returned a verdict finding each defendant guilty of the crime of second degree burglary. At the time appointed for pronouncement of judgment a motion for a new trial was presented on behalf of each defendant, which motion was by the court denied, and judgment was thereupon pronounced whereby it was adjudged that the defendant Martinez should be confined in Folsom prison and the other two defendants should be confined in the county jail for a period of ten months. From the judgment thus rendered and from the order denying the motion for a new trial the defendant Albert Martinez alone presents this appeal. The notice of appeal states that the defendant also appeals from the verdict of conviction. Inasmuch as no appeal lies from the verdict of a jury, the attempted appeal therefrom is dismissed.

The sole contention advanced by appellant on this appeal is that the judgment of conviction lacks evidentiary support. The foundation for this contention rests in the argument that the only evidence which implicated appellant in the commission of the offense of which he was convicted consists of extrajudicial statements of his codefendants Jacques and Garcia, who were admittedly his accomplices. Proper consideration of the contention thus advanced necessitates an examination of the evidence which was presented during the trial.

The reporter's transcript on appeal discloses that evidence was produced which tended to establish the following facts: At some time between 9:15 p. m. of October 9, 1936, and 5 o'clock a. m. of October 10, 1936, the front window of a drug and liquor store in the city of Redlands was broken and a number of bottles of whisky were taken from the display platform back of the window. This fact was discovered about 5 o'clock a. m. of October 10, 1936. At this time it was also observed that there was blood on the windowsill and on the sidewalk and on some pieces of broken glass that were found on the sidewalk beneath the window. An article identified as a brake shoe from a Ford automobile was also found near the window. Inspection of this tool disclosed the presence of fragments of shattered glass in its lining and the appearance of a drop or two of blood on its surface. The whisky which was displayed on the window platform of the store on the night of October 9, 1936, consisted of two brands, viz.: Town Tavern and Windsor. The serial number assigned to the proprietor of the store as a liquor vendor by the board of equalization of the state of California for the latter part of the year 1936 was C2307 and was placed by him or by some person in his employment on the state tax stamp which was affixed to each bottle or flask of whisky offered for sale by him. About noon of October 10, 1936, a peace officer discovered appellant, who was then lying naked on the ground at the side of a road known as Barton avenue. This road extended along the edge of a grove of eucalyptus trees. Shortly after the discovery of appellant as aforesaid the same officer found a Ford automobile which was in the eucalyptus grove a distance of approximately 50 yards from the spot where appellant was reclining. At the time the automobile was located the defendant Jacques was discovered lying on the ground asleep at the left side of the car. At about the same time that appellant and Jacques were found as aforesaid the third defendant, Garcia, was discovered by a deputy sheriff. Garcia was also lying on the ground asleep in an orange grove which was near the eucalyptus grove. Appellant and the two other defendants were intoxicated at the time of their discovery. At this time appellant's right hand was bleeding from a comparatively shallow cut approximately one inch in length which appeared on the hand near the wrist. The above-mentioned automobile was registered in the name of the defendant Jacques. Underneath the back seat of the automobile two pint bottles of Windsor brand whisky were found, and on the ground just ahead of the car broken pieces of one or more bottles of the same brand of whisky were discovered. On one of these broken pieces the state revenue stamp containing the serial number of the purveyor appeared. The number which there appeared was the number which had been assigned as above stated to the proprietor of the drugstore which had been burglarized. The stamps on the two bottles of whisky that were found beneath the rear seat of the automobile also bore this same number. An extrajudicial statement made by the appellant after his arrest was admitted in evidence against him without objection. In this statement appellant admitted that at some undetermined time during the evening of October 9, 1936, he met his two codefendants on High street in the city of Redlands and that later in the same evening at about 10 or 10:30 o'clock the three men entered the Ford automobile which belonged to Jacques and went to Perris, where they visited an aunt of appellant and later returned to Bryn Mawr near which settlement was located the eucalyptus grove where appellant was discovered. In this statement appellant denied that he had perpetrated the burglary or that he had any whisky in his possession or that he remembered having drunk any whisky. Extrajudicial statements made by the two other defendants were also admitted in evidence. At the time of their reception the jury was expressly instructed that each statement was admitted only as to the defendant who had made it and should be considered as to him alone. In each of these statements it was declared that appellant broke the window of the store and shortly thereafter re-entered the automobile in which he was riding with his codefendants, at which time he had in his possession a number of bottles of whisky. Neither appellant nor either of his codefendants testified during the trial of the action.

[1, 2] The narration of the above-detailed facts, eliminating the statements of the defendants Jacques and Garcia, furnishes a sufficient answer to appellant's contention that no evidence other than the statements of his codefendants tending to connect appellant with the commission of the offense appears in the record. Appellant's statement showed that he spent the greater part of the night of October 9 in the company of his codefendants. When he was discovered about noon of the following day, he was lying on the ground about 50 yards from the automobile which was registered in the name of Jacques. One of his codefendants was lying asleep on the ground by the side of the car and the other defendant was asleep on the ground in a near-by orange grove. All three men were intoxicated. Two bottles of whisky were found in the automobile and broken pieces of a third bottle were found near the car. From the number that appeared on the revenue stamps affixed to each of these bottles they were identified as having come from the store that was burglarized some time during the night of October 9. Finally, at the time he was discovered appellant had a cut on his right hand from which blood was exuding. This circumstance is significant because of the presence of drops of blood on the window sill, sidewalk, broken glass, and brake shoe, which indicated that the person who broke the window suffered a cut during the perpetration of the burglary. These circumstances, taken together, furnish something more than mere suspicion that appellant might have been implicated in the burglary. They constitute a chain of circumstances which point strongly to appellant's guilt of the offense. It is an established principle of criminal procedure that evidence corroborative of an accomplice's testimony implicating a defendant in the commission of a crime is not required of itself to establish guilt or

to extend to every detail included in the accomplice's testimony but that it is sufficient to avoid the inhibition of section 1111 of the Penal Code if, standing alone, it tends to connect defendant with the commission of the offense charged. People v. Barker, 114 Cal. 617, 46 P. 601; People v. Bunkers, 2 Cal.App. 197, 84 P. 364, 370; People v. Marks, 83 Cal.App. 370, 257 P. 92. Application of this principle to the above-mentioned circumstances impels the conclusion that appellant's contention of corroborative insufficiency is untenable.

As a matter of fact, since none of the defendants in the action testified during the trial and the trial court expressly advised the jury that the extrajudicial statement of each defendant could only be considered as to him and not as to either of his codefendants—an instruction which we are entitled to assume was obeyed by the jury—the question presented on this appeal is not whether there was sufficient corroboration of the testimony of accomplices but rather whether or not it must be declared that the verdict of conviction is entirely lacking in evidentiary support. In our opinion the above-mentioned circumstances furnish adequate evidentiary support for the verdict.

The attempted appeal from the verdict of conviction is therefore dismissed and the judgment and order from which this appeal has been perfected are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

19 Cal.App.2d 604

ADJUSTMENT SERVICE, Inc., v. DUTTON.

Civ. 10401.

District Court of Appeal, First District, Division 2, California.

March 18, 1937.

Assignments ⚷100

Where parties to contract by which lessee was to manage two apartment houses, collect rents, and receive therefrom $250 a month as his salary, subsequently orally agreed, when income fell off, that lessee should deduct less than $250 a month, and, when income increased, deduct more to reimburse himself, assignee of lessee *held* not entitled to recover for such deductions made prior to forfeiture, where lessee, by his own acts, suffered termination of the lease and thereby prevented performance of contract (Civ.Code, § 1511).

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Adjustment Service, Inc., against Elsie A. Dutton. Judgment for the defendant, and the plaintiff appeals. Affirmed.

Edward T. Mancuso, of San Francisco, for appellant.

Walter S. Brann, of San Francisco, for respondent.

NOURSE, Presiding Judge.

Plaintiff sued on a written contract, and defendant had judgment. Plaintiff's assignor entered into an operating contract with defendant in which he agreed to manage two apartment houses. At the same time he leased both apartment houses from defendant. The contract provided that he should collect all rents and apply them as follows: (1) On operating expenses; (2) $250 a month as his salary; (3) $200 a month to defendant for 50 months to purchase the furniture and other personal property from defendant; (4) $1,100 a month to defendant as rent. The income fell off, and the parties agreed orally that plaintiff's assignor should deduct less that $250 a month for his salary, and that, when the income increased, he should deduct more so that he should reimburse himself for these deductions. Before the end of the 50-month period plaintiff's assignor breached his leases, and they were both terminated in unlawful detainer proceedings. The total of the deductions made prior to forfeiture was $1,250 to recover which this action was brought.

The trial court found that this sum was due, but that it was payable only out of rentals collected by plaintiff's assignor under the express terms of the contract. This finding is in accord with the admitted facts, and it is also admitted that, after the forfeiture of the leases, plaintiff's assignor collected no rents, that the cancellation of the leases was due solely to his fault, and that, by the express terms of the contract, the termination of the leases immediately terminated the contract.

The only principle of law involved is that performance of an obligation is excused when "prevented or delayed by the act of the creditor, or by the operation of law." Section 1511 of the Civil Code. Since the lessee by his own act suffered the termination of the lease and thereby prevented performance under the contract, he has no ground for recovery in this action.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

---

19 Cal.App.2d 635

KONDA v. LAMKIN et al.

Civ. 5776.

District Court of Appeal, Third District, California.

March 18, 1937.

1. Appeal and error ⇨1011(1)

Trial court's findings on conflicting evidence are binding on appellate court.

2. Appeal and error ⇨994(3)

Credibility of witnesses is for trial court in nonjury case.

3. Specific performance ⇨121(3)

Where option contract entitled vendors to expenditures for caring for orange orchard, evidence in optionee's successor's suit for accounting and specific performance *held* to justify judgment denying vendors' claim for excessive charge for purchase of fertilizer.

4. Specific performance ⇨121(3)

Where option contract entitled vendors to expenditures for caring for orange orchard, evidence in optionee's successor's suit for accounting and specific performance *held* to justify judgment disallowing vendors' excessive charge for use of tractor.

5. Specific performance ⇨121(3)

Where option contract entitled vendors to expenditures for caring for orange orchard, evidence in optionee's successor's suit for accounting and specific performance *held* to justify judgment denying vendors' excessive charge for spreading fertilizer.

6. Specific performance ⇨121(3)

Where option contract entitled vendors to expenditures for caring for orange orchard, evidence in optionee's successor's suit for accounting and specific performance *held* to justify judgment refusing vendors' claim for pumping plant expenditure on ground that capital expenditure was not necessary for proper preservation of orchard.

7. Specific performance ⇨121(3)

Where option contract entitled vendors to expenditures for caring for orange orchard, evidence in optionee's successor's suit for accounting and specific performance *held* to justify judgment rejecting vendors' claim for septic tank expenditures on ground that septic tank was on premises not included in option.

8. Account stated ⇨4

Where option contract entitled vendors to expenditures for caring for orange orchard, itemized account of expenditures and receipts presented by vendors prior to institution of action by optionee's successor for an accounting and specific performance did not constitute an "account stated" where vendors admitted that they could not give full statement because all oranges had not been gathered and marketed, since where there is a contingency, there can be no account stated.

[Ed. Note.—For other definitions of "Account Stated," see Words & Phrases.]

9. Specific performance ⇨97(3)

Where option contract entitled vendors to expenditures for caring for orange orchard, optionee's successor's suit for accounting and specific performance could not be defeated on ground that tender had not been made before institution of suit where record showed that successor had deposited amount claimed by vendors with clerk of court.

10. Appeal and error ⇨173(9)

In suit for specific performance and accounting, question of estoppel and objection to complete examination of account by court could not be raised for first time on appeal.

11. Specific performance ⇨17

Where optionee's assignee gave notice of exercise of option and immediately assigned her right to plaintiff, plaintiff had right to maintain action for specific performance and for an accounting as to expenditures for caring for property to which vendors were entitled.

◆

Appeal from Superior Court, Tulare County.

Suit by A. Konda, also known as Anton Konda, against Lester W. Lamkin and another. From an adverse judgment, defendants appeal.

Affirmed.

Bradley & Bradley, of Visalia, and Max B. Jamison, of Porterville, for appellants.

Farnsworth, Burke & Maddox and James K. Abercrombie, all of Visalia, for respondent.

Mr. Justice Plummer delivered the opinion of the Court.

On the 14th day of September, 1933, the appellants executed and delivered to J. G. Richardson and his assignees an option to purchase at any time before January 1, 1935, a certain 24-acre orange orchard in Tulare county, for the sum of $15,395. At the same time an agreement was entered into providing that the appellants should care for said property, pay all taxes, gather the orange crops, market the same, and credit the expense of caring for the orchard with the receipts of the orange crops. The parties also agreed upon a tentative budget of the sum of $3,506 for each fiscal year for caring for the orchard, marketing the crops, etc. It was also agreed that the appellants should keep books of account and records of all expenses and income pertaining to the orchard. J. G. Richardson, the party who obtained the option, assigned the same to Margaret Von Neindorff, who, on October 27, 1934, gave notice to appellants of an intention to exercise the option. On October 30th, however, and before any further proceedings were had, Margaret Von Neindorff assigned the option and all her rights thereunder to plaintiff and respondent.

It appears that the total cost of caring for the orchard claimed by the appellants was almost double the stipulated budget, and presented to the respondent a statement claiming that the sum of $23,380 was necessary to be paid to the appellants in order to secure a conveyance of the premises. This action was begun for an accounting and also for a decree of specific performance directing the appellants to make conveyance according to the terms of the option.

At the time of beginning this action the respondent deposited with the clerk of the court the sum of $23,380. At the conclusion of the hearing of the accounting the court found that the sum to be paid by the plaintiff for the premises, and to which the appellants were entitled to receive for a conveyance of the orchard, was the sum of $17,860.62, and upon the payment of said sum by the plaintiff to the appellants, conveyance was ordered to be made.

In the accounting certain items were disallowed, as follows, to wit:

Excessive charges on fertilizer....	$ 25.00
Excessive charge for use of tractor	83.37
Excessive charge for spreading fertilizer	464.25
Expenditure for pumping plant...	1510.08
Septic tank	75.00

[1] As to each of these items, there is a conflict of testimony, and even though we might be inclined to the opinion that the testimony set out by the appellant outweighs the testimony introduced by the respondent, the trial court had before it the witnesses, and its findings as to such items are binding upon this court.

[2, 3] First, as to the disallowance of $25 as an excessive charge for the purchase of 5,000 feet of manure. The appellants' charge was 3 cents per cubic foot. The testimony of W. J. Ferguson is to the effect that the general current market price for fertilizer delivered roadside in 1933 was 2½ cents per cubic foot. The fertilizer charged for in this item was delivered roadside. Another witness, W. C. Bradford, testified that the current market price in 1933 was 2½ cents per cubic foot. It was for the trial court to decide upon the credibility of such witnesses.

[4] As to the item of $83.37 disallowed as an excessive charge for use of tractor, wherein appellants claimed $2.50 per hour, there is testimony to the effect that the general market price, including driver, fuel, etc., was from $1.50 to $2 per hour. The evidence is to the effect that the appellants used their own tractor.

[5] As to the excessive charge of $464.25 for spreading fertilizer, the evidence is to the effect that 28,500 cubic feet of fertilizer were delivered roadside. For spreading this fertilizer, the appellants made a total charge of $606.75, slightly in excess of 2 cents per cubic foot. There is an abundance of testimony in the record

to the effect that the price for spreading fertilizer was only 1½ cents per cubic foot, which justified the court in making the disallowance referred to.

[6] The main item is the charge for pumping plant. The court disallowed the costs of the pumping plant on the ground that it was a capital expenditure, and had been made unnecessarily by the appellants in this action. It appears that there was a pumping plant upon the premises and there is testimony to the effect that the pumping plant installed by the appellants was but little more effective than the pumping plant already upon the premises. There is testimony in the record also to the effect that during the irrigation season the Vandalia Irrigation District furnished for the orchard, from March 7th to and including October 15th of the year 1934, when the new pumping plant was installed, water for irrigation purposes amounting to 58.10 acre feet. Under the testimony as to the utility of the original pumping plant and the amount of water furnished by the irrigation district, it was for the trial court to determine whether the capital expenditure for a new pumping plant was or was not necessary for the proper preservation of the orchard. The water that could be pumped by the old plant and the water that was pumped by the new plant is all set out in the record, which we need not copy herein, because of what we have just stated, the question of fact presented was for the trial court.

[7] As to the construction of the septic tank, it was found by the trial court that its main use was upon premises other than the orange orchard, and was upon premises not included in the option.

[8] As further ground for reversal, it is urged by the appellants that the itemized account presented of the expenditures and receipts made by the appellants prior to the beginning of the action constituted a stated account. However, the answer of the appellants in this case admits that they could not give a full statement of the expenditures and receipts for the simple reason that all of the oranges had not been gathered and marketed; that the items of account rendered by the appellants to the respondent lacked finality, and therefore could not become a stated account, although the liability of the plaintiff to pay anything is contingent, and where there is a contingency, there can be no stated account. 1 Cal.Jur. 192; 1 C.J. 700; Richmond Dredging Co. v. Atchison, T. & S. F. Ry. Co., 31 Cal.App. 399, 160 P. 862. In this case an accounting was necessary in order that the correctness of the charges and their reasonableness should first be determined.

In California Farm & Fruit Co. v. Schiappa-Pietra, 151 Cal. 732, 91 P. 593, 596, in speaking of stated accounts and of the money to be paid and of the necessity of a tender, the trial court used the following language: "Another exception recognized by this court is that of the case where the taking of an account is necessary for the ascertainment of the sum to be repaid, or the sum is to be liquidated by an adjudication based on evidence of facts independent of the terms of the contract itself. In such a case, as the plaintiff cannot determine in advance of the suit the amount by him to be repaid, an offer to refund such sum as shall be decreed is a sufficient offer to do equity."

In Murdock v. Fisher Finance Corp., 79 Cal.App. 787, 251 P. 319, 320, the court, speaking on the same subject, said: "Moreover in a case where it is necessary to have an accounting to ascertain the sum to be repaid, the rule regarding a tender * * * is not so strict because the court will be able to fix the amount after hearing the evidence, and thus do equity between the parties." (Citing authorities.)

[9] One of the objections urged by the appellants is that no tender of payment was made by the plaintiff before the beginning of this action. The record shows, however, that the plaintiff deposited the sum of $23,380 with the clerk of the court in order to cover whatever sum might be found by the court necessary to be paid to the appellants in order to purchase the orange orchard. The fact that the court found that the sum to be paid by the plaintiff to the appellants was only the sum of $17,860.62 is sufficient evidence of the necessity for an accounting.

[10] It may be further said that no estoppel was pleaded by the appellants, no objection was made to the complete examination of the accounts by the court. It is too late to raise such questions upon appeal. The ability to pay, and good faith on the part of the plaintiff in this action is evidenced by the fact that the sum of $23,380 to cover whatever amount might be found by the court as due for the purchase of the premises, was made by the plaintiff, and remained there for the pur-

pose of paying for the premises whatever sum the court might find necessary.

[11] What we have set forth herein shows conclusively we think that the plaintiff was justified in beginning an action for an accounting, and that the plaintiff has full right to maintain an action therefor. The notice to exercise the option was given by Margaret Von Neindorff, and her rights immediately assigned to the plaintiff. The objection that the plaintiff had no rights thereunder, of course must be held without merit.

The court in its finding that the installation of a new pump by the appellants was unnecessary, likewise held that the appellants were entitled to remove the pump from the premises as their own property.

Finding no error in the record justifying a reversal, the judgment of the trial court is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

---

19 Cal.App.2d 676

ROBERTSON v. CITY OF LONG BEACH.

Civ. 11180.

District Court of Appeal, Second District, Division 1, California.

March 23, 1937.

1. Automobiles 🔑278, 279

Municipality is not liable for injuries to automobile passenger in collision with sidewalk and curbing at street jog not indicated by signs, barricades, lights, warning signals, or other devices.

2. Pleading 🔑236(1)

Trial court's refusal to permit amendment of complaint stating no cause of action is not abuse of discretion, when it is evident that it cannot be made to do so by any amendment.

3. Pleading 🔑236(6)

Trial court's refusal of leave to amend complaint in action against city for injuries to passenger in automobile, which collided with sidewalk and curbing at street jog as alleged result of absence of barricades or other warning signs, by adding allegations negativing existence of natural conditions sufficient to constitute equally effective warning, *held* not abuse of discretion; proposed amendment being fully covered by original complaint.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by William M. Robertson against the City of Long Beach. Judgment for defendant, and plaintiff appeals.

Affirmed.

Charles L. Nichols, Carleton B. Wood, and Gerald F. H. Delamer, all of Los Angeles, for appellant.

George W. Trammell, Jr., City Atty., Harlan V. Boyer, Asst. City Atty., and Walhfred Jacobson, Deputy City Atty., all of Long Beach, for respondent.

DORAN, Justice.

This is an appeal from a judgment in favor of defendant after the sustaining of a general demurrer to the complaint without leave to amend.

The complaint in the action alleged that about 12:30 a. m. plaintiff was riding in an automobile in a general easterly direction on East Ocean avenue in the City of Long Beach and was approaching the intersection of that avenue with Fifty-Fifth street; that east of said intersection, East Ocean avenue, is divided into two parts, a northerly and southerly part, which parts are separated by a strip of property; that at the intersection there is a jog in East Ocean avenue so that the southern curb of the avenue east of the intersection is approximately 12 feet north of the southerly curb west of the intersection; that this curb and sidewalk is approximately 8 to 10 inches higher than the level of the pavement on the avenue; that, as the vehicle in which plaintiff was riding entered this intersection, there were no signs, barricades, lights, warning signals, or devices of any nature whatsoever indicating the jog, or indicating that East Ocean avenue did not continue in a straight line east of said intersection, or that the southerly curb line of the avenue, east of the intersection was north of its southerly curb line west of the intersection, or indicating that the sidewalk or curb east of the intersection extended north of the sidewalk and curbing west of the intersection; that the automobile in which plaintiff was riding collided with said sidewalk and curbing east of the intersection; that as the proximate result of this collision plaintiff was injured and damaged.

It was further alleged that said conditions were dangerous to vehicular traffic and that said city had knowledge of said conditions and had failed and neglected to remedy the same. Other allegations are unrelated to the questions raised by this appeal.

Before the ruling on the demurrer, appellant asked leave, in the event of an unfavorable ruling, to amend, but at no time was a formal written amendment offered, unless it might be said that such offer appeared in the brief filed by plaintiff's counsel in the lower court wherein, with reference to the points raised by the demurrer, it was suggested that the objection to the sufficiency of the complaint could be overcome by "the addition of allegations negativing the existence of natural conditions sufficient of themselves to constitute a warning of equal effect to the warning which would have been given by a barricade or other warning sign."

[1] It is contended by respondent that in the light of the record no cause of action could have been stated by plaintiff; that no liability attaches to a municipality under such circumstances. This contention of respondent must be sustained. In the case of Waldorf v. City of Alhambra, 6 Cal.App.(2d) 522, 45 P.(2d) 207, 209, in which case the facts were almost identical, the court declared: "In almost every city of size in this state some streets are laid out and improved without uniformity as to width or direction, resulting in so-called 'jogs,' 'offsets,' or 'goosenecks,' some ending at cross streets and some even forming cul-de-sacs. We are convinced that the law does not require a municipality to maintain either barriers or warning devices at 'jogs' or 'offsets' of the construction, nature, and appearance of that described in the complaint herein. To the prudent operator of a motor vehicle, acting within the scope of the law governing his own conduct in traversing a public street in the nighttime, the pavement, curb, sidewalk, and the parkway with the trees or poles therein constitute a barrier or warning sufficient to avert disaster and as readily visible to the alert driver as a sign informing him of the condition; there being nothing to conceal the real condition nor to deceive the operator of an approaching automobile while driving at a lawful rate of speed and with due caution."

[2, 3] Appellant earnestly contends that nevertheless permission should have been granted to amend, but it is well settled that, when the complaint does not state a cause of action and it is evident that neither by a proper offer to amend, nor any offer to amend, it can be made to do so, a refusal by the court to permit an amendment cannot be said to be an abuse of discretion. People ex rel. Loy v. Mount Shasta Mfg. Co., 107 Cal. 256, 40 P. 391; Hauser v. Pacific Gas & Electric Co., 133 Cal.App. 222, 23 P.(2d) 1068; Simpson v. Gillis, 1 Cal.(2d) 42, 32 P.(2d) 1071. In the case at bar the issue sought to be raised by the proposed amendment was fully covered by the original complaint.

The judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.

---

19 Cal.App.2d 714

ANDERSON v. HAGEN et al. (two cases).

HAGEN et al. v. O. J. WEBER CO. et al.

Civ. 10689, 10690, 10669.

District Court of Appeal, Second District, Division 1, California.

March 24, 1937.

Rehearing Denied April 21, 1937.

Hearing Denied by Supreme Court May 20, 1937.

1. Appeal and error 🔑1011(1)

If evidence is conflicting, trial court's decision on facts is conclusive on appellate court unless conflict is fanciful only and decision is one which reasonable minds functioning without prejudice could not have reached.

2. Appeal and error 🔑989

In reviewing questions of fact, appellate court can only determine whether there is any substantial evidence, contradicted or not, which supports trial court's findings.

3. Appeal and error 🔑931(1)

In reviewing question of fact, all legitimate and reasonable inferences which uphold findings must be made.

4. Appeal and error 🔑994(3)

Trial court's judgment, rather than that of appellate court, on credibility of witnesses controls.

5. Gifts 🔑49(1)

In principal's proceeding against agent for accounting, evidence *held* to sustain finding that dividend as to which accounting was sought had been given to agent as a present.

6. Trusts 🔑44(1)

Evidence *held* to sustain finding that money with which stock was purchased was advanced as loan and not as trust fund, justifying judgment refusing to impress trust on stock (Civ.Code, §§ 1912, 2216, 2221, 2222, 2224).

7. Corporations 🔑121(5)

Evidence *held* to justify judgment refusing to rescind purchase of stock on ground that purchaser had not made proper offer of restoration (Civ.Code, § 1691).

8. Appeal and error 🔑1050(1)
Evidence 🔑317(1)

Where issue existed as to whether debtor and wife indorsed their stock certificate as pledge or merely to make more expeditious possible sale of corporation, wife's testimony regarding what husband told her on requesting her to indorse certificate *held* objectionable as hearsay and admission of testimony constituted prejudicial error.

◆

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Suits by William H. Anderson against C. O. Hagen and Ermine B. Hagen, for whom has been substituted Hubert F. Laugharn, trustee of the estates of C. O. Hagen and Ermine B. Hagen, bankrupts, and by William H. Anderson against C. O. Hagen, for whom has been substituted Hubert F. Laugharn, trustee of the estate of C. O. Hagen, bankrupt, and by C. O. Hagen and Ermine B. Hagen, for whom has been substituted Hubert F. Laugharn, trustee of the estates of C. O. Hagen and Ermine B. Hagen, bankrupts, against the O. J. Weber Company, William H. Anderson, and others. From a judgment in the first and second suits, the plaintiff appeals, and from the judgment in the third suit, the named defendants appeal.

Judgment affirmed in first and second suits, and judgment reversed in third suit.

LeRoy M. Edwards and O. C. Sattinger, both of Los Angeles, for appellants.

Ernest U. Schroeter, Clark J. Milliron, George H. P. Shaw, and John H. Foley, all of Los Angeles, for respondents.

BISHOP, Justice pro tem.

Growing out of an acquaintance begun in the Philippine Islands, a confidential relationship approaching that most happily found between a father and a mature son existed between William H. Anderson and C. O. Hagen during the years 1923-1933. The former, believing in the ability of the latter as an executive, and with confidence in his integrity as a man of business, intrusted to him during those years sums totaling over one and a quarter million dollars. Among other wreckages which came out of the depression was this friendship, and these three suits were filed, tried together and presented to us on a common record.

The first suit filed in the trial court has been known throughout the history of this litigation as the "accounting case." Anderson, as plaintiff, claimed that he had advanced a total in excess of $849,000 to Hagen in trust under an agreement that it was to be invested for him. Improper investments and profits not reported were alleged as the basis of the accounting which was sought. It was also claimed that a part of the moneys advanced had been used by Hagen to buy stock for himself in the O. J. Weber Company, and a judgment impressing a trust on the stock, now standing in the name of Hagen and his wife, was sought. The judgment entered, that plaintiff take nothing, reflected the trial court's conclusions that the advances to Hagen which, in part, enabled him to pay for his stock, were loans, not trust funds, and that he had already properly accounted for every cent of both the principal and profits of the sums intrusted to him. The evidence, as we view it, supports the trial court's findings, so that the judgment from which the plaintiff has appealed must be affirmed.

Another action was filed by Anderson against Hagen alone, the "rescission case," in which he sought judgment for $112,500, the amount paid to Hagen for one-sixth of the stock in the O. J. Weber Company. The trial court's findings that the representations were not false, and that, in part at least, they were not relied upon by the plaintiff, and that there was no rescission, are supported by the evidence. It follows that the plaintiff is not successful in his attack on the judgment in this case.

The third suit, the "conversion action," was brought by the Hagens, complaining that their 500 shares of stock had been converted by Anderson and the O. J. Weber Company. A judgment against the two defendants for $100,000 we find it necessary to reverse because of an erroneous admission of hearsay evidence.

[1-4] The problems in these cases which required solution at the hands of the trial judge were almost entirely questions of fact; the principles of law involved were comparatively simple and quite thoroughly established. With respect to questions of fact, our duty on appeal is plain. It is neither our function nor our right to read the record to determine whether or not we agree with the conclusion reached by the trial court. If there is a conflict in the evidence, the decision of the trial court is conclusive on us, unless the conflict is fanciful only and the decision is one which a reasonable mind, functioning without prejudice, could not have reached. Our power begins and ends with the task of determining whether there is any substantial evidence, contradicted or not, which supports the trial court's finding. All legitimate and reasonable inferences which uphold the finding must be made. Also its judgment, not ours, on the credibility of witnesses controls. These several statements are too elementary to merit the citation of authority, but their restatement will serve to orient us as we touch upon the evidence.

The Accounting Case, Civil No. 10689.

[5] The appellation "the accounting case," applied by the parties to the case first to be considered by us, proved to be a misnomer. Out of the sum of $1,374,243.09 which Hagen was shown to have handled for Anderson in the many matters and during the ten years in which he dealt with and for him, it ultimately developed in this "accounting" case that but one sum remained questioned by the plaintiff, that the sum of $6,800. Anderson's counsel, after he had digested their auditor's report, conceded that they did not question the correctness of Hagen's basic accounting made in 1930, at which time he gave four promissory notes, and an I.O.U., since paid, by way of settlement. The sum of $6,800 was a dividend which Hagen testified that Anderson gave him as a present, a statement which Anderson categorically denied. The trial court resolved this conflict in the evidence in favor of Hagen, possibly believing him rather than Anderson because in reply to a letter written by Hagen in which reference was made to "that dividend that you donated to me," Anderson not only made no denial of the donation, but referred to the dividend in a manner consistent with the understanding that it had been given.

This leaves but one issue unsettled in this first case, and its identity is conceded by the parties: Were the moneys advanced by Anderson to Hagen all placed in his hands as a trustee, or were the early sums advanced as loans? The position taken by the plaintiff, set forth in his complaint, is that he placed large sums of money in Hagen's hands to be invested for him, but that, unknown to him, Hagen had used some of his (Anderson's) money to buy stock in Weber Company in his (Hagen's) name. By way of answer Hagen admitted receiving large sums to invest for Anderson, but, he alleged, he also received sums as loans, and he bought no stock with Anderson's money. The trial court found that money was advanced to invest (all of which was satisfactorily accounted for), but that there were also advances as loans, and that the stock which Hagen bought and which now stands in the name of himself and wife, was not bought with Anderson's money.

Because words are frequently susceptible of two meanings, care must be taken in their use. So it is that, while it may be said that a contractor who borrows money from a bank to meet his pay roll pays his men with the bank's money, it is obviously not the bank's money from a legal viewpoint. Also one who lends another a sum without security would scarcely do so if he did not trust the other, but it cannot be said in law that it is advanced to him in trust because it is intrusted to him. When the trial court found, therefore, that Hagen did not buy stock with Anderson's money, the finding is defensible even though the stock was purchased with money which, because of his trust in him, Anderson had loaned Hagen. Preston & McKinnon v. Brennan (1901) 135 Cal. 55, 66 P. 981.

The position of the plaintiff, analyzed more closely, is that the stock the Hagens now have standing in their names they hold as involuntary trustees under section 2224 of the Civil Code, which provides: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Clearly, the section can only be said to be applicable if the Hagens acquired their stock through the violation of a trust; no other condition of the section finds any support in the evidence. What trust was violated? It can be no other than a trust under which Hagen acquired over ninety-nine thousand dollars. Upon no theory suggested by the plaintiff was Hagen an involuntary trustee of the ninety-nine thousand dollars. If he held it in trust at all, it was under a voluntary trust created, according to sections 2221 and 2222 of our Civil Code, by words or acts "indicating with reasonable certainty" an intention to create a trust on the one hand, an acceptance on the other. The problem before the trial court, therefore, was to determine whether by words or acts the parties had created a voluntary trust with respect to the ninety-nine thousand dollars placed by Anderson in Hagen's hands, or whether the money was loaned to Hagen.

"A voluntary trust," states section 2216 of the Civil Code, "is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another." "A loan of money," we find in section 1912 of the same Code, "is a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed." The trial court was warranted in concluding that the ninety-nine thousand dollars was advanced as a loan and was not placed in Hagen's hands in trust, by the evidence of what the parties understood their deal to be, and by the evidence of what that deal actually was.

Before his business transactions with Anderson began, Hagen had acquired some 175 shares in the O. J. Weber Company at a price of about $38,000. One McKnight owned a controlling interest in the company and he and Hagen entered into a contract whereby it was agreed that the Hagens should buy and McKnight sell until they each had an equal interest in the company. Of all of this and his ambitions to make a great go of the concern, Hagen told Anderson when they renewed the acquaintance begun in the Philippine Islands. Anderson, according to his own testimony, inquired if Hagen could use some funds. No sum was advanced as an immediate result of the first inquiry, but later a meeting between the two was held in New York, and Anderson began to advance Hagen money.

Unless the parties' own characterization of the nature of their relationship is competent evidence, a question that has not been raised and is not being decided, the plaintiff's position is almost if not entirely without support, for he depends for his trust theory on Hagen's use of the words "as a trust fund" on several occasions. When the first sum of $20,000 was forwarded to him, a sum not used to acquire stock, so of no immediate concern to us, he signed a receipt reciting that it was "to be used in a trust fund for the benefit of Wm. H. Anderson." In January of each of the years 1925, 1927, 1928, 1929, and 1930, Hagen wrote that he had a stated sum, shown later to be the balance due Anderson, which "is being used and will continue to be used as a trust fund for the benefit of William H. Anderson and/or Zella A. Anderson." Were the trial court's attention limited to these words, as it faced the task of determining the relation created by the parties, it might well have been required to hold that a technical voluntary trust had been created. However, "there is no magic in mere words of this character," as our Supreme Court stated in Re Estate of Shaw (1926) 198 Cal. 352, 360, 246 P. 48, in determining that a trust relation could arise without the use of the words "trust" or "trustee." So, too, it has been held that the use of the words "in trust" does not necessarily result in the creation of a trust, if the intention appears to be otherwise. In re Dever's Will (1921) 173 Wis. 208, 180 N.W. 839, 841.

In opposition to Hagen's use of the words "as a trust fund" which, with the exception of the receipt referred to, all appear in documents written after the ninety-nine thousand dollars had been advanced, we find that on numerous occasions the parties referred to the sums advanced as "loans." In May, 1926, Hagen wrote Anderson a letter, the second paragraph of which began:

"About the personal loan, this came to my mind a good many times but I fully intended to show you my ledgers at home. * * * The money came as follows:" listing the dates and amounts of the several remittances received before the middle of 1924, a total of $99,706.20. To this letter Anderson replied, calling attention to a clerical error in one of the figures (not a remittance), but not questioning that the total was properly referred to as a loan. He did suggest that the earnings over $100,000 should be paid to him, to which Hagen replied that he was willing, adding that this would "make my personal loan even $100,000."

In the transaction which is the basis of the rescission action, Hagen and McKnight each sold to Anderson one-third of their stock, the purchase price in each case being $112,500. By his agreement, Anderson had his stock placed in Hagen's name and paid for it by a reduction of $112,500 in the amount Hagen owed him. This explains the reference in Anderson's letter of November, 1926, to Hagen: "Of course, your direct moral responsibility to me remains the same but your loan is now transferred to stock." Confirming the deal, Hagen wrote in the latter part of 1926: "of the $225,000.00 McKnight gets $112,500.00 and the other $112,500.00 will operate to reduce what I owe you—

"You have in round numbers $150,000.00 coming from me. Less $112,500.00 will leave balance due you about $37,500.00."

In March, 1927, Hagen wrote: "I owe you * * * a total of $43,667.93." In August, 1929, Anderson stated in a letter after referring to several matters: "That the only interest which I have outside of the above is the personal loan to you." Again in September, 1930, Anderson reminds Hagen: "I have advanced you personally a considerable sum of money."

Even in those statements upon which plaintiff's case depends, we find ideas at odds with the theory that Anderson had placed these sums technically in trust with Hagen, indicating that Hagen was employing the words "in trust" in their popular sense. In the first statement of all, the receipt, after reciting that the $20,000 was to be used in a trust fund, Hagen wrote: "In case of death the undersigned authorizes his duly authorized administrator to pay this amount from the funds of his estate," an idea more in harmony with the receipt of a loan than of money in trust. Some of the yearly reports were accompanied by a detailed statement headed, "personal account," concluding with the words: "Total owing Major" (Anderson). In each yearly report were listed the resources of Hagen's estate available to pay Anderson. Among these resources we find life insurance, both personal and that carried by the Weber Company and all of Hagen's stock in Weber Company, much of which had been acquired quite independently of Anderson's aid.

Anderson's testimony on the witness stand supports the trial court's conclusion that the money was loaned. He testified respecting the first sum advanced, that he gave no specific directions concerning it "except it was to be used in his Weber business. I did not go into the details of it." Again he testified: "The money was not given to him in the first place for any particular stated return, but more as an assistance to him in extending his business." The following questions and answers were before the trial judge:

"Q. In case these funds were lost, was Mr. Hagen to repay you, or were you to take the loss, or what was the arrangement? A. If he had any way of repaying it, probably it would have been paid, because he practically mortgaged his life insurance policy, or at least assigned it in various agreements.

"Q. You expected to be reimbursed for this money, regardless of the effect of the investment? A. Absolutely."

He further testified that on a later date he had told Hagen that his interests were in the Philippines and he was not interested in joining any company out here; but "that I would be very glad to keep on assisting him in turning over money to him and aiding him in that way."

Probably the most important bit of evidence, because it was an attempt to put in writing the working arrangement between them, we find in a letter written by Hagen to Anderson shortly after the receipt of the $20,000, which went into a Clark & Beckett building deal, and not into stock, but before the advance of any further funds. The first three paragraphs of the letter read:

"Dear Major: I wanted to get a letter into your hands covering the manner in which I will take care of the money that you are entrusting to me.

"The money that I need from the first $50,000 which I use in paying off McKnight, I am going to treat as deal #1. I will have definite figures on this before the first of the year. The money that I use in connection with retiring my debt to McKnight will be handled on the following basis:

"The capital that we employ in handling Weber will be treated as the capital stock; this will run approximately $200,000. Net earnings of the Company as shown by our income tax reports, will be the basis of division of earnings between yourself and myself on the money that I employ to pay McKnight. I am going to set up and credit you with the first 6%, I take the second, you take the third, I take the fourth, and so on, and I am going to divide 50-50 with you, which I am sure will be a reasonably good earning on the money employed."

Not only in the letter from which we have just quoted was Anderson informed that "his" money was to be used to pay for stock in Weber Company which Hagen was buying in order to put himself on a par with McKnight, but in the letter of May, 1926, already referred to he pointed out that the $20,000 first forwarded, "is wrapped up in the Clark Building Loan. This leaves $79,706,22 that is wrapped up in common stock in our companies here on the coast." Reference is then made to his (Hagen's) ownership of 1025 shares.

[6] From all the evidence before him, the trial judge was justified in concluding that the portion of the ninety-nine thousand dollars which Anderson had intrusted to Hagen and which Hagen had used to buy stock, was loaned to him for that purpose, among others, and was known to Anderson to have been used for that purpose, and the stock was not acquired by Hagen through a breach of trust. The judgment in the "accounting case" should be affirmed.

Rescission Case, Civil No. 10690.

Encouraged by Anderson's fatherly advice "that if you do not go forward * * * you must eventually go backward," Hagen and McKnight acquired a controlling interest in three concerns engaged in the same field as was the Weber Company, in order, as Hagen wrote Anderson, "that the Weber Company might step in and run the dairy supply and machinery business of the State." These three concerns may be identified, for our purposes, as Prising Company, Warr Supply, and Cap Company. As a part of their expansion program, that which Hagen had hoped for for some time was accomplished: Anderson took a third interest in their venture, paying McKnight $112,500 cash for the stock acquired from him, giving Hagen credit for an equal sum on his indebtedness, for the stock acquired from him. This transaction, consummated in the fall of 1926, Anderson attempted to rescind in 1933, on the basis of fraud just then discovered.

In his complaint Anderson, suing Hagen alone, alleged that he had been induced to acquire a third of the stock of Weber Company, and of the other three concerns mentioned, by the false representations made by Hagen: (a) That he (Hagen) personally owned 260 shares of the Prising Company, 1025 of the Weber Company, one-half of the stock of Warr Supply, and 24 shares of the Cap Company; (b) that Weber Company was worth $500,000, of which $380,687.82 included no intangible value, such as good will; (c) that the value of the entire capital stock of Warr Supply was $37,180.

Declining to draw inferences inconsistent with the trial court's findings, as we are invited to do, but instead, noting that evidence which supports facts and reasonable inferences based thereon which uphold the trial court, we find justification for this summary. While Hagen and McKnight acquired the stock in the three companies in their own names, they did so, as Anderson was told, on behalf of Weber Company, with Weber Company money and credit. The stock was carried in their names rather than that of the Weber Company so that the trade might not know that Weber Company had taken these concerns over. The stock which Anderson acquired was one-sixth of that in Weber Company from Hagen, a like amount from McKnight, by which means he acquired a third of the interest that Weber Company had in Prising Company and the others. It also appears to be the fact that Hagen owned half of the stock of Weber Company at the time of this deal; it was not true, as we noted in the accounting case, that a part of that which stood in his name was really owned by Anderson because purchased with his money.

In the negotiations which preceded Anderson's decision to take a third interest in the Weber business, figures were furnished him in order that a basis upon which he should pay for his third might be agreed upon. What value should be placed on Weber Company, which was the medium through which profits were expected, was a matter of some uncertainty. McKnight, Hagen told Anderson, thought that $750,000 was a fair figure for the Weber Company, but Hagen thought a lower figure could be agreed upon. The figure $500,000 was finally used, and that this included some $125,000 of "water," Anderson knew. There seems to have been no reliance upon or use made of the net figure alleged in the complaint. The year 1926, when this expansion program was entered upon, cast quite a different hue on probable profits than appeared in the light of the year of 1933; 10 per cent. on the set-up, including Weber Company at $500,000, seemed possible, and it was that that decided Anderson.

With respect to the claim that $37,180 was represented as the value of the entire capital stock of the Warr Supply, the evidence justifies the conclusion that that figure was used as the inventory basis of the assets of the company, and if it proved to be incorrect, an adjustment was to be made; it was not represented as the value of the entire capital stock. That, apparently, was $40,000, for only three-fourths of it was being acquired, and that for $30,000. In any event, Anderson was not induced to buy into Weber Company on any representation with respect to Warr Supply; his answers on the witness stand justify the conclusion that he was paying no attention to the part that that company's affairs had in the deal.

Much emphasis is placed by appellant upon the fact that Hagen, Anderson's trusted agent, made a large profit on the sale of his interest. Were this an undisclosed profit the point would have some relevancy, but it was known. Anderson wrote to Hagen in September, 1930: "If I paid $225,000 for the original one-third in O. J. Weber then $112,500 must have gone to you and $112,500 to McKnight. This figure naturally represents a very handsome profit for both of you but that is what it should have been." The inference is well founded that the fact was known to him all along. The argument that that profit was over $80,459, founded upon Hagen's inclusion of that amount in an income tax statement, is fully answered by the explanation that that amount represented the profit made also by McKnight on the first sale, and the profit he (McKnight) made on the subsequent sale of his remaining stock for $190,000. We need not consider the wisdom of this method of preparing an income tax statement; one of Anderson's counsel stated in the courtroom that it was he who figured it out for Hagen. It is but illustrative of much to be found in the 830 pages of the reporter's transcript and two volumes of letters and accounts: an inference adverse to the court's decision might be drawn, but there is substantial support for the decision, unless we take it upon ourselves to disbelieve witnesses and weigh their testimony.

[7] A further finding supports the trial court's judgment, that is, the finding that it was not true that the plaintiff had offered to restore to Hagen everything of value that plaintiff had received from him on condition that he restore to the plaintiff the purchase price of $112,500. The plaintiff throughout the trial resisted the contention that the sale was a joint sale. We are inclined to the view that plaintiff's position is tenable; he had a right to rescind as to Hagen's sale irrespective of what he did as to McKnight's. If this be so, it follows that to make the rescission effective he must either return that which he received, which no one claims he did, or offer to do so upon Hagen's doing likewise, which the trial court found he did not do. Section 1691, Civ.Code. What the evidence shows that the plaintiff did do was to offer to return what he had received "provided that, and upon the condition that, you (Hagen and McKnight) restore to the said William H. Anderson the said sum of Four Hundred Fifteen Thousand Dollars ($415,000.00)." His offer to restore was thus expressly conditioned upon the restoration of a sum made up not alone of what Hagen had received in his deal, but in addition to what McKnight had received in his two deals. The Code does not authorize a rescission on any such condition. The judgment that plaintiff take nothing in his rescission action was warranted.

The Conversion Action, Civil No. 10669

One of the incidents that took place toward the close of the decade of business dealings between Anderson and Hagen was the indorsement and deposit of the stock certificate which evidenced that Hagen and his wife still had five hundred shares in Weber Company. At Anderson's suggestion or request, the Hagens indorsed their certificate and it was left in the safe box of the Weber Company. Thereafter it was sold, as a pledge, and the $15,000 received credited on the debt due from Hagen. The sale was an unauthorized conversion of their stock, the Hagens claimed, and brought this action in which they recovered judgment against both Anderson and Weber Company in the sum of $100,000.

[8] The determinative issue at the trial was whether the stock had been pledged, as Anderson testified, or whether it had been indorsed, as Hagen stated, simply to make more expeditious a possible sale of Weber Company. Upon this issue Mrs. Hagen was called as a witness, although she had no part in the transaction with Anderson other than to indorse the certificate at her husband's direction, and over timely and proper objection she was permitted to testify, in response to the question: "What was told you at the time that it was signed by you? * * * A. My husband handed it to me asked me to sign it and I asked him why he wanted me to, and he said Major wanted us to sign them, and he said that Major was worried about his affairs, and that he has plans in his head that probably that he might plan to sell to Cherry & Burrell and that was all I knew about those plans, and he said that he thought we should cooperate with Major and that we certainly could trust his judgment, and I felt the same way about Major, and I signed it, and was perfectly happy to sign it."

The question called for and received an answer which, on the matter in dispute, was clearly hearsay, a statement the purport of which was an explanation of the nature and purpose of the deposit of the stock. Because the evidence on this vital point was in direct conflict, the error of admitting this testimony cannot be said to be without prejudice.

The judgments in the accounting and rescission cases, Civil Nos. 10689 and 10690, are affirmed; that in the conversion case, Civil No. 10669, is reversed.

We concur: YORK, Acting P. J.; DORAN, J.

---

19 Cal.App.2d 667

LEE v. DEASY.

EMERICK v. SAME.

HINKLEY v. SAME.

Civ. 10190.

District Court of Appeal, First District, Division 1, California.

March 20, 1937.

Abatement and revival ⚷64
Automobiles ⚷200

Automobile owner's liability for negligence of driver is joint and several with that of driver whose death is not a bar to an action against the owner.

Appeal from Superior Court, San Francisco County; Edmund P. Mogan, Judge.

Actions by Samuel Lee, a minor, by Harold Lee, his guardian ad litem, Charles B. Emerick, and by Willard F. Hinkley, a minor, by Frank W. Hinkley, his guardian ad litem, against Mae E. Deasy. From judgments for plaintiffs, defendant appeals.

Affirmed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant.

George K. Ford and Simpson Finnell, Jr., both of San Francisco, for respondents.

PER CURIAM.

The above-entitled actions involve injuries sustained by the plaintiffs in an automobile accident. The actions were tried together before a jury, and a verdict for each plaintiff was rendered.

The defendant, who has appealed, contends that the actions abated by reason of the death of the driver of the automobile; and that the refusal of an instruction offered by her constituted prejudicial error.

In each instance the plaintiff was riding in an automobile, operated by Milton D. Newman, which collided with an automobile owned by the defendant, which was being driven with her permission by J. R. Deasy. Deasy was joined as a party to the action and answered the complaint, but died before trial.

The sufficiency of the evidence to sustain the verdict is not questioned.

It was decided in Sayles v. Peters, 11 Cal. App.(2d) 401, 54 P.(2d) 94, that the liability of the owner of a car is joint and several with that of the driver, and that the death of the latter is not a bar to an action against the former. See, also, Broome v. Kern Valley Packing Co., 6 Cal.App.(2d) 256, 44 P.(2d) 430; Milburn v. Foster, 8 Cal.App.(2d) 478, 47 P.(2d) 1106; Pascoe v. Payne, 124 Cal.App. 528, 12 P.(2d) 1091.

The refusal to give appellant's offered instruction was not prejudicial as the matters therein were fully covered by other instructions.

We find no merit in the appeal, and the judgments are accordingly affirmed.

---

19 Cal.App.2d 727

GRIFFIN et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 5795.

District Court of Appeal, Third District, California.

March 24, 1937.

Hearing Denied by Supreme Court May 20, 1937.

1. Workmen's compensation 🔑617

Service rendered "in course of employment" as such phrase is used in Workmen's Compensation Act is such service as the employee is expected to render when it occurs within the period of his employment, at a place where he may reasonably be for that purpose and while he is engaged in fulfilling his duties or in doing something necessarily incident thereto (St.1929, p. 430, § 6).

[Ed. Note.—For other definitions of "Course of Employment," see Words & Phrases.]

2. Workmen's compensation 🔑615

The phrase "in course of employment" as used in Workmen's Compensation Act is entitled to a liberal construction to conform with humanitarian purpose for which act was adopted (St.1929, p. 430, § 6).

3. Workmen's compensation 🔑708

When an employee is engaged in performing service for which he is hired, in absence of strict regulations to contrary, he will not forfeit his right to compensation merely because he is injured while he is working beyond prescribed time for cessation of his daily employment (St.1929, p. 430, § 6).

4. Workmen's compensation 🔑708

Where evidence disclosed that branch manager of oil company took prospective purchaser of company's station to station about 7 o'clock in evening, that they spent about four hours checking books and property of station, that manager took prospective purchaser to inn for meal and remained there discussing transaction until 1 or 2 o'clock, and that while driving prospective purchaser to his home manager's automobile struck concrete abutment of bridge, manager's death was result of injuries sustained "in course of employment," notwithstanding company's instruction not to use company's automobile under ordinary circumstances after 9 or 10 o'clock at night (St. 1929, p. 430, § 6).

Proceedings under the Workmen's Compensation Act by Veronica Griffin and another, to recover compensation for the death of John Francis Griffin, employee, opposed by the Gilmore Oil Company, employer, and the Pacific Indemnity Company, insurer. To review an order of the Industrial Accident Commission denying an award of compensation, and to review an order refusing to reopen the proceeding for further hearing, the claimants instituted proceeding for a writ of review.

Orders annulled with directions.

George C. Faulkner, William T. Doyle, and Harry G. Sanford, all of San Francisco, and J. Oscar Goldstein, of Chico, for petitioners.

Everett A. Corten, of San Francisco, and Jerome D. Peters, of Chico, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a proceeding to review an order of the Industrial Accident Commission denying the petition of the surviving widow and child of John Francis Griffin, deceased, to reopen for further hearing, under the provisions of section 20(d) of the Workmen's Compensation Act (St. 1917, p. 850), their application for compensation for his death which occurred incident to his employment with the Gilmore Oil Company. The application for compensation and for rehearing of the proceeding were denied.

The commission found that Mr. Griffin did not meet his death as a result of injuries sustained in the course of his employment for the reason that at the time of his death he was violating instructions from his employer not to use its automobile or engage in its business after 10 o'clock at night. For that reason, the application for compensation and the petition to reopen the hearing were denied. The deceased was killed while driving his employer's machine at 3 o'clock in the morning. The only question which is involved in this proceeding is whether the violation of the employer's instructions constituted a waiver of compensation under the terms of the Workmen's Compensation Act on the theory that he was not then acting within the scope of his employment.

The respondents concede that Mr. Griffin was engaged in performing service for his employer at the time of his death.

John Francis Griffin was employed as branch manager of the Gilmore Oil Company with his headquarters at Chico. It was his duty to supervise and check on all Gilmore gas stations in that district and to negotiate for other agents. John Henderson who had maintained a Gilmore station at Oroville contemplated disposing of it. For ten days prior to the time of the accident which caused his death, Mr. Griffin had been negotiating with Desmond R. Dowdall to persuade him to take control of the Henderson station. Dowdall had been working for Ferrabee and Beilby at their "Lion's Den" Gilmore station at Paradise. That station had just been destroyed by fire. Griffin proposed to take Dowdall to inspect the Henderson station at Oroville with the purpose of inducing him to lease the property. Dowdall agreed to accompany him. They left Chico on the afternoon of July 23, 1934, spending several hours in examining the pumps and property of the "Lion's Den" station to ascertain the damage which resulted from the fire and to determine the repairs which were necessary to restore the station. They met Mr. Beilby at that station. He was a friend of Dowdall, who had great confidence in his judgment. By agreement Griffin took Dowdall and Beilby to Oroville to inspect the Henderson station. They arrived at Henderson's station about 7 o'clock in the evening. They spent about four hours checking the books and property of that station. Dowdall was favorably impressed with the proposal to take charge of the property. Griffin proposed taking Dowdall and Beilby to Mealey's Italian Village nearby for a lunch before they returned home. Griffin made that suggestion for the double purpose of persuading the proprietor of that inn to aid Dowdall in securing a profitable business if he assumed charge of the Henderson gas station, and to obtain something to eat. Dowdall was introduced at the inn as the prospective purchaser of the Henderson property. Griffin asked them to help Dowdall secure customers for the station. The three men ordered lunches and remained at the inn until 1 or 2 o'clock, eating and drinking some beer. It is not contended that any of them became intoxicated. The proprietor, his wife, and a waitress testified that they overheard Griffin and his companions talking of the transfer of the Henderson station to Dowdall. It is conceded that Griffin was engaged during all of this time in negotiating with Dowdall to lease this property for the benefit of the Gilmore Oil Company. Finally they left Mealey's Italian Village for home by way of Oroville and Paradise. It was dark. Griffin was driving the company's automobile. They reached an intersection of the highway at Neil's grade about 3 o'clock in the morning. Near that point the automobile struck a concrete abutment of a bridge. The machine was badly damaged. Dowdall was seriously injured and Griffin was killed as a result of the accident. In a suit which was subsequently brought, Dowdall recovered damages against the Gilmore Oil Company on the theory that he was injured through the negligence of its agent, Griffin. On appeal that judgment was affirmed by this court. Dowdall v. Gilmore Oil Company, 62 P.(2d) 1051. The widow and daughter of the decedent, Griffin, applied for compensation, which was denied by the Industrial Accident Commission on the ground that Griffin was not killed while he was engaged in the course of his employment. The petition for a rehearing was denied, and this proceeding for a writ of review was then instituted.

We are of the opinion John Francis Griffin died as the result of injuries received in the performance of his duties as branch manager of the Gilmore Oil Company while he was acting in the course of his employment, and that his widow and minor child are entitled to compensation therefor under the provisions of the Workmen's Compensation

Act. The evidence does not show a violation of the spirit of the instructions which he received from his employer. Even though his conduct be deemed to have been a technical violation of his instructions, it does not appear that his acts increased the employer's hazard, and such misconduct will not deprive the decedent's widow and minor child of their right to compensation on account of his death.

It is true that the division manager of the Gilmore Oil Company and his assistant testified that several months before the accident occurred they instructed the decedent that he had been seen sleeping in his car parked by the roadside in the nighttime; that such conduct would be damaging to the reputation of their company; and that thereafter he should not sleep in his machine by the roadside at night, nor call upon their dealers or engage in company business or use the company's automobile "under ordinary circumstances after 9 or 10 o'clock" at night. Mr. Charles B. Garrison, the division manager did testify that:

> "I instructed him that in the future he shouldn't be on the road after this after 9 or 10 o'clock. Before he left he said he understood it."

This statement was later modified and explained by saying that he told the decedent "he shouldn't be on business under ordinary circumstances after 9 or 10 o'clock."

Mr. Garrison gave as his reason for so instructing the decedent that "he was driving late at night, that he parked his car on the highway and went to sleep, that the car was stopped and people stopped and observed and found a man asleep in the car."

It is apparent that it was not the purpose of the division manager to specifically limit the time during which Griffin was to be employed, nor to definitely terminate his work at 9 or 10 o'clock at night. On the contrary, it is very clear that to prevent possible detriment to the reputation of their company by Griffin's conduct of sleeping in a car parked by the roadside at night, the manager intended to reprimand him and to warn him against continuing that practice. It is evident that the manager understood and in his instructions took into consideration the fact that the very nature of Griffin's duties frequently required him to work at late and unusual hours. For that reason, he told him that "he shouldn't be on business under ordinary circumstances after 9 or 10 o'clock." The fact that a definite time at which he was to cease working was not fixed indicates that a discretion was left with the deceased to determine whether the exigency of a particular transaction required him to work later than 10 o'clock at night. A master who desired to terminate a servant's service at a specified time of day would not be so indefinite as to say his services would be terminated at either "9 or 10 o'clock." That is absurd. It is very convincing that the instructions received by the deceased did not amount to a definite termination of employment at 9 or 10 o'clock at night. The transaction which was under consideration at the time of the accident certainly did not involve merely "ordinary circumstances." It was unusual in its nature. It may therefore reasonably be considered an exception to the general instructions which the decedent received. It will be observed that Griffin did not "call" on Henderson, their dealer, after 10 o'clock at night. He called upon him between 7 and 8 o'clock in the evening, but he remained until about 11 o'clock checking the books and property in his effort to persuade Dowdall to lease the gas station for the benefit of his employer. It is true that Griffin was on the road in his employer's automobile after the hour of 10 o'clock at night for the necessary completion of his task.

Under the circumstances of this case, it was not a violation of the instructions of his employer for Griffin to have remained engaged in trying to procure a transfer of the Henderson station to Dowdall, and to be using the company machine until approximately 3 o'clock in the morning. If his conduct be deemed to have been a technical violation of instructions, that misconduct may not be urged by the employer as a defense to the claim of the decedent's widow and minor child for compensation on account of his death.

Numerous authorities in this jurisdiction and elsewhere hold that the violation of instructions regarding the time, place, or manner of performing work does not necessarily defeat the employee's claim to compensation for injuries received under such circumstances. That is particularly true where the statute specifically provides, as it does in California, for compensation for any injury sustained in the course of the employment. Section 6 of the Workmen's Compensation Act (St.1917, p. 834, as amended by St.1929, p. 430) provides in that regard:

"Liability for the compensation * * * shall * * * exist against an employer for any injury sustained by his employees arising out of and in the course of the employment. * * *

"(2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment."

Certainly driving a prospective purchaser of a Gilmore gas station to his home after spending several hours in persuading him to lease the plant is service incident to and growing out of the scope and course of the employment of a branch manager of the oil company whose duty it is to procure leases and transfers of gasoline stations for his employer.

[1, 2] The question as to whether an employee is engaged in the performance of services "in the course of his employment" depends upon the circumstances of each particular case. The phrase "in the course of employment" is frequently defined as such service as the employee is expected to render, when it occurs within the period of his employment, at a place where he may reasonably be for that purpose, and while he is engaged in fulfilling his duties or in doing something necessarily incident thereto. The term ordinarily refers to the time, place, and circumstances under which the accident occurs. The phrase is entitled to a liberal construction to conform with the humanitarian purpose for which workmen's compensation acts are adopted. 71 C.J. 658, § 404.

[3] When an employee is engaged in performing the service for which he is hired, in the absence of strict regulations to the contrary, he will not forfeit his right to compensation merely because he is injured while he is working beyond the prescribed time for the cessation of his daily employment. In 71 C.J. 693, § 436, it is said:

"Where the statute by its terms embraces all injuries by accident arising out of and in the course of the employment, it is immaterial that the injury occurred outside of working hours."

In Perdew v. Nufer Cedar Co., 201 Mich. 520, 167 N.W. 868, an award of compensation for damages was sustained on appeal for injuries received by an employee at 10 o'clock at night, after working hours had passed, while he was engaged in assisting another employee of the same company to repair a machine in the employer's shop.

To the same effect is the case of Geibig v. Ann Arbor Asphalt Const. Co., 238 Mich. 560, 214 N.W. 90.

Conceding for the sake of argument, without so deciding, that Griffin violated the instructions of his employer by using its machine for business purposes after 10 o'clock at night, it does not appear that this conduct increased the hazard, for the accident might have occurred in the same manner if he had been driving along that same highway prior to 10 o'clock at night. Moreover, a mere violation of instructions regarding the usual time for ceasing to labor merely amounts to misconduct on the part of the employee, and the California statute specifically provides that willful misconduct of an employee may not be urged as a defense against the claim of dependents of the servant who died from injuries received in the performance of his duties. Section 6 (a) (4) of the Workmen's Compensation Act provides in that regard:

"Where the injury is caused by the serious and wilful misconduct of the injured employee, the compensation otherwise recoverable by him shall be reduced one-half; provided, however, that such misconduct of the employee shall not be a defense to the claim of the dependents of said employee, if the injury results in death, or to the claim of the employee, if the injury results in a permanent partial disability equaling or in excess of seventy per cent of total."

[4] We are therefore of the opinion the Industrial Accident Commission exceeded its jurisdiction in denying compensation to the widow and minor child of John Francis Griffin, deceased, under the circumstances of this case; that he died as a result of injuries sustained while he was performing service in the course of his employment; that he did not violate the spirit of the instructions which he received from his employer; and that if it be deemed that he did violate instructions not to remain out with its

machine in the performance of business for his employer after 10 o'clock at night that violation under the circumstances of this case will not defeat his widow and minor child from recovering compensation on account of his death.

The orders denying an award of compensation and refusing to reopen the proceeding for further hearing are annulled and the commission is directed to award the petitioner such compensation as is proper under the facts of this case.

We concur: PULLEN, P. J.; PLUMMER, J.

19 Cal.App.2d 734

WITTMAN v. SUPERIOR COURT IN AND FOR SAN MATEO COUNTY et al.

Civ. 10436.

District Court of Appeal, First District, Division 1, California.

March 25, 1937.

1. Divorce 🔑182

Right of a defeated wife to prosecute at the husband's expense her appeal from judgment granting husband a divorce is not absolute.

2. Divorce 🔑182, 184(5)

Matter of granting alimony and costs pending appeal from judgment granting husband a divorce rests in sound discretion of trial court, and court's action in denying application therefor will not be disturbed save when it clearly appears that discretion has been abused.

3. Divorce 🔑182

In passing on wife's motion for costs on appeal from judgment granting husband a divorce and for maintenance during its determination, trial court may properly consider not only evidence adduced at hearing of motion, but also history of entire litigation and circumstances which brought about unfavorable result to wife, including evidence adduced at trial on merits.

4. Divorce 🔑182

Denial of wife's application for costs and alimony pending appeal by wife from judgment granting husband a divorce *held* discretionary where wife presented to appellate court only such evidence as was adduced at time of hearing of application.

Mandamus proceeding by Marian Wittman, petitioner, against the Superior Court of the state of California, in and for San Mateo County, and the Honorable Maxwell McNutt, as judge thereof, to compel the making of an order directing her husband to pay certain sums of money.

Writ denied and proceeding dismissed.

Leo R. Friedman and John P. Beale, both of San Francisco, for petitioner.

Harry A. McKenzie and Frank J. Mahoney, both of San Francisco, for respondents.

KNIGHT, Justice.

The Superior Court in and for San Mateo County granted petitioner's husband, C. William Wittman, Jr., an interlocutory decree of divorce upon the ground of extreme cruelty. There are no children, the issue of the marriage; and in said decree it was adjudged that the respective parties separately owned certain personal property, described therein, and that petitioner be awarded $3,500 as and for her share of the division of the community property. From said decree, petitioner appealed to the Supreme Court, and pursuant to the provisions of section 953a of the Code of Civil Procedure made request for a transcript. Thereupon she obtained an order, based on affidavit, directing that her husband show cause why he should not be required to pay her the following sums of money: $272 to cover the cost of preparation of the transcript on appeal; $150 for the cost of printing the briefs; $500 as attorney's fees for services in presenting the appeal; and $150 a month for her support during the pendency of the appeal. Upon the hearing of the order to show cause the trial court denied petitioner's application for such allowances. She then instituted the present proceeding in mandamus in this court to compel the Superior Court and the judge thereof to make an order directing her husband to pay to her such sum or sums of money as may be reasonable and proper for the purposes above mentioned. In response to the alternative writ, respondents filed a demurrer; also an answer wherein certain allegations of the petition are denied, and facts are alleged showing the proceedings had up to the making of the trial court's adverse order.

[1-3] The law is well settled, as petitioner concedes, that the right of a defeated wife to prosecute at the husband's expense her appeal from a judgment granting the husband's divorce is not an absolute right; that the matter of granting alimony and costs pending appeal rests in the sound discretion of the trial court; and that therefore its action denying an application therefor will not be disturbed save when it clearly appears that such discretion has been abused. Stewart v. Stewart, 156 Cal. 651, 105 P. 955; Gay v. Gay, 146 Cal. 237, 79 P. 885; Kellett v. Kellett, 2 Cal.(2d) 45, 39 P.(2d) 203. Furthermore, it is well established that in passing upon the wife's motion for costs on appeal and maintenance during its determination it is proper for the trial court to take into consideration not only the evidence adduced at the hearing of the motion, but also the history of the entire litigation which has taken place between the parties and the circumstances which brought about the unfavorable result to the wife (Kellett v. Kellett, supra), including the evidence adduced at the trial upon the merits (Newlands v. Superior Court, 171 Cal. 741, 154 P. 829).

In the present case it appears that petitioner filed a cross-complaint asking for a divorce upon the ground of extreme cruelty; that pending trial she was granted $150 alimony and suit money; that at the conclusion of the trial the court made an order directing that she be granted the divorce and $3,500 as her share of the community property; that being dissatisfied with the property award, she moved the trial court to vacate its order, and her motion was granted. Thereupon, it appears, additional testimony was taken, following which the trial court granted the divorce to the husband; and, as stated, after making an adjudication of ownership as to certain personal property, again awarded petitioner $3,500 as her share of the community property.

[4] In the present proceeding, petitioner has brought to our attention only such evidence as was adduced at the time of the hearing of the application for costs and alimony on appeal, which relates more particularly to the ability of petitioner's husband to pay the amounts applied for, in case the trial court believed that it was a proper case in which such an order should be made. But in determining the merits of petitioner's application, the trial court doubtless took into consideration also all of the proceedings which had taken place before it up to the making of the order in question, including the evidence theretofore given at the trial on the merits; and we have no way of knowing from the record before us the character of such proceedings and evidence. Therefore, in view of the specific findings embodied in the trial court's decision, upon the issues of fact relating to the charges of extreme cruelty and as to the property rights, we are not in a position to declare, as a matter of law, that the denial of petitioner's application amounted to an abuse of discretion. As said in Kellett v. Kellett, supra, with the testimony of the entire litigation before it, including the evidence, the trial court may well have questioned the good faith of the petitioner in taking the appeal, or at least been of the opinion that she had no reasonable belief in its merits; and in these circumstances it was entirely within its discretion to deny the application for funds to prosecute the appeal.

Moreover, it would appear that the order complained of is an appealable order. Kellett v. Kellett, supra.

The writ is denied and the proceeding dismissed.

We concur: TYLER, P. J.; CASHIN, J.

20 Cal.App.2d 45

WALSH et al. v. MAURICE MERCANTILE et al.

Civ. 10211.

District Court of Appeal, First District, Division 1, California.

March 29, 1937.

Hearing Denied by Supreme Court May 27, 1937.

1. **Negligence** 🔑136(15)

In action against department store owner for injuries received by customer when she stumbled on base of weighing scale in basement aisle of department store, whether store owner used ordinary care to maintain aisle in reasonably safe condition *held* for jury.

2. **Negligence** 🔑32(1)

Owner is not insurer of safety of invitees, but has duty to use ordinary care to keep premises in reasonably safe condition.

3. Trial ⚷296(7)

Error in formula instruction will not require reversal where jury has been elsewhere clearly instructed regarding matter omitted.

4. Trial ⚷296(3)

In action against department store owner for injuries received by customer when she fell over base of weighing scale in basement aisle of store, error in omission of element of ordinary care in maintenance of store in reasonably safe condition from formula instruction *held* not reversible error where omission was covered in several other instructions and jury was instructed not to heed single instruction or portion of instruction, but to consider all instructions in determining any issue.

5. Negligence ⚷67

Department store customer could assume that basement aisle of department store at bottom of steps was unobstructed.

6. Negligence ⚷136(26)

In action against department store owner for injuries to customer received when she fell over weighing scale in basement aisle of store, question of contributory negligence of customer *held* for jury.

◆

Appeal from Superior Court, San Francisco County; Edmund P. Mogan, Judge.

Action by Margaret J. Walsh and another against the Maurice Mercantile Company, doing business as Rosenthal's and sued as Maurice Mercantile, and others. Judgment for plaintiffs, and the named defendant appeals.

Affirmed.

Charles B. Morris, of San Francisco (Leo J. McEnerney, of San Francisco, of counsel), for appellant.

Faulkner & O'Connor, of San Francisco, for respondents.

PER CURIAM.

Defendant Maurice Mercantile Company maintains a store which has a number of departments on the main floor, and several in the basement, including a shoe department. From the main store a stairway, consisting of nine steps, extended down to the basement. The stairway was divided by a bannister; there was also a bannister on each side, the distance between these and the center bannister being about 8 feet. The bannister post on the right-hand side was on the second step, and that of the center bannister was on the third step, from the basement floor. Two steps extended beyond the lower ends of these to the floor. The width of the bottom step was 13½ inches, and the next above 13¼ inches. At the bottom of the stairway an aisle 49 inches wide measured from the bottom step was formed by merchandise tables which extended at a right angle in the direction of the stairway. To the right of the ends of the two bottom steps defendant maintained a weighing scale. It was usually placed with its base against these ends, and its back against the end of a merchandise table. This table extended back parallel with the stairway, and the end against which the scale was placed was nearly on a line with the lower right-hand bannister post. The scale was 4 feet high; the dimensions of its base were 20¼ inches by 11⅝ inches, and its platform was 5½ inches above the floor.

On April 14, 1934, plaintiff Margaret J. Walsh, who had entered the store to purchase shoes, descended the stairway on the right-hand side. She reached the basement and turned to the right toward the shoe department. She testified that as she reached the lower floor she was looking at the shoes, which were displayed on the tables and walls of the store. After she had taken two or three steps to her right, she tripped and fell over the scale. According to the testimony, the scale was out of its usual position, its base being from 5 to 6 inches within the aisle. She suffered physical injuries, for which she and her husband were awarded damages.

Defendant has appealed from the judgment; and it is urged that the evidence was insufficient to support the conclusion that defendant was negligent and shows the plaintiff to have been guilty of contributory negligence; further, that certain of the trial court's instructions to the jury were prejudicially erroneous.

[1] Under the rule declared in the following cases, the evidence was, we think, sufficient to go to the jury on the question whether the defendant used ordinary care to maintain the aisle in a reasonably safe condition, and fairly supports the verdict on this issue: Williamson v. Hardy, 47 Cal.App. 377, 190 P. 646; Brinkworth v. Sam Seelig Co., 51 Cal.App. 668, 197 P. 427; Oles v. Kahn Bros., 81 Cal.App. 76, 253 P. 158; Moffitt v. Ford Motor Co.,

135 Cal.App. 7, 26 P.(2d) 661; Touhy v. Owl Drug Co., 6 Cal.App.(2d) 64, 44 P.(2d) 405.

As grounds for the contention that the jury was erroneously charged to the prejudice of the defendant, reliance is placed on two instructions, which it is claimed had the effect of removing from their consideration the question whether the defendant did or did not use ordinary care to keep the premises in a reasonably safe condition. The instructions complained of read as follows:

"If you believe from the evidence that plaintiff, Margaret J. Walsh, was in an aisle or passageway in said store so owned, operated and controlled by the defendant, Maurice Mercantile Co., and that in and through said aisle or passageway, by reason of its location and arrangement, she in making her purchases was induced to go, and that there was present a scale in said aisle or passageway, and if you believe that thereby said aisle or passageway was not in a reasonably safe condition so as to not unnecessarily expose her to danger or accident, and if you find she was injured thereby, then I charge you that your verdict shall be in favor of the plaintiffs and against the Maurice Mercantile Company, provided said Margaret J. Walsh was free from fault or negligence contributing to her accident.

"I charge you that if you believe from the evidence in this case that plaintiff, Margaret J. Walsh, was in the store operated by defendant on or about April 14th, 1934, and while in said store and while proceeding along an aisle or passageway, one necessarily used by a customer in making purchases at said store,—stumbled, tripped and fell over a weighing scale placed in said aisle and passageway, and if you find it caused said aisle and passageway no longer to be in a reasonably safe condition so as not to unnecessarily expose the customer to danger or accident, and if you further find that plaintiff, Margaret J. Walsh, was herself free from fault or any negligence contributing to her injury, then I charge you that your verdict should be in favor of plaintiffs and against Maurice Mercantile Company."

[2-4] As held in Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76, an owner is not an insurer of the safety of invitees, his duty being to use ordinary care to keep his premises in a reasonably safe condition. See, also, Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793. The element of ordinary care in this respect was omitted from the first of these instructions, and the second was erroneous for the same reason. While it is not easy to reconcile the decisions on the question of an erroneous formula instruction, and it has been held in several cases that such error justifies a reversal, nevertheless, where the jury has been elsewhere clearly instructed regarding the matter omitted, it appears to be the view that this error alone will not be sufficient to have that effect. De La Torre v. Johnson, 203 Cal. 374, 377, 264 P. 485; Barham v. Widing, 210 Cal. 206, 291 P. 173, 178; Hoffman v. Southern Pacific Co., 215 Cal. 454, 460, 11 P.(2d) 387; Reuter v. Hill, 136 Cal.App. 67. Here the omission was covered in several instructions by which the jury was told that an owner was only required to exercise ordinary care in maintaining his premises in a reasonably safe condition; and, in addition, they were cautioned not to heed a single instruction or a portion of an instruction alone, but to consider all the instructions in determining any issue in the case. As was said in Barham v. Widing, supra, where the court was considering a similar omission, "When the fact is considered, however, that the entire charge given was exhaustive and covered the subject thoroughly and completely, it is inconceivable that any jury could have been misled by the mere omission of these one or two words in said instruction."

[5, 6] From the point where plaintiff turned on reaching the basement to the scale was from two to three steps. It is claimed that her failure to observe the obstruction constituted negligence on her part. As stated, her attention was partially directed towards the displays of merchandise. The facts in this respect are similar to those in Brinkworth v. Sam Seelig Co., supra. There it was held that failure to observe an obstruction was not necessarily negligence, but the question was one for the jury. Conceding that if plaintiff had looked she might have seen the scale, nevertheless, in the circumstances, she was reasonably justified in assuming that the aisle was unobstructed, and her failure to see it was not necessarily negligence. Different inferences might be drawn from the evidence. As held in the following cases, the question was one for the jury: Gornstein v. Priver, 64 Cal.App. 249, 221 P. 396; Madigan v. Hale & Co., 90 Cal.App. 151, 265 P. 574; Hodge v.

Weinstock, Lubin & Co., 109 Cal.App. 393, 293 P. 80.

The evidence as a whole fairly supports the verdict, and no error has been shown which would warrant the reversal of the judgment.

The judgment is affirmed.

19 Cal.App.2d 564

NELSON v. ASSOCIATED INDEMNITY CORPORATION et al.

Civ. 11288.

District Court of Appeal, Second District, Division 2, California.

March 15, 1937.

1. Workmen's compensation ⚷2084

Right of employee to recover compensation in a proceeding before the Industrial Commission is, as against the employer, exclusive remedy of employee where specified conditions exist under Workmen's Compensation Act (St.1917, p. 831, as amended).

2. Workmen's compensation ⚷957

Disability resulting from treatment instituted to cure or relieve employee from effects of a compensable injury is compensable under Workmen's Compensation Act (St.1917, p. 831, as amended).

3. Workmen's compensation ⚷2087

Employee who was suffering from a compensable injury and underwent an operation at request of insurance carrier to improve his condition *held* entitled to proceed before Industrial Commission for aggravated disability caused by negligent performance of the operation and hence was not entitled to maintain an action against insurance carrier for negligence of physicians, since remedy before commission was exclusive (St.1917, p. 831, as amended).

* * *

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Ira B. Nelson against the Associated Indemnity Corporation and others. From a judgment in favor of the defendants after a general demurrer to plaintiff's complaint was sustained without leave to amend and from an order denying a motion for permission to amend, the plaintiff appeals.

Affirmed.

Porter C. Blackburn, of Los Angeles, for appellant.

Syril S. Tipton, of Los Angeles, for respondents.

CRAIL, Presiding Judge.

This appeal is from a judgment in favor of defendant, entered after a general demurrer to plaintiff's complaint was sustained without leave to amend, and from an order denying a motion for permission to amend.

The following facts appear in the proposed amended complaint: Plaintiff, while employed by one Spicer, received an injury to his right elbow. The defendant corporation was the compensation-insurance carrier of Spicer. After proceedings duly had before the Industrial Accident Commission, an award was made in favor of plaintiff and against the defendant corporation, requiring weekly payments for an indefinite period—until termination of plaintiff's disability. Spicer was relieved from all liability and the defendant was substituted in his place under the Workmen's Compensation Act (St.1917, p. 831, as amended). Defendant made the compensation payments to plaintiff for a period of approximately fourteen months, then discontinued them. Defendant stated that it would commence making the payments again if plaintiff would submit to an operation for the purpose of improving his condition. Plaintiff agreed to submit to the operation, which was performed by defendant's physicians. The operation was unsuccessful and, as a result of the unskillful and negligent manner in which the operation was performed, plaintiff's elbow was rendered worse, his disability was aggravated, and his disability is now permanent. Thereupon, plaintiff commenced this action for the purpose of recovering damages from the insurance carrier for the negligence of the physicians, alleged to be its agents, in performing the operation. The insurance carrier is the only defendant.

It is admitted by the plaintiff that the defendant's relation to the case is the same as that of an employer and that defendant "is liable to the same extent as the employer would be." Indeed, he states this as one of his large-type contentions. It is for this reason undoubtedly that the plaintiff sets out at great length on the face of his complaint the facts of the employment by Spicer, the injury while engaged in said employment, the proceedings before the Industrial Accident Commission, and the award against defendant including the release of Spicer, all of which ordinarily would be immaterial in a malpractice case.

The sole question necessary for determination on this appeal is: Does the plaintiff have a remedy against defendant before the Industrial Accident Commission and is such remedy exclusive?

[1] It is well settled that the Workmen's Compensation Act provides substantially that, where the specified conditions exist, the right to recover compensation in a proceeding before the Industrial Accident Commission shall be, as against the employer, the exclusive remedy of the employee. 27 Cal.Jur. 262, and cases cited.

In the case of Alaska Packers' Ass'n v. Industrial Accident Commission, 200 Cal. 579, 583, 253 P. 926, 928, the Supreme Court said: "The California Workmen's Compensation Act provides the only means by which an injured employee can recover compensation from his employer for injuries received in the course of and arising out of his employment, and it abrogates the common-law liability of the master for such injuries in the cases to which it is applicable. * * * When the specified conditions exist, the remedy provided by the Act is exclusive of all other statutory or common-law remedies."

[2] Furthermore, it has become well settled that a disability, resulting from treatment instituted to cure or relieve the employee from the effects of a compensatable injury, is also compensatable under the Workmen's Compensation law. 27 Cal. Jur. 423. In the case of Fitzpatrick v. Fidelity & Casualty Co. of New York, 60 P.(2d) 276, 278, our Supreme Court said: "In the development of our system of workmen's compensation, it has become settled, as already indicated, that an employee is entitled to compensation for a new or aggravated injury which results from the medical or surgical treatment of an industrial injury, whether the doctor was furnished by the employer, his insurance carrier, or was selected by the employee." Also, see Sarber v. Ætna Life Ins. Co. (C.C.A.) 23 F.(2d) 434, 435, and cases cited therein.

[3] It is clear, therefore, that the new or aggravated disability caused by the negligent performance of the operation, alleged in the amended complaint, is a part of the disability for which the plaintiff is entitled to indemnity under an award from the Industrial Accident Commission and that the commission has exclusive jurisdiction over such claim against the employer and his insurance carrier.

Plaintiff contends that there is support in the cases for a different ruling. In this behalf he relies upon Smith v. Golden State Hospital, 111 Cal.App. 667, 296 P. 127, 128. But it develops upon inspection that in that case the employee sued, not the employer or his carrier, but the hospital and the physicians who performed the operation upon him. The court said: "The only parties defendant upon this appeal by the plaintiff are the hospital and the physicians, and the sole question presented is as to the right of the employee to maintain an action against them for malpractice after allowance of compensatory relief from the employers." In our view, this is not an authority for the plaintiff's contention that under the facts alleged he has a cause of action in a civil suit against the employer or his insurance carrier. The plaintiff has his remedy, but he should press it before the Industrial Accident Commission, which commission has exclusive jurisdiction to hear it.

Judgment and order affirmed.

We concur: WOOD, J.; McCOMB, Justice pro tem.

---

19 Cal.App.2d 693

SHARICK v. GALLOWAY et al.

Civ. 1764.

District Court of Appeal, Fourth District, California.

March 23, 1937.

1. Automobiles 🔑216

As respects issue of contributory negligence of pedestrian struck by automobile, that pedestrian would not have been injured if he had not been where he was at time of accident is not alone controlling.

2. Automobiles 🔑218, 245(90)

Violation of statute prohibiting pedestrian from walking along highway outside of business or residence district other than on left-hand side constitutes negligence per se, but whether such negligence contributes to pedestrian's injury is question for jury (St. 1929, p. 546, § 150½).

3. Negligence ⚷121(1)

Violation of statute or ordinance which proximately contributes to injury is presumptively act of negligence, unless act or omission was justifiable or excusable under circumstances.

4. Negligence ⚷136(9, 25)

Whether violation of statute or ordinance proximately contributed to accident and whether violation was excusable or justifiable are questions for jury, except where reasonable men could only draw inference that such negligence contributed to injury.

5. Automobiles ⚷238(9)

Complaint alleging that pedestrian was walking at night six feet to right of pavement on highway when struck by automobile and hurled seventy-five feet *held* not demurrable as showing contributory negligence barring recovery for violation of statute prohibiting walking on right-hand side of highway, as failing to disclose that such negligence, if any, contributed to pedestrian's injury (St.1929, p. 546, § 150½).

◆

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Actions by Benjamin Sharick against Mollie Galloway and others. Judgments for defendants, and plaintiff appeals.

Reversed.

See, also, 12 Cal.App.(2d) 733, 55 P.(2d) 1196.

Clifton Hildebrand and John Corgiat, Jr., both of Oakland (Philander B. Beadle, of San Francisco, of counsel), for appellant.

W. G. Machetanz and McFadzean & Crowe, all of Visalia, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for injuries sustained by the plaintiff when he was struck by an automobile driven by one of the defendants. So far as material here, the sixth amended complaint alleges that a county road 40 feet in width, with the center portion paved to a width of 16 feet, runs through the town of Farmersville, in a north and south direction; that a described portion of this road is inside the residence district of said town, within the meaning of subdivision (b) of section 28½ of the California Vehicle Act (St.1923, p. 517, § 28½ (b, c), as added by St.1929, p. 510); that on November 10, 1933, after dark, the plaintiff was walking along this road in a southerly direction inside of said residence district; that he was walking parallel with, but about 6 feet to the west of the paved and traveled portion of said highway; and that while he was so walking the defendant Boon so negligently operated an automobile, which he was driving in a southerly direction on the paved portion of this road, "as to cause said automobile to run off of the paved and usually traveled portion of said highway and to run into and collide with plaintiff and plaintiff was hurled through the air seventy-five feet by the impact of said automobile with his body." The court sustained demurrers to this complaint without leave to amend, and this appeal followed the judgment.

It is conceded that the demurrers were sustained on the theory that it appears from the face of the complaint that the appellant was guilty of contributory negligence as a matter of law, in that he was walking along his right-hand side of a highway outside of a business or residence district in violation of section 150½ of the California Vehicle Act, as added by St.1929, p. 546. We will refer to this act as it read at the time of the accident.

The respondents contend that it appears from the complaint that the accident in question was outside of a business or residence district, since it is not alleged that the area in question was signposted in accordance with section 116 of the act (St. 1923, p. 555, as amended by St. 1931, p. 2122), and since section 28½ (c) of the act provides that a public highway shall be conclusively presumed to be outside of a business or residence district unless it is signposted as required by the act. While it is conceded that the portion of the road involved was not signposted, it is contended by the appellant that it is and was within a residence district and it is so alleged in the complaint. The appellant argues tnat the presumption raised by section 28½ of the act does not apply, since under section 116 the local authorities are required to signpost main through highways only, that they may or may not signpost other highways at their discretion, and that it does not appear from the complaint that this was a main through highway. The question thus raised need not be decided and we will assume, for the purposes of this opinion, that this accident occurred outside of a business or residence district.

Under this assumption, the question remains whether it may be said, as a matter of law, that the complaint fails to state a cause of action because it discloses a violation of section 150½ on the part of the appellant in that he was walking on his right side of the road in a district where that section applies. In other words, the question is whether the act of negligence thus disclosed must be held to have been a proximate cause of the accident.

[1] The respondents argue that this necessarily follows since the appellant would not have been at the place where he was struck if he had been walking on the other side of the road, in compliance with the statute. In almost any case it might be said that the party would not have been injured if he had not been at the place involved, and that fact alone is not controlling. The respondents rely on Hopkins v. Galland Mercantile Laundry Co., 218 Cal. 130, 21 P.(2d) 553. In that case the injured party, who was in a place where he had no right to be and where he could not be seen by the truck driver, was struck by a truck which was being backed. The situation with which we are now concerned is not only essentially different, but is one in which the question of proximate cause depends upon the evidence which might be produced. In at least two cases in this state a similar question has been held to have been one of fact. Gayton v. Pacific Fruit Express Co., 127 Cal.App. 50, 15 P.(2d) 217, 220; Scalf v. Eicher, 11 Cal.App.(2d) 44, 53 P.(2d) 368, 372. In the first of these cases, in referring to section 150½, this court said:

[2] "It cannot be doubted that the violation of the provisions of this section by a pedestrian constitutes negligence per se on his part. Whether or not such negligence contributed to his injury is a question of fact to be decided by the jury, in the ordinary accident case, under numerous recent decisions in California."

In the other case, the court said:

"In walking upon the right shoulder of the highway, decedent violated the law. This violation was negligence per se. Unless the violation of the law proximately contributed to the death of decedent, it would be immaterial. Whether or not the violation of the law proximately contributed to the death was a question of fact for the jury to determine. * * *

[3, 4] "Young Scalf was not available as a witness. Plaintiff therefore was entitled to rely upon the presumption that the decedent had taken ordinary care of his own concerns. Code Civ.Proc. § 1963, subd. 4; Smellie v. Southern Pacific Co., 212 Cal. 540–561, 299 P. 529. Defendants sought to overcome and dispel this presumption by evidence that decedent had violated section 150½ of the California Vehicle Act. The mere violation of the provisions of the act would not be sufficient to controvert and overcome the presumption, but there must be evidence to the effect that the act or omission constituting the violation proximately contributed to the accident. The violation of a statute or ordinance which proximately contributes to the injuries is presumptively an act of negligence unless the act or omission was justifiable or excusable under the circumstances. Mora v. Favilla, 186 Cal. 199–207, 199 P. 17; Shearman & Redfield on Negligence (6th Ed.) § 467. Whether or not a violation of a statute or ordinance proximately contributed to an accident and whether the violation was excusable or justifiable are questions of fact except in a case where 'the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury.'"

[5] The appellant had a right to be where he was under some circumstances as, for instance, if he had been walking in the other direction. While he might have been in a better position to avoid being struck if he had been facing the approaching automobile, even this might depend upon facts developed by the evidence. The accident would not have occurred if the automobile had remained on the pavement or within a few feet thereof. It is alleged that the appellant was struck while he was walking about 6 feet to his right of the paved and traveled portion of the highway, and that he was hurled through the air by the impact for a distance of 75 feet. These facts, and many others which might be developed from the evidence, have and might have so important a bearing upon the

conduct of both parties that it cannot be said from the allegations of the complaint alone that the only inference which might reasonably be drawn is that the negligence of the appellant contributed to his injury.

We conclude that the court erred in holding, as a matter of law, that the negligence of the appellant, as disclosed by the complaint, was a proximate cause of his injury.

Both of the judgments appealed from are reversed.

We concur: MARKS, J.; JENNINGS, J.

KEY NUMBER SYSTEM

19 Cal.App.2d 590

BECK et ux. v. SHEPHERD FRUIT CO. Inc., et al.

Civ. 1583.

District Court of Appeal, Fourth District, California.

March 17, 1937.

Hearing Denied by Supreme Court May 13, 1937.

1. Guaranty ⚷4

Promise by orange grove purchasers' crop mortgagee to vendors that mortgagee would abide by contract of sale and would pay to vendors certain sums from proceeds of oranges, and would also see that purchasers paid taxes, and fertilized "as per contract of sale" constituted a "guaranty" that provisions of contract would be performed by purchasers, and was not an independent contract, as respects mortgagee's liability to vendors who had repossessed grove in quiet title action.

[Ed. Note.—For other definitions of "Guaranty," see Words & Phrases.]

2. Vendor and purchaser ⚷301

Upon purchasers' breach of covenant in contract for sale of orange grove, vendors might stand on contract and bring action to recover balance of purchase price, or treat contract as terminated because of breach, retain money paid on purchase price, and repossess grove, but were not entitled to seek both remedies.

3. Vendor and purchaser ⚷300

Orange grove vendors' action to cancel contract of sale and quiet title to property indicated election to treat contract as terminated, and decree adjudging vendors the sole owners and that all adverse claims of purchasers and their crop mortgagee were invalid, and quieting title of vendors in property, terminated contract, and purchasers were relieved from obligations under contract.

4. Guaranty ⚷64

Orange grove vendors who elected to retain money paid on purchase price and to repossess grove could not recover from purchasers' crop mortgagee which guaranteed that purchasers would perform covenants of contract of sale.

5. Appeal and error ⚷113(2)

Order refusing to vacate judgment *held* not appealable where ground stated for motion to vacate judgment was urged as reason for reversal of judgment.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Albert Beck and his wife against the Shepherd Fruit Company, Inc., and E. R. Lewis. From a judgment against the first-named defendant, and from an order denying first-named defendant's motion to vacate the judgment, first-named defendant appeals.

Appeal from order refusing to vacate judgment dismissed, and judgment reversed.

Albert Ford and Kelley & Hews, all of Riverside, for appellant.

Andrew J. Copp, Jr., of Los Angeles, for respondent.

JENNINGS, Justice.

For some time prior to the month of October, 1930, plaintiffs were the owners of an orange grove in Riverside county, Cal. This property they were willing to sell and during the month of September, 1930, the plaintiff Albert Beck entered into negotiations for the sale of the grove to William H. Seeley and his wife, Ina M. Seeley. These negotiations culminated in the execution of a contract in writing between plaintiffs and the Seeleys on October 6, 1930. This instrument recited that plaintiffs, as owners in joint tenancy of the real property, agreed to sell and the Seeleys agreed to buy said property for the sum of $50,000, of which the sum of $2,000, whose receipt was acknowledged, was paid in cash. A further sum of $5,000 was to be paid from the proceeds to be derived from the sale of oranges that were then growing on the property. The exact language of the agreement which provided for the payment of the $5,000 is as follows:

"Three thousand and no/100 ($3000.00) Dollars, from the proceeds of the present crop of Navel oranges, now standing and growing; and $2,000.00 from the proceeds of the crop of Valencia oranges, now standing and growing on the above-described property. Both last referred to payments to be secured by an order on the packing house." The agreement then provided that the remainder of the purchase price, to wit, the sum of $43,000 should be paid in annual installments of $5,000 or more and that when the unpaid balance should not exceed the sum of $43,000, plaintiffs, as vendors, would execute a deed to the property to the vendees and would take back a deed of trust on the property to secure the payment of a note or notes representing such unpaid remainder of the purchase price to be executed by the purchasers, payment of such note or notes further to be secured by a crop mortgage on all growing crops during the existence of the trust deed. The vendees agreed that they would pay all taxes and assessments levied against the property and all charges for water furnished on the land. They further agreed that they would properly care for and preserve the property and more specifically that they would provide a designated quantity of fertilizer for each tree per year and that the land should be fertilized on or before 30 days from the date of the agreement, weather conditions permitting.

The defendant Shepherd Fruit Company, which was a corporation engaged in the business of picking, packing, and marketing fruit, had its principal office in the city of Los Angeles. It also maintained a packing house in the city of Corona of which the defendant E. R. Lewis was the superintendent with the title of district manager. F. M. Withers was the secretary-treasurer of the corporation and was acquainted with the parties to the above-described contract. As the negotiations which culminated in the execution of the contract progressed, F. M. Withers was apprised of them and on September 13, 1930, addressed a letter to plaintiff Albert Beck, in which he stated that Seeley had come to see him and discussed the proposed purchase of Beck's property and that if the deal were consummated Seeley would wish some financial assistance from the corporation to enable him to handle the matter. The writer expressed the willingness of the corporation to furnish such assistance and stated that he was informed that Beck would be willing to accept an order drawn by the purchaser on the corporation which the purchaser desired should handle the marketing of the fruit growing on the property. The letter contained a statement that the corporation would agree to have the purchaser give Beck an order for an unspecified amount to be paid by the corporation any time between October 15 and November 1, if agreeable to Beck. The evidence which related to the negotiations between Beck and Seeley leading up to the execution of the contract indicated that Beck was unwilling to accept an order drawn by Seeley on the defendant corporation, but insisted on payment of a portion of the selling price in cash at the time the contract was made and payment of a further amount to be derived from the proceeds of the crop of fruit, such latter payment to be secured by an order to be drawn by the purchaser on the packing house. The contract which the parties finally executed was accordingly thus drawn. It then became necessary for the purchaser, Seeley, to procure the sum of $2,000 which was required to be paid to Beck at the time the contract would be executed. Seeley accordingly went to Fresno, where F. M. Withers then was and either exhibited to him a copy of the proposed contract or informed Withers of its terms. Withers then caused a crop mortgage to be prepared which was to be executed by Seeley in favor of the Shepherd Fruit Company to secure payment of the sum of $2,000 to be advanced by the corporation to Seeley and had a check drawn by the corporation in Seeley's favor for said sum of $2,000. The check thus drawn was then turned over to Seeley, together with the crop mortgage and a letter of instruction addressed to the defendant E. R. Lewis. This letter mentioned the execution of the check and the fact that Withers had given Seeley a marketing contract to be executed by Seeley and his wife; also, that Seeley had been given a crop mortgage to be executed by himself and wife. The letter further stated that as soon as Beck executed the contract of sale Seeley would place the same of record and Lewis was instructed to record the crop mortgage immediately afterward. The instructions thus given were followed. The contract of sale was executed on or about October 6, 1930, and the parties thereto acknowledged execution on October 15, 1930. The crop mortgage was executed at the same time the contract of sale was executed and it was likewise acknowledged on October 15, 1930. Both of the aforesaid instruments were deposited with a title company immediately after execution and were offered for recordation by the title company at the same time. The contract of sale was actually recorded immediately prior to the crop mortgage on October 20, 1930.

After the contract of sale was executed the Seeleys, as purchasers, went into possession of the property. On November 28, 1930, the plaintiff Albert Beck telephoned the defendant E. R. Lewis and advised Lewis that he did not propose to permit Seeley to pick the fruit because he had not fertilized the grove in accordance with the terms of the contract of sale and that unless the Shepherd Fruit Company would guarantee that the grove would be fertilized and that the payments of $3,000 and $2,000 would be made as required by the contract he would bring an action to restrain the picking of the fruit and for cancellation of the contract. Lewis agreed to see to it that Seeley fertilized the grove and promised to sign a letter to that effect and to deliver it to Beck. On November 28, 1930, Lewis prepared on the stationery of the defendant corporation and delivered to Beck the following letter:

"Dear Mr. Beck: As per your request we the Shepherd Fruit Co. Inc. promise to abide by your contract of sale to Mr. Wm. H. Seeley of a certain parcel of land near Arlington, Calif. now growing Navel and Valencia oranges, in that we will pay to you $3,000.00 from the proceeds of the Navel oranges and $2000.00 from the net returns of the Valencias, we will also see that he pays the 1930 and 31 taxes, also fertilize as per contract of sale by Dec. 30th, 1930.

"Yours very truly,
"E. R. Lewis, Dist. Mgr."

The fruit growing on the property was thereafter picked and marketed by the defendant Shepherd Fruit Company in accordance with the marketing agreement entered into between Seeley and the corporation. After all expenses incident to the picking and marketing of the fruit were deducted from the gross proceeds derived from sale of the fruit, there remained a total amount of $1,492.90, which the defendant corporation retained and applied on the $2,000 indebtedness of Seeley, which was secured as aforesaid by the crop mortgage. The taxes on the property for the year 1930-1931 were permitted to become delinquent and the property was sold to the state of California for the amount of such taxes. On June 10, 1931, the Becks, plaintiffs herein, instituted an action against the Seeleys and the Shepherd Fruit Company to quiet their title to the property. The above-mentioned defendants defaulted in appearance and on September 21, 1931, a judgment was entered in said action quieting the title of said plaintiffs to the property.

The present action was instituted on July 12, 1933. The complaint alleged the execution of the contract of sale between plaintiffs and the Seeleys with particular reference to the covenant for payment of the sum of $5,000 from the proceeds of the orange crop then growing on the property and that the two payments that would be made out of the proceeds of the crop should be secured by an order on the packing house. It was alleged that the packing house referred to in the covenant was the packing house at Corona operated by the defendants. The pleading further alleged that on November 28, 1930, the Seeleys offered to sell and deliver to the defendant corporation the orange crop subject to the covenant for payment of $5,000 to be made as above noted and that the defendants on said date agreed to accept delivery of the crop and to comply with the provisions of the aforesaid covenant and that the defendant corporation thereupon evidenced its willingness to perform its agreement by signing and delivering to plaintiffs the letter of November 28, 1930. The complaint then alleged the acceptance by plaintiffs of the promises contained in said letter and their consent to the sale and delivery of the crop induced by the statements contained in the letter and that the crop was thereafter sold by defendants for a sum which exceeded the amount of $5,000, but that defendants failed and refused to make the required payment and that the taxes assessed against the property were allowed by the Seeleys to become delinquent which rendered it necessary for plaintiffs to pay the sum of $1,836.94 to redeem the property. The prayer of the complaint demanded judgment against the defendants in the amount of $6,836.94 comprising the $5,000 payment required by the contract of sale and the sum paid by plaintiffs to redeem the property. Upon the conclusion of the trial of this action the court required plaintiffs to elect whether they would seek recovery from the defendant corporation or from the defendant Lewis. Plaintiffs elected to demand recovery from the corporation and judgment was thereafter entered in favor of plaintiffs against the corporation in the amount of $1,492.90 with interest as specified. In thus rendering judgment for the net amount realized from the sale of the orange crop, the court allowed the defendant corporation to deduct all costs and expenses incident to the handling and sale of the crop, but refused to allow the corporation to apply the net proceeds on the promissory note and crop mortgage for $2,000 executed by the Seeleys to secure repayment of said sum of $2,000 advanced by the corporation to the Seeleys. Within ten days after entry of judgment, the defendant Shepherd Fruit Company, Inc., gave notice that it intended to move for a new trial and also gave a separate notice that it intended to move the trial court for an order vacating the judgment. The motion for a new trial was denied on February 21, 1935, and the motion to vacate the judgment was denied on February 27, 1935. The defendant Shepherd Fruit Company, Inc., appealed from the judgment and its notice of appeal states that this defendant also appeals from the order of February 27, 1935, denying the aforesaid motion to vacate the judgment.

The principal contention advanced in support of the appeal from the judgment is that plaintiffs are barred from recovery in this suit by their prior action in repossessing the property which they contracted to sell to the Seeleys and by quieting their title to said property by means of the suit which they brought for this purpose in 1931. Plaintiffs, in opposition to this contention, maintain that the letter of November 28, 1930, constituted a contract entirely independent of the agreement of sale entered into between plaintiffs and the Seeleys which was supported by the consideration that plaintiffs forbore from restraining delivery of the orange crop to the defendant corporation, although the Seeleys had then failed to perform their covenant to fertilize the grove and were in default. The presentation of these conflicting contentions necessitates an examination of the contents of the letter of November 28, 1930, which was signed by the defendant E. R. Lewis.

This document states that the Shepherd Fruit Company promises "to abide by your contract of sale to Wm. H. Seeley of a certain parcel of land near Arlington, Calif. now growing Navel and Valencia oranges, in that we will pay to you $3000.-00 from the proceeds of the Navel oranges and $2000.00 from the net returns of the Valencias, we will also see that he pays the 1930 and 31 taxes, also fertilize as per contract of sale by Dec. 30th, 1930."

[1] It is apparent that in the brief verbiage of the communication reference is twice made to the contract of sale which is clearly designated as the contract which plaintiffs had made with Seeley. It must further be observed that the payments of $3,000 and $2,000 are the exact amounts which the Seeleys had agreed by their contract to pay and that the source of these two payments is precisely the same as that which was specified in the sale contract. The language which refers to the payment of taxes and fertilization is modified by reference to the contract of sale. The language of the communication taken alone, therefore, impels the conclusion that it did not, as plaintiffs contend, constitute an entirely independent agreement on the part of the defendant corporation to pay the designated sums of money, but that it amounted to a guaranty by the corporation that the specified provisions of the contract relating to payments to be made on the purchase price and the payment of taxes and fertilization would be performed by the Seeleys as purchasers under the contract of sale. In this connection the words "we will also see that he pays the 1930 and 31 taxes, also fertilize as per contract of sale by Dec. 30th, 1930," are significant. This language is not indicative of the expression of an independent agreement by the corporation to pay taxes and fertilize. The plain meaning of the language is that the corporation intended to guarantee that the Seeleys would perform their covenants to pay taxes and fertilize "as per contract of sale."

Furthermore, it must be noted that the trial court did not rely solely on the language of the communication, but permitted the introduction of evidence explanatory of the language. Examination of the record leaves no doubt that the plaintiffs treated the letter of November 28, 1930, as amounting to an acceptance of a "fruit order" by the Seeleys in favor of plaintiffs and that plaintiffs considered that performance of the specified covenants of the contract of sale relating to payment of designated amounts from proceeds of the crop and fertilization of the land and payment of taxes was guaranteed by the defendant corporation.

Arrival at the conclusion that the letter of November 28, 1930, did not constitute an independent contract, but that, on the contrary, it had the meaning heretofore mentioned, brings us to a consideration of the effect produced on this contract of guaranty by the prior action of plaintiffs in quieting their title to the land from any claims by the Seeleys or the defendant corporation which claims depended entirely on the contract of sale originally entered into between plaintiffs and the Seeleys.

[2-4] In the first place, upon a breach by the purchasers of any covenant contained in the contract of sale the sellers, plaintiffs herein, became entitled to a choice of two remedies. They might either stand on the contract of sale and bring an action to recover the balance of the purchase price or they were entitled to treat the contract as terminated because of the breach, retain the money paid on the purchase price, and repossess the property. They were not, however, entitled to seek both of these obviously inconsistent remedies, and they were consequently put to their election as to which of the two they would pursue. When, therefore, in June, 1931, the plaintiffs brought an action to cancel the contract of sale and quiet their title to the property they indicated their election to treat the contract as terminated and the decree entered in this action in September, 1931, adjudging plaintiffs to be the sole owners of the property and that all adverse claims of the defendants therein and of all persons claiming under them were invalid and quieting the title of plaintiffs in the property effectually terminated the contract. The contract of sale being thus terminated the vendees were released from their obligations under the contract. Cocores v. Assimopoulos, 127 Cal.App. 360, 363, 15 P.(2d) 892; California Raisin Pool v. Balian, 139 Cal.App. 343, 348, 34 P.(2d) 227; Smith v. Miller, 5 Cal.App.(2d) 564, 569, 43 P.(2d) 347. Since, as heretofore indicated, it is our view that the letter of November 28, 1930, signed by the defendant E. R. Lewis, which formed the basis of the present action, was not an independent contract entirely disassociated from the contract of sale, but amounted to a guaranty that the Seeleys would perform their covenants under the contract of sale, it follows that plaintiffs, having elected to retain the money paid on the purchase price and to repossess the property which was the subject of the sale contract, may not now recover from the guarantors of the purchasers. Glassell v. Coleman, 94 Cal. 260, 29 P. 508; Frankel v. Rosenfield, 95 Cal. App. 647, 650, 273 P. 122.

The view which we take of the situation here presented as reflected by the transcript on appeal impels the conclusion that the defendant Shepherd Fruit Company, Inc., was entitled to apply the net proceeds realized from the sale of the orange crop on the promissory note and crop mortgage given by the purchasers under the conditional sales contract to said defendant. Judgment should therefore have been rendered in favor of this defendant.

[5] Examination of the record herein indicates that the legal effect of the motion to vacate the judgment was equivalent to a motion for a new trial. It is further evident that the ground stated for the motion to vacate the judgment has been urged as a reason for reversal of the judgment. It is our conclusion that no appeal lies from the order refusing to vacate the judgment and that the attempted appeal therefrom should be dismissed.

The attempted appeal from the order refusing to vacate the judgment is therefore dismissed. The judgment from which this appeal has been taken is reversed and upon the going down of the remittitur the trial court is directed to correct its findings in accordance with the views herein expressed and to enter judgment in favor of the appealing defendant.

We concur: BARNARD, P. J.; MARKS, J.

19 Cal.App.2d 651

ROSS v. FIRST NAT. TRUST & SAVINGS BANK OF SAN DIEGO et al.

Civ. 1796.

District Court of Appeal, Fourth District, California.

March 18, 1937.

Hearing Denied by Supreme Court May 17, 1937.

1. Appeal and error ⚷110

Order denying motion for new trial is not an appealable order (Code Civ.Proc. § 963, as amended by St.1933, p. 2472).

2. Assignments ⚷50(1)

Where sellers and buyer of corporate stock agreed that the stock and contracts for sale of land owned by the buyer should be deposited in a bank which should apportion payments on the contracts among the sellers of the stock, but bank declined to be a party to any such escrow or to do otherwise than deposit collections on the contracts in the buyer's account and pay them out on his order, whereupon the parties mutually abandoned the contract and substituted parol contract under which stock was delivered and buyer gave written order to bank for payments to sellers, there was no equitable assignment of the contracts rendering bank liable for breach of trust in delivering the contracts to the buyer.

3. Assignments ⚷98

Assuming that, where buyer of stock gave orders to bank with which contracts for sale of realty had been deposited to pay amounts collected thereon to sellers, there was an equitable assignment of payments made on the contracts, bank was not liable to sellers for permitting buyer to make withdrawals from the account, where buyer had made larger payments into the account of moneys to which the sellers had no claim, as the withdrawals must be held to have been made from such moneys.

4. Appeal and error ⚷221, 719(9)

Though pleadings and evidence would have supported money judgment against an insolvent defendant, where plaintiff and cross-complainant did not press for such judgment in trial court and did not raise question in appellate court, error in not rendering judgment against him and in rendering judgment in his favor was waived.

◆

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by A. L. Ross against the First National Trust & Savings Bank of San Diego and others, in which the Security-First National Bank of Los Angeles, as executor of William A. Edwards, deceased, filed a cross-complaint against the other defendants. From a judgment against plaintiff and cross-complainant and an order denying a new trial, they appeal.

Judgment affirmed, and appeal from order denying new trial dismissed.

Ed P. Sample and William H. Wylie, both of San Diego, for appellants.

William G. Mirow, of San Diego, and Michael G. Luddy, of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from a judgment in favor of the defendants and cross-defendants, the First National Trust & Savings Bank and A. G. Smith, and against plaintiff A. L. Ross and cross-complainant Security-First National Bank of Los Angeles as executor of the last will and testament of William A. Edwards, deceased.

During the period here involved the First National Trust & Savings Bank of San Diego consolidated and merged with the First Trust & Savings Bank of San Diego under the former name. The latter's banking house in East San Diego, at which the earlier part of the transactions here involved took place, became a branch of the First National Trust & Savings Bank of San Diego. For brevity we will refer to this bank and the East San Diego branch as "the bank," and to the Security-First National Bank of Los Angeles as "the executor."

For some time prior to September 1, 1927, the El Cerrito Park Company owned a tract of land in the city of San Diego which was being subdivided and sold by A. G. Smith, who was in possession of it under a contract of purchase. Smith had sold many parcels of land in this subdivision under conditional sales contracts. These contracts were made payable to him and were deposited by him in the bank for collection. The unpaid amounts on these contracts, in the bank for collection, were as follows: On August 2, 1927, $140,300.51, on September 1, 1927, $139,535.83, and on November 7, 1927, an amount in excess of $100,000.

Previous to September 1, 1927, the El Cerrito Park Company had issued 7,500 shares of its capital stock to the following persons: William A. Edwards, 625 shares; J. T. Kaidel, 625 shares; F. E. Patterson, 875 shares; C. D. Sprigg, 312½ shares; C. P. Douglass, 312½ shares; H. S. Richards, 250 shares; A. L. Ross, 1,375 shares; Pauline H. Bowen, 625 shares; D. E. Boone, 1,562½ shares; A. G. Smith, 937½ shares. Prior to that date A. G. Smith had conceived the idea of acquiring all of the issued stock of the company. Under date of August 2, 1927, he wrote the company, putting a value of $200,000 on its issued stock and offered to acquire it from the stockholders on the basis of that valuation.

Under date of September 1, 1927, a contract was entered into between Smith, as party of the first part, and stockholders Edwards, Kaidel, Patterson, Sprigg, Douglass, Richards, and Ross, as parties of the second part, whereby the second parties agreed to sell their stock and Smith agreed to buy it for $116,666.66. One-half was to be paid in cash within three months. The balance was to be paid through collections on conditional sales contracts belonging to Smith and deposited by him in the bank, subject to the express provision that the total purchase price was to be paid by Smith by September 1, 1930. The language of the contract is confusing, probably due to the fact that Smith had placed a total value of $200,000 on the entire issued stock of the El Cerrito Park Company and he was acquiring, under the contract, only the stock owned by the seven stockholders who were the parties of the second part to the contract of sale of September 1, 1927. It was provided that he was to acquire the stock of Pauline H. Bowen and D. E. Boone directly from them.

It was provided that $100,000 "in good paying contracts" on file in the bank should be guaranteed by Smith and that the receipts from them should be apportioned among the seven stockholders signing the contract until the deferred payments amounting to $58,333.33, and interest, were paid. It was also provided that in the event any purchaser was in default for 90 days on his contract that Smith should either replace such contract with one not in default or pay the contract price within 90 days.

It would seem to have been the intention of the parties, as expressed in the none too definite terms of the contract, or to be inferred from them, that an escrow be opened in the bank into which would be deposited the stock of the seven stockholders and the $100,000 in contracts, with the bank as agent of both parties for the purpose of carrying out the escrow.

The evidence as to subsequent events is sharply conflicting in some particulars. Under familiar rules we need only consider that which tends to support the findings and judgment.

Shortly after the contract of September 1, 1927, was executed, Smith, Ross, and perhaps Patterson, went to the bank for the purpose of arranging for the escrow. They took a copy of the contract with them. The manager of the bank, and later the collection teller, told them that the bank would not be a party to any such escrow; that Smith could leave his contracts for collection as before; that the bank would deposit the collections in Smith's checking account, and that it would pay out any money it collected only on Smith's order; that this was the only capacity or manner in which the bank would act in the matter. In commenting on this situation Ross is quoted as saying: "That don't make much difference, because Smith is worth it, anyway, and will pay it sometime."

The refusal of the bank to act as escrow holder necessitated a modification of the plan proposed in the contract. The final arrangements made by the parties may be best defined by their actions.

The seven stockholders delivered all their stock direct to Smith and he paid them $58,333.33 for it. Smith reduced the contracts in the bank for collection by withdrawals so that the unpaid principal sums totaled slightly more than $100,000. Smith gave the bank written directions to pay to the seven stockholders the collections made on these contracts. This the bank did, after deducting its collection charges, with the exception that Smith may have drawn his personal checks for small amounts on this account. To offset these checks it appears that Smith permitted considerably more than the total amount of the personal checks, which amount was collected on a contract not connected with the El Cerrito Park Company, to be paid into this account and to be distributed to the seven stockholders. The bank collected $39,416.89 and paid $37,784.11 to the seven stockholders. No question is raised over the bank's deducting its collection charges from the money it collected. At least some, if not all, of the seven stockholders knew of this practice and acquiesced in it.

Some of Smith's purchasers defaulted in their payments on the conditional sales contracts. In 1929 this condition became serious. For a time Smith substituted current contracts for those in default, but finally this had to be discontinued. When a purchaser stopped making payments, his contract was delivered by the bank to Smith, who tried to make collections or to make adjustments of the balance due. At least Ross had knowledge of this practice. No objection was made to it. Finally all purchasers stopped making payments and all contracts were returned to Smith. The collection account was finally closed on August 4, 1934, the bank paying $194.11 to one of the attorneys for plaintiff upon the authority of plaintiff. After that date the bank had none of the contracts of sale in its possession nor was any money collected by it on any of those contracts.

Prior to the commencement of this action F. H. Patterson died, and his claim under the contract of September 1, 1927, was distributed to his widow. It is interesting to note that this claim is described in the decree of distribution as "an unsecured account receivable of A. G. Smith for purchase of real estate in El Cerrito Heights." Mrs. Patterson, Kaidel, Sprigg, Douglass, and Richards assigned their claims and demands to plaintiff, who brought this action.

William A. Edwards died, and the Security-First National Bank of Los Angeles was appointed as executor of his last will and testament. As the executor did not assign to or join with plaintiff in the action, it was named a defendant. It filed a cross-complaint seeking recovery from the bank and Smith upon the same grounds as plaintiff.

Disregarding the fact of there being several counts, the amended complaint seems to allege the following cause of action against the bank; the contract of September 1, 1927, is pleaded in hæc verba; that this contract provided for the sale of the stock to Smith for $116,666.66; that Smith paid on account $58,333.33; that the unpaid balance was to be secured by deposit in escrow of contracts of sales of lots in the El Cerrito Park Tract in the total principal sum of $100,000; that these contracts were deposited in escrow with the bank which accepted the escrow and agreed to hold them for the stockholders as security for Smith's indebtedness; that the bank violated its agreement and returned the contracts to Smith while there was still unpaid on his indebtedness to the seven stockholders the sum of $29,598.58, principal, besides interest. There are appropriate allegations of the various amounts of the principal and interest alleged to be due each of the stockholders. An accounting is sought from the bank and that it be required to sell the contracts deposited with it by Smith; that, in the event it had lost possession or control of the contracts, judgment be rendered against it for the balance unpaid by Smith, together with interest. The only judgment prayed for against Smith is that he has no right, title, or interest in any of the contracts.

[1] The trial court found against the contentions of plaintiff and the cross-complainant executor and in favor of the bank and Smith and rendered judgment accordingly. Plaintiff and cross-complainant appealed from the judgment and from the order denying their motion for new trial, which is not an appealable order. Section 963, Code Civ.Proc., as amended by St.1933, p. 2472.

The trial court found that the bank refused to receive the escrow proposed by the stockholders and Smith; that it refused to receive or hold the conditional sales contracts other than as collection agent for Smith; that it only agreed to receive payments from purchasers and deposit them, less its collection charges, in Smith's checking account; that it only agreed to put out money from Smith's checking account on his order; that the "bank declined and refused to participate in the consummation of the transaction contemplated in" the contract of September 1, 1927, "or to act as an escrow holder or a pledgeholder in connection therewith or to assume any trust relationship with respect thereto or to enter into any contractual relationship in connection therewith with any of the parties thereto, except with the defendant and cross-defendant A. G. Smith; * * * that thereupon the terms and conditions of said 'Exhibit A' (contract of September 1, 1927), in so far as it was contemplated thereby that an escrow should be opened, were by the parties to said 'Exhibit A' abandoned and all of the persons named as parties of the second part to said 'Exhibit A' endorsed and transferred and delivered directly to said A. G. Smith, * * * all of the certificates representing shares of stock of El Cerrito Park Company, a corporation, owned by them and referred to in said 'Exhibit A'; that thereupon all intention of the parties to said 'Exhibit A' to have such instruments transferred and assigned by and from said A. G. Smith to plaintiff **A. L.**

Ross and the other parties named as parties of the second part to said 'Exhibit A' was abandoned"; that the bank distributed all the money received by it to the seven stockholders upon written order of Smith and in the proportions directed in writing by plaintiff and had returned all contracts to Smith.

It is clear from what we have already said, and the evidence we have outlined, that the findings of fact are sustained by material and competent evidence.

[2] Appellants seem to have changed the theory of their case here from that set forth in their pleadings. They now urge that, instead of the bank being liable for breach of contract in not holding the conditional sales contracts for the seven stockholders as security for Smith's indebtedness, the liability of the bank is based on breach of trust; that the contract of September 1, 1927, effected an equitable assignment of the conditional sales contracts to the seven stockholders; that the bank had knowledge of all of the terms of this contract; that it was charged with knowledge of the equitable ownership of the contracts by the seven stockholders; that it should have held the contracts for them or should have delivered the contracts to them; and that it breached its trust when it delivered the contracts to Smith.

This argument overlooks the pertinent findings of the trial court which in effect found a mutual abandonment of the terms of the contract of September 1, 1927, upon which appellants must rely to support the theory of equitable assignment, assuming, without holding, it could be supported. It also overlooks the finding of the substitution therefor of a parol contract which does not support the theory of equitable assignment, as Smith retained both title to and possession of the contracts free from any claim of the seven stockholders and through his order to the bank only gave them the right to participate in the payments made by the purchasers named in the contracts as long as his order remained in effect. See Donovan v. Middlebrook, 95 App.Div. 365, 88 N.Y.S. 607; In re Wood's Estate, 243 Pa. 211, 89 A. 975; Hibernian Banking Ass'n v. Davis, 295 Ill. 537, 129 N.E. 540; In re Cleary, 9 Wash. 605, 38 P. 79.

The case of Deeble v. Exchange National Bank, 32 Cal.App. 9, 161 P. 1010, 1011, is decisive of the question we are considering. In that case J. W. Young had conditional sales contracts deposited for collection in the Exchange National Bank. Young was indebted to the plaintiff Deeble in the sum of $1,460. Young gave Deeble an order directing the bank to pay Deeble part of the moneys collected by it on the contracts. The bank returned the contracts to Young before the Deeble debt was paid. In affirming the judgment of the trial court against Deeble it was said:

"The contention of plaintiff is that upon the giving of the written direction signed by Young to the bank, the bank became obligated to retain in its possession the contracts until an amount sufficient had been collected to satisfy the debt due from Young to the plaintiff. The difficulty with this position is that the bank was in nowise a debtor to Young. It was acting merely as Young's agent, and the written direction given to it constituted no assignment of amounts due from the purchasers of the land. The effect of the arrangement, as we read the allegations of the complaint, was only that so long as the bank continued to act as collector for Young it would pay over to the plaintiff, out of the proceeds of the contracts in its hands, the amounts directed to be paid by Young. The contract holders, debtors of Young, would have been in no way estopped from paying the money due from them directly to their creditor. Under the facts shown there could have been no release of the principal debt worked by the giving of the order by Young directing his agent to pay to his creditor, the plaintiff, enough money, if such was collected, to satisfy the debt. No doubt, as to the money actually collected by the bank, plaintiff was given the right to claim such a proportion as it was agreed should be paid therefrom, and to that extent the order might perhaps be said to work an equitable assignment in favor of plaintiff of the right to take that money. The contracts, as it appears, were held by the bank without any interest given to the defendant therein and were held subject to the right of Young to retake them into his own possession upon demand."

[3] Appellants urge that, even if it be held there was no equitable assignment of the contracts of sale, still it must be held there was an equitable assignment of the payments made into the bank by the purchasers under these conditional sales contracts. We may assume, without holding, that this argument is sound and still be unable to disturb the judgment. The trial court found that all the money collected by the bank on the contracts had been paid to these stockholders. This finding is supported by all the evidence in the case with two

minor exceptions which are more apparent than real. It is probably true that Smith drew small amounts for his personal use from this account in the bank. It is also true that there was paid into this account an amount of money much larger than the withdrawals by Smith, to which money appellants and their assignors had no claim and in which they had no right to participate. They were not damaged by these withdrawals by Smith, as they must be held to have been made from collections to which appellants and their assignors had no claim. It is also true that the bank deducted its collection charges before making the disbursements to the seven stockholders with whom Smith contracted. These charges were deducted by the bank over a period of more than six years without objection by the seven stockholders, and some, if not all of them, were aware of the practice. This question was not raised in the trial court and is not urged here. It is apparent that appellants are not only estopped by their silence from claiming any portion of the collection charges but have waived any claim to them.

It is evident from what we have said that the judgment in favor of the bank must be affirmed. The judgment in favor of Smith requires further discussion.

[4] In the amended complaint, and also in the cross-complaint, it is alleged that Smith promised to pay the seven stockholders $116,666.66 for their stock in El Cerrito Park Company and that he failed to perform this obligation. While the prayers of these pleadings do not contain requests for a money judgment against him, their allegations are sufficient to support such a judgment had one been rendered. The evidence supports these allegations, and it is clear that appellants might have obtained a judgment against Smith had they so desired. The record discloses that neither of the appellants pressed for a judgment against Smith in the trial court. They do not raise this question here. Perhaps this may be explained by the allegations in the complaint and cross-complaint that Smith was insolvent. As it seems evident that both appellants regarded a judgment against Smith without value, and as this question was not pressed in the trial court where they seemed interested only in recovering judgment against the bank, and as it is not raised here, we hold that the error, if any, in not rendering judgment against Smith and in rendering judgment in his favor, was waived in the trial court and is waived here.

Judgment affirmed. The appeal from the order denying the motion for new trial is dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

---

19 Cal.App.2d 524

CANAL OIL CO. v. NATIONAL OIL CO. et al.

Civ. 5768.

District Court of Appeal, Third District, California.

March 12, 1937.

1. Evidence 🔑265(5)

Owner's statements that he excluded land subject to canal right of way from deeds because he thought he did not own fee to such land in view of his previous conveyance of right of way *held* not a concession that he had no title to land over which right of way was located when he subsequently conveyed such land, as respects whether assignee of oil and gas lease on such land executed by grantee had leasehold interest therein.

2. Quieting title 🔑10(1)

Plaintiff in suit to quiet title must rely on strength of his own title.

3. Quieting title 🔑44(4)

In suit to quiet title to oil and gas leasehold interest on land subject to canal right of way, plaintiff's showing that it was owner and holder of assignment of oil and gas lease on such land duly executed by previous owner of right of way, and that it was in possession under lease and had executed acts of ownership by constructing valuable improvements thereon, was prima facie evidence of its ownership of such leasehold interest, notwithstanding that plaintiff did not trace title to original source.

4. Quieting title 🔑44(4)

Claimant's possession of valid conveyance of title from former record owner thereof, together with occupancy of property and acts of ownership such as construction of valuable improvements thereon, constitutes prima facie evidence of ownership of property which, in absence of evidence to contrary, justifies rendering of decree quieting title in claimant.

5. Quieting title 🔑44(4)

Under statute, mere occupancy of realty without other evidence of ownership does not constitute adequate evidence of ownership in quiet title action, unless occupancy has ripened into title by prescription (Civ. Code, § 1006, as amended by St.1915, p. 933).

6. Quieting title 🔑44(4)

Failure of defendants to rebut plaintiff's prima facie proof of ownership of oil and gas leasehold interest in land subject to canal right of way warranted judgment quieting title to leasehold in plaintiff.

7. Boundaries 🔑17

Land conveyed by deeds which recited that land was located west and northeasterly of land subject to canal right of way, and which excepted such right of way from land conveyed, did not extend to center of right of way or to thread of stream of canal, as respects right of persons claiming under such deeds to have title to oil and gas leasehold interest in land subject to right of way, quieted in them (Civ.Code, §§ 831, 1112).

8. Injunction 🔑57

Agreement founded on void act of Congress is unenforceable and does not warrant injunction prohibiting drilling for oil upon property contrary to terms of agreement.

9. Quieting title 🔑15

Alleged violation of provision of Code of Fair Competition for Petroleum Industry prohibiting drilling for oil and gas in certain oil field did not afford defendants a valid defense to plaintiff's claim of title to oil and gas leasehold interest on land in such oil field, where National Industrial Recovery Act, pursuant to which Code was adopted, had been held unconstitutional (National Industrial Recovery Act, 48 Stat. 195).

10. Continuance 🔑22

Liberality should be exercised in granting postponements of trials to obtain presence of material evidence and to prevent miscarriages of justice (Code Civ.Proc. § 595, as amended by St.1933, p. 1873).

11. Appeal and error 🔑966(1)

Granting or denial of continuance will not be disturbed on appeal except for abuse of discretion (Code Civ.Proc. § 595, as amended by St.1933, p. 1873).

12. Mines and minerals 🔑58

Formal written consent to corporation's acceptance of oil and gas lease, or adoption of minutes to that effect, was not necessary to establish corporation's acceptance of oil and gas lease, but such acceptance could be shown by acts and conduct of corporation.

13. Deeds 🔑65

Acceptance of deed or other instrument of conveyance of realty may be shown by acts and conduct of grantee.

14. Continuance 🔑46(8)

In corporation's action to quiet title to oil and gas leasehold interest in land subject to canal right of way, absence of corporation's by-laws at trial did not warrant continuance on ground that by-laws would disclose lack of corporation's authority to accept such lease, and other weaknesses in corporation's title to leasehold interest, in absence of showing that such by-laws existed (Code Civ.Proc. § 595, as amended by St. 1933, p. 1873; § 1985, as amended by St. 1933, p. 1479; Civ.Code, § 290; § 301, as amended by St.1933, p. 1365).

15. Corporations 🔑297

In absence of corporation's adoption of by-laws, authority to perform acts which may be controlled by by-laws is invested in board of directors.

16. Corporations 🔑298(1)

Oil company could maintain suit to quiet title to oil and gas leasehold interest in land subject to canal right of way, without adopting formal resolution to that effect.

17. Corporations 🔑298(1)

Corporation has inherent right to sue, in all cases relating to its business or property rights, without adoption of resolution specifically authorizing action to be brought.

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by the Canal Oil Company against the National Oil Company and others and the Petrol Corporation and another, wherein the National Oil Company and others filed a cross-complaint. From the judgment, the cross-complainants appeal.

Affirmed.

Harvey & Johnston, Alfred H. McAdoo, and J. W. Heard, Jr., all of Bakersfield, for appellants.

Hanna & Morton, of Los Angeles, and Edward West, of Bakersfield, for respondents.

Mr. Justice THOMPSON, delivered the opinion of the court.

The National Oil Company and other defendants and cross-complainants have appealed from a judgment quieting title in plaintiff to an oil and gas leasehold interest in a certain right of way of the East Side Canal Company in the southeast quarter of the northeast quarter of the northwest quarter of section 30 south, range 29 east, in Kern county, containing 2.17 acres of land. A canal occupies a portion of this right of way. The appellants hold an oil lease to 40 acres of land adjoining the right of way in dispute in the same section above referred to. The land in which the appellants have an interest is adjacent to, but is described as "lying west of the right of way of said East Side Canal." The interest which the appellants claim in the plaintiff's leasehold title above described is that the description of their property automatically carries their title to the thread of the stream in the canal.

It is contended the findings and judgment are not supported by the evidence, for the reason that the plaintiff failed to trace its title back to its source, or to a common source of title relied upon by the respective parties to the action. It is also claimed the court erred in holding that appellants' title does not extend to the thread of the stream in the canal, that plaintiff's lease is in violation of an agreement respecting fair competition for the petroleum industry, which was adopted for the Pacific Coast district, and that the court abused its discretion in denying appellants' motion for a continuance of the trial.

The evidence sufficiently supports the findings and judgment quieting title in plaintiff to the leashold interest in the right of way over the property above described for the purpose of developing oil and gas therefrom.

The evidence shows that for many years the East Side canal has extended in a northwesterly direction through section 30, township 30 south, range 29 east, M. D. M., in Kern county. Apparently the East Side Canal Company owned merely an easement or right of way upon this property for the purpose of maintaining the canal. The East Side Canal Company is not a party to this suit. The portion of the canal right of way which is involved in this suit is a strip of land about 75 feet in width by 350 feet in length, traversing the easterly extremity of the southeast quarter of the northeast quarter of the northwest quarter of said section 30, township 30 south, range 29 east, consisting of 2.17 acres of land. There is no evidence that the canal extends to the extreme western edge of the right of way adjacent to which the appellants' land is situated on the westerly side thereof. The evidence indicates that James Porter formerly owned all of the property which is involved in this litigation. While he was probably the common source of the titles upon which the respective litigants rely, the evidence does not adequately establish that fact. That lack of evidence is, however, immaterial in view of our conclusions regarding the other issues on appeal.

The only instruments which were received in evidence in support of the plaintiff's title consist of: (1) A deed of conveyance from the James Porter Investment Company to C. W. Bloemer, of the north half of section 30, township 30 south, range 29 east, M. D. B. & M., in Kern county, dated October 24, 1932; (2) an oil and gas lease dated September 20, 1933, for the term of twenty years, from C. W. Bloemer and wife to Fred N. Rumbley and H. F. Owen, covering title for the development of oil in the specific right of way described in the complaint; (3) a modification of this lease, the terms of which are immaterial to this litigation; and (4) an assignment of the last-mentioned lease dated July 8, 1934, from Rumbley and Owen to this plaintiff.

[1] In addition to the foregoing evidence of the plaintiff's record title, two witnesses testified that pursuant to its lease the plaintiff took possession of the property and made improvements thereon consisting of the construction of a foundation for the erecting of a derrick in preparation for the sinking of oil wells. Assuming that the common source of title of the leasehold interests of both parties to the litigation was James Porter, the plaintiff called him as a witness, and he testified without objection that he previously conveyed to the James Porter Investment Company, of which he was the president, the property which is involved on this appeal. It is true that Mr. Porter admitted he had previously executed a deed to Hubert A. Dustman in 1913 to a

portion of his adjoining property, from which deed the right of way involved in this litigation was exempted. That deed recited that the property conveyed therein lay "west of the right of way of the East Side Canal." Mr. Porter also said he conveyed a portion of that tract in 1928 to L. E. Nance, specifically exempting the right of way which is involved in this suit by reciting in that deed that the property conveyed lay "northeasterly of the right of way of the East Side Canal Company," and by further expressly exempting the right of way by the use of the following language: "Excepting therefrom the right of way of the East Side Canal Company." On cross-examination Mr. Porter said that the reason he excluded the right of way from the two deeds last mentioned was because he then thought he did not own the fee to that strip of land, having previously conveyed it to the East Side Canal Company. Evidently he did not intend to convey any title to the right of way to either Dustman or Nance. He specifically refrained from doing so. In explanation of his reason for not conveying title to the right of way to either Dustman or Nance and of subsequently conveying an interest in that same right of way to Mr. Bloemer, who thereafter conveyed a leasehold interest therein to Rumbley and Owen, who assigned the lease to the plaintiff, Mr. Porter said, "I had learned that the property belonged to me." It is reasonable to infer that he first assumed the deed of the right of way to the East Side Canal Company conveyed all of his title, but that he subsequently learned the company held only an easement for the sole purpose of maintaining thereon a canal, and that the fee in the property still remained in him. In other language, the preceding statements of Mr. Porter with respect to former deeds of conveyance do not amount to a concession that he held no title to the right of way which he transferred to Bloemer.

[2, 3] While it is true that the plaintiff in a suit to quiet title must rely on the strength of his own title, we are satisfied that in the present case the plaintiff furnished prima facie evidence of its ownership of the leasehold interest in that portion of the right of way which is in dispute, by showing that it is the owner and holder of an assignment of a lease in the property for the development of oil and gas which was duly executed by a previous owner of the property, and that the plaintiff is also in possession of the property under its lease and has exercised acts of ownership over the property by constructing thereon valuable improvements. Morris v. Clarkin, 156 Cal. 16, 103 P. 180; Syme v. Warden, 114 Cal.App. 707, 300 P. 863.

[4] Such circumstances present an exception to the general rule that title must be traced to the original source thereof. The possession of a valid conveyance of title from a former record owner thereof, together with occupancy of the property accompanied with acts of ownership such as the construction of valuable improvements thereon, constitutes prima facie evidence of ownership of the property which, in the absence of evidence to the contrary, justifies the rendering of a decree quieting title in such claimant.

[5] The appellants contend that, since the amendment of section 1006 of the Civil Code in 1915 (St.1915, p. 933), title to property may not be acquired under any circumstances except when such occupancy has ripened into title by prescription. We are not in accord with that construction of the statute. We are of the opinion that section should be construed to mean that mere occupancy of real property, without other evidence of ownership, may not constitute adequate evidence of ownership "unless such occupancy shall have ripened into title by prescription." That is exactly what the court determined in the case of Syme v. Warden, 114 Cal.App. 707, 300 P. 863, with which construction we are in full accord.

[6] In the present case there is no substantial evidence to rebut the plaintiff's prima facie proof of ownership established by showing that it holds a valid assignment of lease of the property from a former title owner thereof, together with occupancy of the property, accompanied with acts of ownership in the nature of the construction of valuable improvements thereon.

The appellants have utterly failed to prove that they have any interest in the right of way, the very instruments upon which they rely for evidence of their title, which are set forth in their cross-complaint, clearly indicate that title to the disputed strip of land was specifically excepted therefrom. Moreover, the appellants did not ask for a decree quieting title in them to any portion of that disputed right of way. They contented themselves with disputing plaintiff's title thereto and by requesting the court to enjoin plaintiff from drilling for oil or gas on that 2.17 acre tract of land.

There is no merit in the appellants' contention that the court erred in finding that their title to adjoining property does not automatically extend to the center of the canal. The appellants assert title to the center of the canal according to the principle announced in sections 831 and 1112 of the Civil Code. Section 831 provides: "An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown."

Section 1112 provides: "A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant."

[7] In the present case the right of way which was conveyed as an easement for the purpose of maintaining a canal is neither a road, street, nor highway. It is not a public way. On the contrary, it is a mere private easement. Nor is the canal a public stream. Moreover, the description of the appellants' adjoining property does not bound it by the canal or by the right of way. The instruments under which the appellants claim title specifically exempt from the grant's title to the right of way by reciting that the property which is thereby conveyed is located "west of the right of way of the East Side Canal" and "northeasterly of the right of way of the East Side Canal Company." The Nance deed further specifically exempts title to the right of way by describing the property conveyed "excepting therefrom the right of way of the East Side Canal Company." The deeds upon which the appellants rely are not susceptible of being construed so as to convey title to the center of the right of way or to the thread of the stream in the canal. Without objection, Mr. Porter testified that he did not intend to convey title by means of those deeds to any portion of the right of way. The deeds do not purport to do so. By reference to the engineer's diagram showing a survey of the boundaries of that right of way, it appears that the canal does not extend to the extreme border of the right of way. The canal therefore does not become a monument to be considered in determining appellants' title. The deeds upon which they rely do not refer to the canal as a boundary line of their property. Those deeds merely locate the properties which are thereby conveyed as "west of the right of way," "northeasterly of the right of way" and "excepting therefrom the right of way." There is no substantial evidence in the record supporting appellants' contention that their titles extend either to the center of the right of way or to the thread of the stream of the canal.

The evidence does not show that the plaintiff was guilty of violating the covenants of an agreement on the part of the Pacific Coast Petroleum Agency contrary to the provisions of the "Code of Fair Competition for the Petroleum Industry" or that the appellants are entitled to the injunction prayed for in their cross-complaint, restraining the plaintiff from developing oil from its property, on the equitable ground that plaintiff has not appeared in this suit to quiet title "with clean hands." It does not appear in the pleadings or by proof that the appellants were parties to the Pacific Coast Petroleum Agency contract above referred to. Nor was the plaintiff a party to that contract. It is, however, asserted that the plaintiff is the alter ego of the Petrol Corporation and the Petrol Producing Corporation, which were cross-defendants in this suit, and which are alleged to have been parties to that agreement. The court found that the plaintiff was not connected with or interested in these last-mentioned corporations. We are directed to no substantial evidence to the contrary. On the theory that the appellants are not authorized to charge plaintiff with violating an agreement to which they were not parties, the court further found: "That the cross-complainants are without right or interest to claim that these cross-defendants, or any of them, are violating the rules and regulations of any third party, or any statutes or laws of this state, or the Federal Government, and the court specifically finds that such allegations are not founded on fact nor supported by the evidence in this case."

[8] The covenant of the agreement of the Pacific Coast Petroleum Agency, the violation of which the appellants complain, was a part of the "Code of Fair Competition for the Petroleum Industry" which was adopted pursuant to the National Industrial Recovery Act (48 Stat. 195). That clause undertook to prohibit the drilling for oil or gas in the Mountain View field of Kern county upon any independent tract containing less than 10 acres of land. The Supreme Court of the United States in the case of Schechter Poultry Corporation v. United States of America, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947, held

the National Industrial Recovery Act to be unconstitutional and void upon the ground, among others, that it constituted an unlawful delegation of legislative authority. An agreement founded on a void act of Congress is unenforceable and does not afford a basis authorizing an injunction prohibiting the drilling for oil upon property, contrary to the terms thereof.

[9] The court properly found that the alleged violation of the "Code of Fair Competition for the Petroleum Industry" affords the appellants no valid defense to plaintiff's claim of title.

The court did not abuse its discretion in refusing to permit a continuance of the cause on application therefor by the appellants in the course of the trial. The cause was tried in Bakersfield on May 23, 1935. On that day the appellants filed an affidavit in support of their motion to postpone the trial, on the ground that it was necessary to their defense to procure the by-laws and minutes of the plaintiff corporation to show that the by-laws were not regularly adopted; that the officers of the corporation were not authorized to execute the oil and gas lease under which the plaintiff claims title; that the lease was not approved or accepted by it; that the bringing of this action was not authorized by the corporation; and that the plaintiff as the alter ego of the Petrol Corporation which signed the agreement with Pacific Coast Petroleum Agency was "controlled and directed by said Petrols" corporations, and that plaintiff therefore was barred from recovery on account of a breach of that contract. The affiant averred that appellants took the depositions of the secretary and one other officer of the plaintiff corporation in Los Angeles, which is the residence of the corporation, on May 17th, at which hearing the by-laws and minutes were not produced, and that Mr. McRoberts, one of the attorneys for the plaintiff, then told affiant he was unable to locate the by-laws and minutes and thought they had been returned to the office of James P. Fitzpatrick, the secretary of the corporation, but that the by-laws and minutes would be produced at the trial in Bakersfield, and, for the reason that Mr. Fitzpatrick had said the "officers and directors of said plaintiff corporation were very busy in his office and did not know anything about the present affairs of plaintiff corporation," the appellants refrained from taking the depositions of the officers of the corporation to procure the use of the by-laws and minutes at the trial of the case.

Section 595 of the Code of Civil Procedure (as amended by St.1933, p. 1873) provides that: "A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it."

Since counter affidavits were not filed on the motion for a continuance, we must assume the attorney for plaintiff assured the appellants the by-laws and minutes would be produced at the time of the trial in Bakersfield, and that a lack of diligence in procuring the documents might be excused on that account. It does not appear appellants pursued the legal method of securing the documents at the taking of the deposition in Los Angeles or otherwise. They did take the deposition of Fitzpatrick, the secretary of the corporation. By means of a subpœna duces tecum pursuant to section 1985 of the Code of Civil Procedure (as amended by St.1933, p. 1479), they could have required the production of these documents. Apparently no such application was made. An examination of the record indicates that the appellants did not rely greatly on their attack upon plaintiff's title because of any weakness thereof which might be disclosed by the by-laws or minutes.

[10, 11] It is true that liberality should be exercised in granting postponements of trials to obtain the presence of material evidence and to prevent miscarriages of justice, but, in the interest of expediting litigation to prevent injustice and to procure orderly procedure, the granting or denial of a continuance will not be disturbed on appeal except for an abuse of discretion on the part of the trial judge. Ross v. Thirlwall, 101 Cal.App. 411, 418, 281 P. 714; 13 C.J. 123, § 4.

Assuming that the present case shows adequate diligence on the part of the appellants to have warranted the court in granting a continuance, we are of the opinion the by-laws and minutes which they sought to procure were not material and their admission in evidence would in no way disturb the judgment which was rendered. Moreover, there is no affirmative showing that either by-laws or corporation minutes affecting the subject of this litigation ever existed. In response to the inquiry of the court regarding that matter, Mr. West, attorney for the plaintiff, stated: "As far as it is humanly possible (to ascertain), there are no such records. We know there are no by-laws." In their application for a continuance the appellants failed to state the purpose or materiality of the by-laws and minutes, except that their attorney did infer that they expected to show by those instruments that the plaintiff's lease was void for lack of formal acceptance on the part of the corporation. He said: "Delivery includes the act of acceptance. There could be no acceptance of any assignment of this except through the act of the Board of Directors. There never was a meeting of the Board of Directors, therefore there was never any acceptance of this assignment." It is true that the affidavit does state on information and belief that, if the by-laws and minutes were produced, they would show certain specified facts, such as that the assignment of lease was not duly accepted, that the officers of the corporation were not authorized to execute the lease, and many other things. The record, however, fails to show that the appellants in their motion for a continuance stated that they desired or expected to prove any of those matters, except the above statement with relation to the nonacceptance of the lease. Nor was any statement made regarding the materiality of such evidence. The articles of incorporation of the Canal Oil Company were received in evidence. They fully comply with the requirements of section 290 of the Civil Code, specifically authorizing the buying, selling, mortgaging, hypothecating, leasing, and controlling of lands or any interests therein, incident to the owning, holding, regulation, or operating of property for the development of oil or gas wells. There is no doubt these provisions of the charter authorized the plaintiff to acquire the lease in question and to operate the property for the production of oil or gas.

[12, 13] It was not necessary for the corporation to accept the leasehold interest in the property by a formal written consent thereto or by the adoption of corporation minutes to that effect. The acceptance of a deed or other instrument of conveyance of real property may be shown by the acts and conduct of the grantee. 18 C.J. 214, § 123; 4 Thompson on Real Property, 999, § 3917; Hochstein v. Berghauser, 123 Cal. 681, 686, 56 P. 547; Beard v. Nunn, 172 La. 155, 133 So. 429. In the case last cited it is held that a resolution of a board of directors is not necessary to establish acceptance of a deed by a corporation. In 18 Corpus Juris, 214, § 123, it is said in regard to the establishing of a presumption of acceptance: "An acceptance of a deed need not be by formal or express words to that effect, but may be by acts, conduct, or words of the parties showing an intention to accept. So there may be an acceptance by the retention of the deed by the grantee; by an assertion of title by him; by his conveyance or mortgage of the property; by acts of ownership generally in respect to the property; or by bringing a suit on the deed. * * *"

[14, 15] The absence of corporation by-laws at the trial does not furnish ground for a continuance. There is no showing that such by-laws exist. The attorney for plaintiff positively asserts there are no such by-laws in existence. Since the amendment of section 301 of the Civil Code in 1929 (St.1929, p. 1264), the time for the adoption of by-laws of a corporation is not limited. Prior to 1929 that section required the adoption of by-laws within one month after the filing of the articles of incorporation. Now there is no time limit within which they are required to be adopted (Civ. Code, § 301, as added by St.1931, p. 1773, as amended by St.1933, p. 1365). In the absence of the adoption of by-laws, the authority to perform acts which may be controlled thereby is invested in the board of directors. 6a Calif.Jur. 305, § 159. In the authority last cited it is said: "Under the General Corporation Law the making of by-laws is not a duty but a power and an authority. It does not require that any by-laws be made, but states that a corporation 'may' adopt, amend or repeal by-laws."

[16, 17] Nor was it necessary for the plaintiff to authorize the maintenance of this suit by the formal adoption of a resolution to that effect. A corporation has inherent right to sue, in all cases which relate to its business or property rights, without the adoption of a resolution specifically authorizing the action to be brought. Kenton Furnace R. & Mfg. Co. v. McAlpin (C.C.) 5 F. 737, 741.

We are satisfied the court did not abuse its discretion in denying appellants' motion for a continuance of the trial under the circumstances of this case.

The judgment is affirmed.

I concur: PULLEN, P. J.

19 Cal.App.2d 697

HAYDEL v. MORTON.

Civ. 10041.

District Court of Appeal, First District,
Division 1, California.

March 24, 1937.

Hearing Denied by Supreme Court
May 20, 1937.

1. Malicious prosecution 🔑56

In action for malicious prosecution, plaintiff must establish that defendant acted without probable cause and was actuated by malice.

2. Malicious prosecution 🔑20

"Probable cause" for prosecution, as defense in action for malicious prosecution, is a suspicion founded on circumstances sufficiently strong to warrant a reasonable man in belief that the charges are true.

[Ed. Note.—For other definitions of "Probable Cause," see Words & Phrases.]

3. Malicious prosecution 🔑19

Existence of probable cause, as defense in action for malicious prosecution, is not negatived by mere fact that no crime was committed or that accused is innocent.

4. Malicious prosecution 🔑24(2)

Favorable termination of a prosecution against the accused is not sufficient to create a conflict on issue of probable cause in action for malicious prosecution.

5. Malicious prosecution 🔑71(2)

Question of what facts amount to probable cause as defense in action for malicious prosecution is question of law to be determined by court in absence of substantial conflict in the evidence.

6. Malicious prosecution 🔑64(2)

That defendant had been informed by accountant that checks payable to corporation of which plaintiff was manager had been deposited in plaintiff's personal account and proceeds had not been credited to corporation, and that defendant had been advised by bonding company's representative to file claim on plaintiff's bond, and had been advised by his attorney that plaintiff had misappropriated funds, before causing arrest of plaintiff, *held* to establish probable cause for causing arrest of plaintiff.

7. Malicious prosecution 🔑21(1)

Where checks payable to corporation by which plaintiff was employed and in which defendant was chief stockholder had been allegedly diverted to plaintiff's personal account, and representative of bonding company had advised defendant to file claim on plaintiff's bond for misappropriation of corporation's funds, that defendant obtained advice of counsel before causing plaintiff's arrest *held* conclusively to establish probable cause for causing plaintiff's arrest for alleged misappropriation of funds.

Appeal from Superior Court, San Francisco County; Louis H. Ward, Judge.

Action for malicious prosecution by Lionel H. Haydel against Andrew Wade Morton. From a judgment on a verdict for plaintiff, defendant appeals.

Reversed.

Sullivan, Roche & Johnson, of San Francisco, for appellant.

F. H. Dam and Thomas C. Ryan, both of San Francisco, for respondent.

PER CURIAM.

Appeal from a judgment in an action for malicious prosecution.

Defendant, Morton, was the owner of Morton Hospital in San Francisco, and plaintiff was his accountant and office manager, but lacked authority to draw checks on defendant's bank account. Defendant was absent from San Francisco during the months of June and October, 1929. In June, plaintiff received from one Fernandes three checks on account of the latter's indebtedness to the hospital, and in October another on the same account. The dates and amounts were June 3, 1929, $300; June 12, 1929, $500; June 17, 1929, $250; and October 4, 1929, $500. Each was made payable to the plaintiff and was deposited by him in his personal bank account. The plaintiff, according to his own testimony, was a skilled accountant, experienced in business, and familiar with business methods. He also testified that he had no authority to deposit hospital moneys in his own account, and that he was instructed to keep a complete record of all transactions of the hospital.

In the latter connection, it appears without dispute that the hospital records consisted of a duplicate receipt book and a duplicate bank deposit book, also a daily cash receipt book, permitting a permanent record to be kept of all cash received. While this system was not of the most approved kind, the testimony shows without question that it was sufficient to enable an accountant to keep a complete record of all ordinary transactions. Plaintiff failed to notify the defendant that he had procured the checks or had deposited the same in the manner stated, although the duplicate receipt book showed the issuance of receipts to Fernandes for the three June checks. Upon the defendant's return in June the plaintiff procured a check for $250.50, representing that he was entitled to reimbursement to that extent for moneys he had expended on account of the hospital. In April, 1930, an auditor, employed to audit the books of the hospital, discovered the fact that the plaintiff had received the checks and informed the defendant. The plaintiff then claimed that he had expended these amounts for hospital expenses, or had placed part of the proceeds in the cash drawer at the hospital, but no record was made of such deposits. He admitted that he had destroyed all his canceled checks and memoranda showing the particular dispositions which he claimed to have made of the money. His personal account with the bank, however, showed the deposits and certain withdrawals at different times. Defendant notified the company which had issued a bond guaranteeing plaintiff's fidelity, and also his own attorney. A representative of the company, after interviewing the plaintiff, reported to the defendant that he had failed to receive an explanation except as above stated, and advised that a claim be filed against the company. The attorney likewise interviewed the plaintiff, and upon receiving the same explanation stated to the defendant that in his opinion a crime had been committed. Following this, the defendant delivered the canceled checks to the district attorney, who filed a complaint, which was sworn to by the defendant, based upon the check of October 4. Plaintiff was arrested and held to answer to the superior court, and upon his trial was acquitted. Following the acquittal, the district attorney advised the defendant that the verdict was improper and that complaints based upon the other checks should be filed. These were prepared by the district attorney, sworn to by the defendant, and filed. The complaints were afterwards, without the knowledge or consent of the district attorney or defendant, dismissed by a judge of the municipal court. Upon the advice of the district attorney, new complaints were filed, which are still pending.

After his acquittal and the filing of the complaints last mentioned, plaintiff brought an action against defendant, seeking damages alleged to have been suffered by reason of the first charge. This action resulted in a judgment in his favor, but a new trial was granted upon certain counts of the complaint. Defendant appealed on the remaining portion of the judgment and the same was reversed. Haydel v. Morton, 8 Cal. App.(2d) 730, 48 P.(2d) 709. Upon the dismissal of the complaints mentioned, plaintiff brought the present action.

The trial resulted in a judgment in his favor. Upon a motion for a new trial, the amount of the judgment was reduced. The defendant, who has appealed, claims that the evidence was insufficient to justify the verdict against him; that plaintiff's counsel was guilty of misconduct; and that the jury was actuated by passion and prejudice.

[1-5] As the rule has been repeatedly stated, in an action of this character the plaintiff must establish that defendant acted without probable cause and was actuated by malice. Haydel v. Morton, 8 Cal.App.(2d) 730, 48 P.(2d) 709. The first element has been defined as a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charges are true [Johnson v. Southern Pacific Co., 157 Cal. 333, 337, 107 P. 611; Lee v. Levison, 173 Cal. 166, 169, 159 P. 438]; and the existence of such cause is not negatived by the mere fact that no crime was committed or that the accused is innocent [Carpenter v. Ashley, 15 Cal.App. 461, 115 P. 268]; nor is the favorable termination of a proceeding against the accused sufficient to create a conflict on this issue [Moore v. Durrer, 127 Cal.App. 759, 16 P.(2d) 676; Griswold v. Griswold, 143 Cal. 617, 77 P. 672]. Moreover, the question of what facts amount to probable cause has been held to be a question of law (Booraem v. Potter Hotel Co., 154 Cal. 99, 97 P. 65), and in the absence of substantial conflict in the evidence the court must determine whether probable cause has been established (Moore v. Durrer, supra).

[6, 7] The evidence at the last trial was not materially different from that taken at the first. The facts generally have been set out at length in the opinion in that case, and nothing would be gained by adding to what has already been stated. As the court said: "The admittedly irregular and unauthorized actions of the plaintiff in handling the checks from Dr. Fernandes were in themselves sufficient to constitute probable cause as above defined; but furthermore, the obtaining by defendant of the advice of coun-

sel conclusively established probable cause under the circumstances disclosed by the record (citing cases). As we are of the opinion that the admitted evidence established probable cause for the prosecution of the plaintiff without considering the fact that the defendant took the precaution to have counsel investigate and advise him, we need not discuss plaintiff's contention that the affirmative defense of advice of counsel failed. We may state, however, that we find no merit in said contention." We also are satisfied that the evidence clearly shows probable cause and reasonably supports no other conclusion.

The judgment is accordingly reversed.

19 Cal.App.2d 641

PEOPLE v. ODOM.

Cr. 1547.

District Court of Appeal, Third District, California.

March 18, 1937.

1. Indictment and Information 🔑196(5)

Omission to allege sufficient facts in information to state public offense is not waived by failing to demur to the pleading.

2. Criminal law 🔑974(1)

Lack of jurisdiction of court or failure to state public offense in information may be raised on motion in arrest of judgment (Pen.Code, §§ 1012, 1185).

3. Indictment and Information 🔑110(47)

Information charging, in words of provision of Vehicle Code, that accused "willfully and unlawfully" drove motor vehicle on highway and failed to stop immediately such vehicle involved in accident causing injuries and death to another and to render aid, *held* to allege sufficiently accused's knowledge that vehicle had struck and injured pedestrian (Pen.Code, §§ 950–952, and § 959, as amended by St.1935, p. 859; St. 1935, pp. 170, 171, §§ 480, 482(a).

To do a thing "willfully" is to do it by design, with set purpose, or "knowingly."

[Ed. Note.—For other definitions of "Knowingly," "Unlawfully" and "Willfully," see Words & Phrases.]

4. Indictment and Information 🔑89

Information charging that person "willfully and unlawfully" performed an act is equivalent to alleging that he "knowingly" did so, and thus supplies element of knowledge of unlawful act where that element is necessary to be alleged in pleading.

5. Indictment and Information 🔑89

It is not necessary to repeat the word "willfully" in connection with every averment of pleading when it is reasonably implied with reference to succeeding clauses.

6. Indictment and Information 🔑110(47)

Information charging in words of provision of Vehicle Code that accused willfully and unlawfully drove motor vehicle on highway and failed to stop "immediately" such vehicle involved in accident causing injuries and death to another and to render aid *held* not defective as leaving inference that accused might have stopped in reasonable time, since "immediately" does not mean "instantly," but, as respects such provision, in reasonable time (Pen.Code, §§ 950–952, and § 959, as amended by St.1935, p. 859; St.1935, pp. 170, 171, §§ 480, 482(a).

[Ed. Note.—For other definitions of "Immediately" and "Instantly," see Words & Phrases.]

7. Automobiles 🔑323

Provision of Vehicle Code requiring "driver of any vehicle" involved in accident resulting in injury or death to stop immediately and render assistance applies with equal force to owner of vehicle riding therein at time of accident with full authority to control operation of vehicle as it does to person who is actually driving (St.1935, pp. 170, 171, §§ 480, 482(a).

[Ed. Note.—For other definitions of "Driver," see Words & Phrases.]

8. Automobiles 🔑323

Provision of Vehicle Code requiring "driver of any vehicle" involved in accident resulting in injury or death to stop immediately and render assistance *held* to include joint owner riding in automobile at time of accident and having absolute right to control sixteen year old son actually driving automobile (St.1935, pp. 170, 171, §§ 480, 482(a).

9. Automobiles 🔑357

In prosecution for failing to stop immediately vehicle involved in accident causing injuries and death to another and to render aid, instruction that if accused was owner and had control of automobile, knew automobile had struck another, failed to stop immediately and fulfill requirements of Vehicle Code and reading provision containing requirements referred to, *held* not error, under evidence (St.1935, pp. 170, 171, §§ 480, 482(a).

10. Automobiles ⚿336

Requirements of provisions of Vehicle Code setting forth duties of driver of motor vehicle involved in accident causing injury and death to another define separate offenses (St.1935, pp. 170, 171, §§ 480, 482(a).

11. Automobiles ⚿357

In prosecution of owner of automobile for failure to stop after accident and to render aid, failure to instruct that provisions of Vehicle Code setting forth duties of motorist whose automobile is involved in accident define separate offenses *held* not error, where accused's automobile did not stop and accused did not attempt to render aid, notwithstanding that requirements of such provisions were read to jury (St.1935, pp. 170, 171, §§ 480, 482(a).

12. Criminal law ⚿1172(1)

That instruction is argumentative does not necessarily render it reversible error.

13. Automobiles ⚿357

In prosecution for failing to stop automobile involved in accident and to render aid to pedestrian struck by automobile, instruction that gist of offense was not unfortunate injury or death of victim but willful failure to render reasonable assistance *held* not prejudicial to accused (St.1935, pp. 170, 171, §§ 480, 482(a).

14. Automobiles ⚿352

Under information charging that accused failed to stop automobile involved in accident which occurred on public "highway," proof that body of pedestrian struck by automobile was found on "road" *held* not fatal variance, where evidence showed that "road" or "street" referred to in testimony was roadway open to public for purpose of vehicular travel (St.1935, pp. 98, 170, 171, §§ 81, 480, 482(a).

[Ed. Note.—For other definitions of "Highway," "Road" and "Street," see Words & Phrases.]

◆

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

E. R. Odom was convicted of failing to stop his automobile to render assistance after it had struck a pedestrian who died as a result of the accident, and he appeals.

Affirmed.

R. R. Sischo, of Merced, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant was convicted of violating the provisions of section 480 of the Vehicle Code (St.1935, p. 170), by failing to stop his automobile to render assistance as required by section 482 (a) of the same code, after he had struck a pedestrian who died as a result of the accident. From the judgment of conviction which was rendered pursuant to the verdict of a jury, from the order denying defendant's motion in arrest of judgment and from the order denying his motion for new trial, the defendant has appealed.

It is contended the information fails to state a public offense for the reason that it is not specifically alleged that the defendant knew his machine had struck the deceased; that the court erred in giving and refusing to give instructions to the jury; and that there is a fatal variance between the allegations of the information and the proof which was adduced.

The evidence shows that the defendant and his older son jointly owned the automobile which was involved in the accident. At 8:30 o'clock in the evening of November 8, 1936, the defendant was riding in the rear seat of his machine, which was then being operated by his younger sixteen year old son, who was not the joint owner of the vehicle. The operation of the machine was under the control and direction of the defendant. Another young man by the name of Bradford, who was a friend of the family, was sitting on the front seat by the side of the driver. It was dark. While they were driving along the highway, which was called Shaffer road, near Atwater, a man by the name of Sylvester Apadoca suddenly appeared on the highway and was struck by the machine. A few moments later he was found dead by a traffic officer at that point on the highway. The defendant knew his machine had struck the pedestrian and he failed to stop to render assistance to the injured man. On the contrary he deliberately drove on his way and failed to report the accident. He also attempted to conceal his identity.

Regarding his knowledge of the accident, the defendant testified: "We were just driving down the road about 20 miles an hour, I guess, and all at once there was a man just appeared right in front of the car. * * * It (the car) struck (him) on the left hand side, kind of. * * * We slowed up. * * * We was at a loss to know what to do and so the boy just drove on."

Mr. Bradford testified regarding the conduct of the defendant when the automobile struck the man:

"Well he (the driver) just slowed up.

"Q. Yes. Did E. R. Odom, who was in the back seat, say anything? A. Well, he said, 'You have run over a man and killed him'. * * *

"Q. What, if anything, did the driver say? A. He said he couldn't help it.

"Q. Then what, if anything, did E. R. Odom in the back seat say? A. He told him to drive on."

[1, 2] The defendant failed to demur to the information, but he presented a motion in arrest of judgment under the provisions of sections 1012 and 1185 of the Penal Code, on the ground that the information fails to state facts sufficient to constitute a public offense, which motion was denied. The omission to allege sufficient facts in an information to state a public offense is not waived by failing to demur to the pleading. A lack of jurisdiction of the court, or a failure to state a public offense in the information may be raised on motion in arrest of judgment. People v. Ross, 103 Cal. 425, 37 P. 379; 8 Cal.Jur. 446, § 466.

We are of the opinion the information sufficiently states a public offense which was committed by violating the provisions of section 480 of the Vehicle Code of California by failing to stop the defendant's automobile to render assistance to a pedestrian who had been struck by the machine and injured, from the result of which the victim subsequently died. It is contended the information is fatally defective for the reason that it is not alleged therein that the defendant knew his machine had hit and injured the pedestrian. Assuming, without so deciding, that it is necessary to allege in an information that the person accused of violating the provisions of section 480 of the Vehicle Code knew that his machine was "involved in an accident resulting in injury to or death of any person," we are of the opinion that knowledge on the part of the defendant in this case is sufficiently alleged. The information is couched in the exact language of the statute and conforms to the provisions of sections 950-952 and 959 (as amended by St. 1935, p. 859) of the Penal Code. The essential portion of section 480 of the Vehicle Code, under which the defendant was charged, reads as follows:

"*Accidents involving death or personal injuries.* The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop such vehicle at the scene of such accident and shall fulfill the requirements of section 482 (a) hereof."

That portion of section 482 (a) of the Vehicle Code, which is applicable to this case, reads:

"The driver of any vehicle involved in an accident resulting in injury to or death of any person * * * shall render to any person injured in such accident reasonable assistance, including the carrying or the making arrangements for the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person."

The charging part of the information is that the defendant did:

"Willfully and unlawfully drive a motor vehicle upon a public highway therein and did fail to immediately stop said motor vehicle involved in an accident causing injuries and death to another person and to render aid as provided in section 482 (a) of the Vehicle Code."

[3] Since the amendment of section 952 of the Penal Code in 1929, greater liberality is allowed in determining the sufficiency of the allegations of an information or of an indictment. By the terms of that section, as amended, it is declared the information may be drawn "in the words of the enactment," or "in any words sufficient to give the accused notice of the offense of which he is accused." The defendant in the present case knew that his machine had hit and injured or killed a pedestrian at a time and place which is specifically designated in the information. The pleading then charges that he "willfully" drove his motor vehicle at that time in such a manner that it was "involved in an accident causing injuries and death to another person." In effect, so clearly that the pleading may not reasonably be misunderstood, the information charges the defendant with "will-

fully" failing to immediately stop and render aid to the injured person as required by section 482 (a) of the Vehicle Code. To charge that the defendant willfully drove the machine in such a manner as to cause the injury or death of a person, in effect alleges that he knowingly drove it so as to cause the injury or death of the individual. To allege that one knowingly operated a machine in such a manner as to kill or injure another person is equivalent to saying he knew that he had injured or killed the person by the manner in which he drove the machine.

[4] An information which charges that a person "willfully and unlawfully" performed an act is equivalent to alleging that he knowingly did so, and thus supplies the element of knowledge of the unlawful act where that element is necessary to be alleged in the pleading. People v. Calvert, 93 Cal.App. 568, 573, 269 P. 969, 971; In re Stambaugh, 117 Cal.App. 659, 4 P.(2d) 270. In the Calvert Case, supra, a judgment of conviction of the possession of a still was sustained on appeal. It was contended the accused did not know he was in possession of an unlawful still, and that the information was fatally defective because it failed to allege that knowledge on his part. The court said in that regard:

> "Appellants contend that the information does not state a public offense, 'in that it failed to allege that (the) still charged in the information was "knowingly" possessed'. The information charges that the defendants 'unlawfully, willfully, and feloniously' possessed the still. 'To do a thing willfully is to do it by design with set purpose.' People v. Sheldon, 68 Cal. 434, 437, 9 P. 457, 459. To do a thing willfully is to do it knowingly. People v. Swiggy, 69 Cal. App. 574, 581, 232 P. 174; 4 Words and Phrases, Second Series, p. 1304; Pen. Code, § 7, subds. 1 and 5."

[5] The Stambaugh Case, supra, declares that it is not necessary to repeat the word "willfully" in connection with every averment of a pleading, when it is reasonably implied with reference to succeeding clauses. In the present case, it is clearly inferred that the defendant was accused of "willfully" or knowingly failing to stop his car to render aid, when he knew his machine had struck and injured or killed another person. The defendant could not possibly have been misled by that language. He must have known the nature of the offense with which he was charged.

[6] There is no merit in the appellant's contention that the information is defective in merely alleging that the accused person failed to immediately stop his machine when the accident occurred, leaving the inference that he may still have stopped within a reasonable time thereafter. The statute requires the driver of a machine under the circumstances of this case to "immediately stop such vehicle at the scene of such accident." This phrase should receive a reasonable construction. It means that he should promptly stop at the scene of the accident for the purpose of rendering assistance to the injured person. The word "immediately" does not mean instantly. The law does not require impossible things to be performed. Proof of the fact that a driver who was involved in an accident in which some individual was injured stopped his machine as promptly as possible under the circumstances of the case would certainly exempt him from liability on that account. It was sufficient to have charged him in the language of the statute with failure to stop the machine. If there be an excuse for failure to stop the car promptly, that is a matter of defense which may be shown at the trial. It is not contended in this case that the defendant made any effort to stop his machine at all.

[7,8] The offense of failing to stop an automobile which has struck and injured a person and to render assistance to the victim of the accident, as provided by section 480 of the Vehicle Code, applies with equal force to the owner of the machine who is riding therein at the time of the accident with full authority to direct and control the operation as it does to the person who is actually driving the vehicle. The term "driver of the vehicle" as it is used in the statute includes the owner of the machine who is present and has the control of its operation. People v. Rallo, 119 Cal.App. 393, 397, 6 P.(2d) 516; People v. Steele, 100 Cal.App. 639, 644, 280 P. 999; People v. Maggio, 90 Cal.App. 683, 266 P. 813. There was therefore no variance between the allegations of the information and the proof of the defendant's guilt of the offense charged in the present case. The defendant is joint owner of the machine. He was riding in the machine at the time of the accident and had absolute right to direct and control his sixteen year old boy in its operation. In fact he did instruct the boy to "drive on" after the accident had occurred. The evidence indicates that the machine failed to stop because the defendant com-

manded his boy to drive on. Under such circumstances, the owner of the machine becomes guilty as does the driver thereof of violating the statute.

The court did not err in giving to the jury the following instructions:

[9] "I instruct you that it is unlawful for the driver of any vehicle involved in an accident resulting in an injury to or death of any person, to fail to immediately stop such vehicle at the scene of such accident and fail to fulfill the requirements of section 482 (a) of the Vehicle Code."

"Therefore, in this case if you believe beyond all reasonable doubt and to a moral certainty that the defendant, E. R. Odom, was the owner and had control over the operation of the automobile in which he was riding and which injured and killed another person and the said defendant, E. R. Odom, knowing his machine had struck another person, failed to immediately stop the car and to fulfill the requirements of section 482 (a) of the Vehicle Code, to give information and render aid as provided therein, then you shall find the defendant guilty as charged."

The provisions of section 482 (a) were also read to the jury in the language of the code. The defendant admitted that he knew his machine had hit and injured or killed an individual. There is no evidence to the contrary. He also admitted he was joint owner of the car. He had the absolute right to direct and control its operation at the time of the accident. There is no conflict of evidence in that regard.

[10, 11] On the authority of People v. Kaufman, 49 Cal.App. 570, 193 P. 953, since, under the provisions of section 480 and 482 (a) of the Vehicle Code, the driver of a machine might be guilty of only one of several distinct acts of omission, each one of which may constitute a separate offense, the appellant contends it was error for the court in this case not to instruct the jury to that effect, for the reason that it cannot be determined from the verdict whether all jurors agreed upon the guilt of the defendant as to any particular offense. In the present case, no such uncertainty exists. The evidence is undisputed that the machine did not stop at all after the accident occurred, and the defendant did not attempt to render any aid whatever. Since he failed to stop, he had no opportunity to render aid. The gist of the offense of which the defendant was convicted is that he failed to stop his machine so that he could comply with the requirement of section 482 (a) of the code. Since that was the only offense supported by the evidence and the case was tried on that theory, it may not be questioned that the jury was unanimous on that particular subject. There was no harm in instructing the jury regarding the different offenses included in the mandate of section 482 (a). It was conceded the defendant performed none of them, for he did not even stop his car. It follows that the jury must have been unanimous in concluding that he failed to perform any of the acts enjoined upon him by that section because he did not stop his car. The preceding instructions were properly given to the jury.

[12, 13] It was not prejudicial for the court to have charged the jury that "I instruct you that the gist of this offense is not the unfortunate injury or death of the victim, it is the willful failure to render reasonable assistance. * * *" The portion of the challenged instruction above quoted seems to be favorable to the defendant. In effect, it charges the jury that they must not attempt to punish the accused because he was the means of injuring or even killing the unfortunate victim of the accident. It states that he may only be found guilty provided he failed to stop his machine so as to render aid to the injured person. It may be conceded the instruction as a whole is argumentative. The language used in that instruction was taken from the opinion which was rendered in the case of People v. Rallo, 119 Cal.App. 393, 6 P. (2d) 516. It was used in that case to illustrate the competency of certain evidence and to distinguish between the offenses of failing to stop a machine and render assistance to one who has been struck and injured or killed, and the crime of manslaughter which might grow out of similar circumstances. The reasons for the adoption of a statute assigned by a court in rendering an opinion may be absolutely accurate, and yet the language may be inappropriate to use in an instruction to a jury. But the mere fact that an instruction is argumentative does not necessarily render it prejudicial error requiring a reversal of a judgment. People v. Stanton, 106 Cal. 139, 39 P. 525; People v. Watts, 198 Cal. 776, 797, 247 P. 884. There appears to be nothing in the language of the instruction which was given in this case which could have prejudiced the defendant. The giving of this

instruction did not constitute reversible error.

The jury were correctly instructed that if they found that the defendant was the owner of the machine, that he was riding in the car at the time of the accident, and that he had actual control over the operation of the automobile, even though he was not driving it himself, he would be guilty of violating the provisions of section 480 of the Vehicle Code, if he knew that the machine had hit and injured or killed a pedestrian and failed to stop it to render assistance to the victim of the accident. We have heretofore cited cases upholding the principle that the owner of the machine under such circumstances may be held guilty of violating the statute. The authorities from other jurisdictions are in accord with the California cases in that regard. No authorities are cited which conflict with that conclusion.

[14] There is no merit in the contention that there is a fatal variance between the allegation of the information that the accident occurred "upon a public highway" in Merced county and the proof that the body of the man was found on "Shaffer road." The chief of police of the town of Atwater testified in that regard: "I went out on First street in Atwater, or Shaffer road as it is sometimes called. * * * I found a gentleman laying nearly in the center of the road." Mr. Dysart testified in that regard: "And it (the body) was lying on the highway? A. Yes. * * * On First street out of Atwater, north of Atwater. Q. Was it on the Shaffer road? A. The First street is all I know." It is immaterial whether the accident occurred on a street in Atwater or on an extension of that street outside of the city limits termed Shaffer road. It was called both a highway and a street. Section 81 of the Vehicle Code (St. 1935, p. 98) defines a highway as follows:

> "'Street' or 'highway' is a way or place of whatever nature open to the use of the public as a matter of right for purposes of vehicular travel."

There can be no doubt the accident occurred on a roadway open to the public for the purpose of vehicular travel. There appears to be no variance in that regard.

The judgment and the orders are affirmed.

I concur: PULLEN, P. J.

---

20 Cal.App.2d 39

PEOPLE v. LOW YING.

Cr. 1926.

District Court of Appeal, First District, Division 1, California.

March 29, 1937.

1. Perjury ⚿25(1)

In indictment for perjury, averments either of facts which render testimony complained of material, or merely in general language that testimony was material, will constitute sufficient allegations of materiality, unless other averments in indictment affirmatively show that testimony complained of was immaterial.

2. Perjury ⚿25(5)

Indictment for perjury alleging generally that perjured testimony was material *held* sufficient to charge materiality, where such testimony as set forth in indictment was given in prosecution of defendant for offering bribes, and dealt with alleged conversation between defendant and district attorney wherein district attorney solicited and accepted bribes, since it was material as impeaching district attorney's testimony in rebuttal of defense of entrapment and as giving circumstances of alleged entrapment.

3. Perjury ⚿11(2)

To constitute perjury, matter sworn to is sufficiently material, though not directly and immediately material, if so connected with facts directly in issue as to have a legitimate tendency to prove or disprove such facts, as by giving weight or probability to other testimony, affecting credibility of a witness, or otherwise, so as to influence tribunal upon issue involved.

4. Perjury ⚿29(3)

In prosecution for perjury, wherein alleged perjury was testimony as to conversation with district attorney tending to impeach district attorney's veracity, fact that district attorney was witness at trial wherein testimony was given may be shown under general averments in indictment that alleged perjury was material.

5. Perjury ⚿32(1)

In prosecution for perjury, the state of the cause in the action in which alleged false testimony was given may be proved to show materiality of testimony.

6. Perjury ⚿29(2)

Where several assignments of alleged false testimony are embraced in one count in indictment for perjury, adequate proof of materiality of one or more of such assignments adequately proved will support indictment if falsity is satisfactorily shown.

◆

Appeal from Superior Court, Marin County; Thomas D. Johnston, Judge.

Low Ying, alias Lee Sim Chuck, alias Sam Lee, was indicted for perjury. From an order sustaining a demurrer to the indictment, the People of the State of California appeal.

Reversed with directions.

U. S. Webb, Atty. Gen., Seibert L. Sefton, Deputy Atty. Gen., and A. E. Bagshaw, Dist. Atty., of San Rafael, for the People.

James M. Hanley, of San Francisco, and Carlos R. Freitas and Jerome A. Duffy, both of San Rafael, for respondent.

KNIGHT, Justice.

The defendant was indicted for perjury, and the trial court sustained his demurrer to an indictment, with directions to resubmit the case to the grand jury. From the order so made the People have taken this appeal.

It appears from the facts stated in the indictment and in defendant's brief that the alleged perjured testimony was given by the defendant on March 4 and 5, 1936, while he was on trial in the superior court in and for Marin county on six charges of having offered bribes to the district attorney; that he was found guilty on five charges, acquitted on one, and subsequently granted probation; that at said trial he admitted having offered the bribes, but as a defense claimed that he was illegally entrapped into so doing by the district attorney.

The alleged false testimony is set forth in the indictment in narrative form, and covers some five pages of the transcript. Therein the defendant purported to state what occurred at eight separate conferences which he claimed to have had with Mr. Bagshaw, the district attorney, the first of which took place, so the defendant testified, in San Francisco in 1931 (which was evidently prior to the time Mr. Bagshaw became district attorney), and the others in Marin county between the middle of November, 1934, and May 17, 1935. If true, said testimony would be sufficient to establish as between the defendant and the district attorney the existence of a corrupt relationship at the time of and preceding the alleged bribery and entrapment, involving not only the giving of bribes by the defendant, but the solicitation and acceptance thereof by the district attorney. Following the recital of such testimony, the indictment alleges "that the said false testimony, statements and things sworn to and given in evidence by the said Low Ying, as aforesaid, was and were then and there material to the issues tendered in said cause * * * in that it tended to show and did show that he, the said Low Ying, was entrapped by the said A. E. Bagshaw into the commission of the offenses set forth and charged in the indictment on file in the said cause." The indictment then proceeds to negative specifically the truth of the testimony so given by the defendant, and in this connection alleges in substance that no conferences whatever took place between defendant and Mr. Bagshaw prior to May 14, 1935; and that while the defendant did converse with him on three occasions on and after May 14, 1935, as stated by the defendant, the testimony given by the defendant as to what was said and done on those occasions was false.

[1] The question presented concerns the materiality of the alleged false testimony to the issue of illegal entrapment. With respect thereto the law is well settled that materiality may be pleaded either by setting out facts from which the materiality appears as a matter of law, or by direct averment without setting forth the probative or circumstantial facts (People v. Ah Bean, 77 Cal. 12, 18 P. 815; People v. Dunstan, 59 Cal.App. 574, 211 P. 813), and that where the indictment contains an express averment of the materiality of the testimony it is sufficient unless it affirmatively appears from other averments that the testimony is immaterial. People v. Brilliant, 58 Cal. 214; People v. Ross, 103 Cal. 425, 37 P. 379; People v. Metzler, 21 Cal.App. 80, 130 P. 1192; People v. Collins, 6 Cal.App. 492, 92 P. 513. That is to say, where the indictment contains an express averment that the alleged false testimony was material, its materiality may be shown at the trial by the introduction of evidence to that effect; and consequently, before an indictment embodying such express averment may be held legally in-

sufficient, it must positively appear as a matter of law from other averments or from the testimony itself, that under no possible theory could said testimony be deemed material. Wharton's Criminal Law (12th Ed.) vol. 2, § 1570; United States v. Nelson (D.C.) 199 F. 464.

[2] In the present case, as will be observed, the indictment contains a direct averment that the alleged perjured testimony was material to the issue tendered in the bribery case in that it tended to show that defendant was illegally entrapped. Therefore, the indictment must be held legally sufficient unless, as defendant contends, it affirmatively appears from the testimony itself, as a matter of law, that in no sense could said testimony be considered material to that issue. We are unable to sustain defendant's contention.

[3] As pointed out in People v. Patterson, 64 Cal.App. 223, 221 P. 394, the rule in this state and elsewhere is that the matter sworn to need not be directly and immediately material. It is sufficient if it be so connected with the facts directly in issue as to have a legitimate tendency to prove or disprove such fact, by giving weight or probability to the testimony of a witness testifying thereto or otherwise. People v. Barry, 63 Cal. 62; People v. Senegram, 27 Cal.App. 301, 149 P. 786; People v. Phillips, 56 Cal.App. 291, 205 P. 40; 21 R.C.L. p. 259. And in this latter connection it has been expressly held that since evidence affecting the credibility of a witness usually tends to strengthen the case of a party to an action or weaken the defense of his adversary, such evidence is material (People v. Metzler, supra; People v. Dunstan, supra); that it is material also when contradicting part of the testimony given by another witness which is material, or if going to the credit or discredit of another witness. People v. Lem You, 97 Cal. 224, 32 P. 11. In other words, if the alleged false testimony tends circumstantially to prove or disprove the main issue, the degree of materiality is of no importance (People v. Albert, 91 Cal. App. 774, 267 P. 587; In re Braynard, 52 Cal.App. 631, 199 P. 576); and the ordinary test is whether the testimony could have properly influenced the tribunal before whom the case was being tried upon the issue involved therein. In re Braynard, supra.

[4, 5] Here it is apparent that the determination of the issue of entrapment depended largely upon the testimony of the district attorney, to whom the bribes were admittedly offered; and manifestly the alleged false testimony given by the defendant, as will be seen from an examination thereof, amounted, as a whole, to an attempted impeachment of the credibility of the district attorney. Therefore, as such impeachment testimony, it would be material under the doctrine of the cases above cited to the main issue of entrapment, because whether given in rebuttal of denials made in that behalf by the district attorney, or as original defense testimony, it could have had the obvious effect, if believed, of properly influencing the jury in in its consideration and determination of that issue. And the fact that the district attorney was a witness in the case may be shown at the trial under the general averment that the alleged false testimony was material. Wharton's Criminal Law, supra; People v. Lem You, supra. As said in the case last cited, "* * * the state of the cause in the action in which the alleged false testimony was given, may be proved, in order to show the materiality of the latter."

[6] Defendant's attack upon the sufficiency of the indictment seems to be centered upon the asserted immateriality of the conversation which he claimed he had with Mr. Bagshaw in 1931. But where, as here, several assignments of alleged false testimony are embraced in one count, it is not essential to a conviction to prove the materiality of all of the assignments. The proper course of pleading is to negative specially each part of the alleged false testimony, and if the materiality of one or more of said assignments be adequately proved it is enough to support the indictment, provided falsity is satisfactorily shown. Wharton's Criminal Law (12th Ed.) vol. 2, §§ 1567, 1570, 1582. Therefore, in the present case, even though the prosecution should fail at the trial to meet the burden of proving the materiality of the assignment of false testimony relating to the conversation of 1931, and for that reason that particular transaction should be eliminated, evidence showing the materiality of any one of the remaining seven assignments would be sufficient to sustain the indictment, provided, of course, the falsity of the testimony relating thereto be shown.

Furthermore, it would appear that the ascertainment of the truth of defendant's claim that he was illegally entrapped by the district attorney depended primarily upon the circumstances attending the three conferences which defendant admittedly held with the district attorney on and after May 14, 1935; and it is alleged in the indictment that the testimony given by the defendant as to what occurred on those three occasions was false. Clearly, therefore, such testimony was directly material to the issue of illegal entrapment, regardless of its materiality, as impeachment or contradictory evidence.

For the reasons stated it is our conclusion that as against the direct averment in the indictment that the alleged false testimony was material to the issue of entrapment, it cannot be held, as a matter of law, that it affirmatively appears from the testimony itself that it was immaterial.

The order appealed from is therefore reversed, with directions to overrule the demurrer.

I concur: CASHIN, J.

Mr. Presiding Justice TYLER, deeming himself disqualified, did not participate.

---

19 Cal.App.2d 673

REGOLI v. FANCHER et al.

Civ. 10457.

District Court of Appeal, First District, Division 2, California.

March 22, 1937.

Hearing Denied by Supreme Court May 20, 1937.

1. Deeds 🔑18

Where owner of land, his wife and beneficiary under a trust deed of the land joined in quitclaim deed to trustee in bankruptcy of owner's son, trustee claiming the land under previous invalid deed from bankruptcy commissioner, and owner only received consideration for quitclaim deed, quitclaim deed *held* invalid as to beneficiary.

2. Bankruptcy 🔑268

Purchasers of land at invalid bankruptcy sale *held* not "bona fide purchasers" as against purchaser under foreclosure of trust deed, with respect to quitclaim deed subsequently taken by them, which was invalid as to beneficiary of trust deed because of lack of consideration, and was subject to defense that it was obtained by duress.

[Ed. Note.—For other definitions of "Bona Fide Purchaser," see Words & Phrases.]

3. Bankruptcy 🔑268

Persons who purchase in bankruptcy proceedings act at their peril and are bound to know whether officers in bankruptcy proceedings are acting within their jurisdiction.

4. Quieting title 🔑7(2)

In action to quiet title, wherein plaintiff is defending himself against quitclaim deed allegedly executed by plaintiff's grantors under duress, as distinguished from action for damages for duress, fact that quitclaim deed was never rescinded *held* not to preclude attack on it.

5. Appeal and error 🔑1010(1)

Reviewing court may not disturb findings of trial court where there is abundant evidence to sustain them.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action to quiet title by Anthony Regoli against C. R. Fancher and others, wherein defendants filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Affirmed.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Stanley J. Smith, John S. De Lancey, and Stanley R. Sterne, of Oakland, for appellants.

Thomas T. Califro, of San Francisco, and Frank E. McGuire, of Oakland, for respondent.

STURTEVANT, Justice.

This is an action to quiet title. The plaintiff framed his complaint in two counts. The defendants appeared and answered both counts and at the same time filed a cross-complaint. The plaintiff answered the cross-complaint, and the trial was had on all of the issues made by said pleadings. Having heard all of the evidence, the trial court made findings in favor of the plaintiff, and from the judgment entered thereon the defendants have appealed.

Both parties claim title under mesne conveyances from N. Forsman and wife, who were formerly the owners of the property. We will first discuss the case as made by the plaintiff. N. Forsman and wife conveyed to L. Guaragna and Rosie Guaragna, his wife. On September 21, 1925, the grantees executed a trust deed to N. Lucchesi and P. Lucchesi, his wife, as trustees for A. Lucchesi, the beneficiary. Afterwards T. T. Califro was substituted as trustee. N. Lucchesi and his wife, as trustees, conveyed to Califro, as trustee. Upon demand being made upon him, T. T. Califro commenced proceedings to sell the interest of the grantors L. Guaragna and Rosie Guaragna, his wife. The proceedings so progressed that on May 7, 1931, T. T. Califro, as trustee, sold the property to A. Regoli, this plaintiff. While the defendants find fault with the procedure followed by the trustee in making the sale, they do not make any attack showing, or tending to show, that the sale was invalid for any reason whatsoever except as will hereinafter be noted.

[1] We pass now to a consideration of the claims of the defendants. The record shows that James Guaragna, the son of L. Guaragna and Rosie Guaragna, his wife, was adjudged a bankrupt. In the bankruptcy proceedings of James Guaragna such steps were taken that on May 18, 1926, a commissioner's deed was executed purporting to convey the title of L. Guaragna and Rosie Guaragna, his wife, of N. Lucchesi and P. Lucchesi, his wife, and A. Lucchesi, to J. Costello, the trustee in bankruptcy. On a former hearing of this action the validity of the conveyance just mentioned was the subject of the contest. The trial court rendered a decision upholding the validity of the conveyance so made by the commissioner in bankruptcy. From that judgment an appeal was taken and the judgment of the trial court was reversed. Regoli v. Fancher, 1 Cal.(2d) 276, 34 P.(2d) 477. An examination of that decision discloses that the Supreme Court held the conveyance made by the commissioner in the bankruptcy proceeding was void. The case went back, and on the second trial no rights whatever were asserted under the bankruptcy proceedings. However, the defendants continued to assert title under certain other conveyances. The deed made by the commissioner in the bankruptcy proceedings was dated May 18, 1926. It purported to convey the title to J. Costello, as trustee in bankruptcy. Later Mr. Costello applied to the bankruptcy court for permission to sell the property and proceeded to conduct the sale. On August 19, 1926, the sale was had. On December 9, 1926, he executed a deed to C. R. Fancher and Dorothy H. Fancher, his wife. In the meantime many discussions were had between Mr. Costello and L. Guaragna and wife, N. Lucchesi and wife, and A. Lucchesi. As a result of those conversations, on December 13, 1926, a quitclaim deed was executed by L. Guaragna and wife, N. Lucchesi and wife, and A. Lucchesi to J. Costello, as trustee in bankruptcy. For that quitclaim deed no consideration passed excepting $1,000 paid to L. Guaragna. A. Lucchesi received no consideration whatsoever. The title of the defendants rests on the strength of the two conveyances which we have just adverted to. The title conveyed in the bankruptcy proceedings was, as we have noted above, wholly invalid. Regoli v. Fancher, supra. As A. Lucchesi was primarily interested and as he received no consideration, the second conveyance was invalid as to him.

[2, 3] Fancher and wife were not bona fide purchasers and entitled to rely on the quitclaim deed. That is so because they had made their purported purchase in the bankruptcy proceedings on August 19, 1926, and received their deed on December 9, 1926, whereas the quitclaim deed was not made until December 13, 1926. When the Fanchers purchased in the bankruptcy proceedings, they acted at their peril, and they were bound to know whether the officers in the bankruptcy proceedings were acting within their jurisdiction. Regoli v. Fancher, supra.

[4, 5] In their cross-complaint the defendants set up their title under the quitclaim deed. In his answer to the cross-complaint the plaintiff alleged that the quitclaim deed was executed by L. Guaragna et al., acting under menace and duress. On the trial he introduced evidence in support of such allegations. The trial court found the facts in his favor. The defendants now argue that the quitclaim deed was never rescinded and that it may not now be attacked. They cite and rely on Bancroft v. Bancroft, 110 Cal. 374, 42 P. 896. That was an action to recover damages for injuries arising out of certain alleged acts constituting undue influence. In the instant case no damages are involved. The plaintiff is defending himself against the effect of an instrument which his grantors executed under alleged menace and duress. He has the right to do so. Tiffany & Co. v. Spreckels, 202 Cal. 778, 262 P. 742. As stated above, the trial court made findings in favor of the

plaintiff on said issues, and this court may not disturb those findings, as there was abundant evidence to sustain them.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

---

20 Cal.App.2d 1

PEOPLE v. MALONE et al.

Cr. 1936.

District Court of Appeal, First District, Division 2, California.

March 25, 1937.

Hearing Denied by Supreme Court April 22, 1937.

1. Criminal law ⇨1130(4)

Appeal from conviction for grand theft and conspiracy to commit grand theft would be dismissed, where defendant neither filed brief nor presented argument to reviewing court in support of appeal (Pen. Code, § 952).

2. Larceny ⇨14(2)

Person who, with intent to defraud, obtains possession of property of another on understanding that it is to be used for definite object and he fails to so use it, is guilty of "larceny by trick and device" (Pen.Code, § 952).

[Ed. Note.—For other definitions of "Larceny by Trick," see Words & Phrases.]

3. Conspiracy ⇨47
Larceny ⇨65

Evidence *held* sufficient to support conviction for conspiracy to commit grand theft, and for grand theft by trick and device (Pen.Code, § 952).

4. Conspiracy ⇨47

Indirect evidence is sufficient to prove conspiracy.

5. Criminal law ⇨427(5)

In prosecution for conspiracy to commit grand theft and for grand theft, evidence of conversation between previously convicted alleged coconspirator and complaining witnesses *held* admissible, where evidence was sufficient to sustain implied finding as to existence of conspiracy (Pen. Code, § 952).

Appeal from Superior Court, Monterey County; Benjamin C. Jones, Judge.

B. D. Malone and F. J. Bouer were convicted of conspiracy to commit grand theft and grand theft, and they appeal.

Appeal of defendant F. J. Bouer dismissed, and convictions affirmed.

A. E. Warth and C. C. Baker, both of Salinas, and Roger W. Powers, of Los Angeles, for appellant Malone.

George Kerr, of San Francisco, for appellant Bouer.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SPENCE, Justice.

Defendants were jointly charged with conspiracy to commit grand theft and with grand theft. Both defendants pleaded not guilty and waived a trial by jury. Upon a trial by the court, both defendants were found guilty as charged and they have appealed from the judgments of conviction and the orders denying their motions for new trial.

[1] The first count of the informations charged conspiracy and the remaining five counts charged theft. The conspiracy count alleged five overt acts and each of said five overt acts constituted the basis for one of the subsequent counts charging theft. It was alleged therein that said defendants, together with one Harmon B. Green, did unlawfully conspire to commit grand theft and in pursuance of said conspiracy did unlawfully take the building and loan association passbooks of the complaining witnesses, the passbook in each instance being of a value in excess of $200. Said Harmon B. Green had been previously tried and convicted and is not directly involved in this proceeding. The transcript was filed herein on December 29, 1936, but defendant Bouer has neither filed a brief herein nor presented any argument to this court in support of his appeal. The appeal of said defendant will therefore be dismissed.

The charges of theft were set forth in general terms as permitted by section 952 of the Penal Code, and the prosecution proceeded to trial upon the theory that defendants were chargeable with both obtaining property by false pretenses and with larceny by trick and device. One of the main contentions of defendant Malone on this appeal is that the evidence was insufficient to show the commission of theft by any of the parties under either theory, but as we are satisfied that the evidence was sufficient to show larceny by trick and device, we shall not endeavor to cover the evidence relating to false pretenses.

The transcript is voluminous and it discloses the operations of defendants Malone and Bouer with respect to several corporations. It is unnecessary to set forth all the evidence relating to these operations but it may be stated that many of the transactions and dealings appear to have been of a most unusual nature.

In 1934, and at a time when the Postal Union Life Insurance Company was threatened with a revocation of its permit to do business, defendants Malone and Bouer acquired 20,000 of the 25,000 shares of capital stock of said corporation. Immediately thereafter they organized Postal Underwriters, Inc., and while defendant Malone soon withdrew as a director of said company, his wife was made a director and president thereof and it is apparently conceded that defendants Malone and Bouer controlled said company through persons acting nominally as its officers and directors. Green thereafter acted as agent of both the Postal Union Life Insurance Company and the Postal Underwriters, Inc., his salary being paid by the former until June, 1935, and thereafter by the latter. His work was done in the northern part of California and particularly in Monterey county. He worked under the immediate supervision of Bouer but both Green and Bouer consulted with Malone on various occasions.

The alleged thefts were all committed between August 1, 1935, and September 30, 1935. During that time, Green placed an advertisement in the Monterey Peninsula Herald as follows: "WANTED $30,000 PACIFIC STATES SAVINGS AND LOAN ASSOCIATION PASS-BOOKS OR CERTIFICATES; 100% on the Dollar GUARANTEED. Write Box 1559, c-o Monterey Peninsula Herald. ACT AT ONCE." At that time said passbooks were valued at between 50 and 75 cents on the dollar. Green was asked: "Did you have any discussion concerning the insertion of ads or advertising for pass-books prior to the insertion of that ad with Malone or Bouer?" He testified that he had but it is not entirely clear whether his answer related to both or to one or the other of said defendants. In any event Green proceeded to obtain the passbooks of the various complaining witnesses.

The method used by Green in obtaining said passbooks was practically the same in all cases. Green told the holder of the passbook that he represented the Postal Union Life Insurance Company and Postal Underwriters, Inc., and that they were buying up the passbooks. He stated that they were "perfectly responsible" and if the holder would turn over the passbook, said holder would receive a life insurance policy for the amount represented by the passbook and in six months the holder would get dollar for dollar with 5 per cent. or in some cases six per cent. interest. In some instances, Green stated that the holder would receive a contract with Postal Underwriters, Inc., as well as the insurance policy with Postal Union Life Insurance Company.

Upon receipt of a passbook, Green gave to the holder a so-called "Binding Receipt." The receipt given to Pearl F. Hamilton is typical of those given to the other complaining witnesses. It read in part: "Received from Pearl F. Hamilton the sum of Eleven Hundred Thirty Three & 43/100 Dollars as follows As shown by Pass-Book No. 102 being the full premium on a policy for $1133.43 plus Int—(6) mo. End Pac. States Sav & Lon under an application bearing a corresponding number and date with this receipt, to POSTAL UNION LIFE INSURANCE COMPANY, Los Angeles, California." This receipt was dated August 29, 1935, and signed by "H. B. Green Agent." It contained the further notation: "Contract & Policy mature Feb 29 —1936 plus 5% Int to that date." Thereafter an agreement of Postal Underwriters, Inc., signed by M. L. Malone, the wife of defendant Malone, as president, and E. W. Riggs, as secretary, was delivered to Pearl F. Hamilton. Under this agreement Postal Underwriters, Inc., agreed to pay to Pearl F. Hamilton on February 28, 1936, the sum of $1,313.20 with interest at 5 per cent. and further agreed to pay all premiums on a $1,400 life insurance policy with Postal Union Life Insurance Company. It was further provided that, "in case of maturity of and payment of said policy to the legal beneficiary at the time of maturity, during the life of this agreement, such payment shall be deemed to be a payment to second party and shall be credited and applied in payment of any money due under the terms of this agreement as fully and to the same extent as if paid by first party to second party in cash." We find no explanation in the record of the discrepancy between the figures in the receipt and the agreement as above set forth.

It must be conceded that it is difficult to determine the exact nature of the transactions from the documentary evidence and other evidence including the evidence of the conversations of Green with the complaining witnesses. It seems clear, however, that in each instance the holder of the passbook was given to understand that his passbook was turned over to Green for the definite object of obtaining an insurance policy from the Postal Union Life Insurance Company and in some instances the holder was given to understand that he would also receive an agreement from the Postal Underwriters, Inc. No insurance policies were ever issued to or received by any of the complaining witnesses, no premiums for such policies were ever paid to the Postal Union Life Insurance Company by Green, Malone, Bouer, or Postal Underwriters, Inc., and no money was ever received by the complaining witnesses from Postal Underwriters, Inc., as agreed. All that any of the complaining witnesses ever received was the "Binding Receipt" and the agreement executed by Postal Underwriters, Inc. The passbooks of the complaining witnesses were sold to F. M. Brown & Co. by either Green or Bouer and a check representing the proceeds of each sale was made out to either Green, Malone, or Bouer as payee and forwarded to the payee named.

[2-4] We are satisfied that the foregoing evidence was sufficient to show that Green was guilty of larceny by trick and device. People v. Hennessey, 201 Cal. 568, 258 P. 49; People v. Cook, 10 Cal. App.(2d) 54, 51 P.(2d) 169; People v. Von Badenthal, 8 Cal.App.(2d) 404, 48 P.(2d) 82; People v. White, 124 Cal.App. 548, 12 P.(2d) 1078; People v. Eley, 121 Cal.App. 53, 8 P.(2d) 885. Under the authorities cited, it appears settled that when a person, with intent to defraud, obtains possession of the property of another upon the understanding that it is to be used for a definite object and fails to so use it, such person is guilty of larceny by trick and device. There was ample evidence to show an intent to defraud on the part of Green as well as the other elements necessary to constitute the offense.

But defendant Malone further contends that even if the evidence was sufficient to show that the thefts were committed by Green, it was insufficient to show a conspiracy between Green and defendants Malone and Bouer with respect to said thefts. In support of this contention, defendant Malone sets forth the evidence showing that said defendant had no direct contact with any of the complaining witnesses. Such evidence is not conclusive on the question before us and we are of the opinion that there was ample indirect evidence to sustain the implied finding as to existence of the conspiracy. Indirect evidence is ordinarily all that is available to prove conspiracy and it is sufficient for that purpose. People v. Coffelt, 140 Cal. App. 444, 35 P.(2d) 374; People v. Ferguson, 134 Cal.App. 41, 24 P.(2d) 965; 5 Cal. Jur. 521.

[5] The remaining contentions of defendant Malone are all directly related to those heretofore discussed. They deal with alleged error in overruling objections to testimony covering the conversations of Green with the complaining witnesses, alleged error in denying motions to strike such testimony, and alleged error in denying motions based upon the alleged insufficiency of the evidence. As above indicated, we are of the opinion that evidence was sufficient to sustain the implied finding as to the existence of the conspiracy. The evidence of the conversations of Green with the complaining witnesses was therefore admissible as to these defendants (5 Cal.Jur. 522, § 25), and we find no error in the trial court's rulings.

The appeal of defendant Bouer is dismissed and the judgments of conviction and the orders denying the motions for new trial are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

19 Cal.App.2d 701

DUTTWEILER v. WASHBURN et al.

Civ. 10455.

District Court of Appeal, First District, Division 2, California.

March 24, 1937.

1. Fraud ⚷49

Party alleging fraud who sustains allegations of one material false representation will not fail because he does not sustain some of other alleged misrepresentations.

2. Fraud ⚷18

False representations, in sale of 16-acre vineyard, that it contained excellent variety of healthy Zinfandel grapes six years old, grafted on resistant roots, and that it produced 18 tons of good grapes in one year, *held* to constitute "material misrepresentations" as basis for cross-complaint for fraud in action to quiet title.

[Ed. Note.—For other definitions of "Material Misrepresentation," see Words & Phrases.]

3. Set-off and counterclaim ⚷29(2)

In action to quiet title alleging defendant's default in performance of purchase contract, defendant may allege fraud inducing such purchase contract, on cross-complaint.

4. Limitation of actions ⚷37(2)

Purchaser of land seeking to show fraud inducing the sale as defense to vendor's action to quiet title, rather than as cause of action for rescission of the sale, *held* not subject to doctrine of laches or three-year statute of limitations on actions for fraud (Code Civ.Proc. § 338, subd. 4, as amended by St.1935, p. 1673).

◆

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action to quiet title by Fred Duttweiler against Albert W. Washburn and others, wherein defendant filed cross-complaint. From a judgment for defendants after trial before the court sitting without a jury, plaintiff appeals.

Affirmed.

Norman S. Menifee, of Redwood City, for appellant.

Henry E. Greer and Harold J. Haley, both of San Rafael, for respondents

STURTEVANT, Justice.

This is an action to quiet title. The plaintiff filed a complaint in the ordinary form; the defendants answered and also filed a cross-complaint. The plaintiff answered the cross-complaint, and on the issues so framed a trial was had before the court sitting without a jury. The court made findings in favor of the defendants, and from the judgment entered thereon the plaintiff has appealed.

Both parties claim under a common grantor, Henry Duttweiler, deceased. For some years prior to February 26, 1929, Henry Duttweiler had been the owner, in possession of, and operating a small farm consisting of about fifteen acres in Marin county. On the date last mentioned he entered into an executory contract to sell the property to Albert W. Washburn and Genevra Washburn, his wife. The vendees went into possession and have continued in possession down to the present time. In January, 1934, Henry Duttweiler executed a quitclaim deed to the plaintiff Fred Duttweiler.

By the terms of the executory contract of purchase the defendants agreed to pay $4,500. They paid in cash $600 and assumed a debt of $2,000, secured by a deed of trust, owing to the Novato Bank. They contracted to pay $25 per month and 7 per cent. interest on deferred payments. No claim is made that the payments have not been kept up to the Novato Bank. The payments to the vendor were made until the spring of 1933 on the balance of the principal due the vendor. Later interest was paid to him until October, 1933. Since then no payments have been made. The contract was never formally rescinded. The defendants alleged and the trial court found that the present value of the property is $1,500, that the defendants have paid $2,925, and that by reason of the fraudulent representations hereinafter discussed the defendants have been damaged in the sum of $3,000—a sum much in excess of the unpaid balance due under the terms of the executory contract to the vendor or this plaintiff as his successor in interest. The trial court credited the purchasers with the amount of their unpaid instalments to the vendor and rendered judgment in their favor.

[1, 2] Both in their answer and in their cross-complaint the defendants pleaded fraud and deceit on the part of their vendor.

Among other things they alleged: That the entire tract consisted of fifteen acres which was principally planted to vineyard and fruit trees; that they were not at the time of the purchase experienced viticulturists, but on the other hand the defendant Albert W. Washburn was and had been a butcher by trade and entirely unfamiliar with vineyards; that in 1929 they entered into an executory contract to purchase the farm from Henry Duttweiler; that before doing so Mr. Washburn called at the farm of the vendor and the latter stated to him that the vineyard consisted of an excellent variety of Zinfandel grapes, the vines were healthy, were grafted on resistant roots, were six years of age, and, during the year 1928, the vineyard produced eighteen tons of grapes of fine quality; that they believed said representations and acted thereon and entered into the contract; that each and all of said representations were false; that all of the vines were not Zinfandel; that they were of different ages, from one to twelve years; that none were grafted on resistant roots but were cuttings and grown as such; that during the year 1928 the vineyard did not produce eighteen tons but produced about seven tons; that said seven tons were not grapes of good quality; and that the vines were not healthy but were then suffering from phylloxera; and that said disease spread and has continued to spread until at the present time the vineyard is of no value as a vineyard. During the trial the defendants introduced evidence sustaining each of the foregoing misrepresentations and the trial court so found the facts to be. In their pleading the defendants inserted many other misrepresentations, and the plaintiff contends that the findings thereon are not supported by the evidence. That contention need not be dwelt upon as it is settled law that if the injured party sustains his allegations of one material false representation he will not fail because he does not sustain some of his other alleged misrepresentations. That the misrepresentations of the variety of the grapes, the health of the vines, the nature of the root stock, and the productivity of the vineyard were material misrepresentations and constituted a cause of action, will hardly be controverted. 25 Cal.Jur. 554.

[3] The plaintiff also contends that in an action to quiet title the defendants should not have been heard on the allegations of their cross-complaint setting up the fraudulent misrepresentations. That contention may not be sustained. Nevada Land & Inv. Corp. v. Sistrunk, 220 Cal. 174, 30 P.(2d) 389.

[4] In their cross-complaint the defendants set forth allegations to the effect that they did not discover they had been defrauded until the year 1933. They also set forth certain allegations to the effect that they had not been guilty of laches. The plaintiff contends both sets of allegations were not sustained by the evidence and therefore the judgment should be reversed. If this were an action in rescission his contention would not be without merit. Evans v. Duke, 140 Cal. 22, 73 P. 732. But when, as here, the vendee elects to set up by way of defense his claim of fraud, he is not restricted by the doctrine of laches nor by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure (as amended by St.1935, p. 1673). Cox v. Schnerr, 172 Cal. 371, 378, 156 P. 509.

We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

19 Cal.App.2d 660

CHAMBERLAND v. WHITNEY et al.

Civ. S. C. 21.

District Court of Appeal, Second District, Division 1, California.

March 19, 1937.

1. Descent and distribution 🔑90(4)

Where father-in-law and daughter-in-law owned undivided interests in realty and father-in-law executed conveyance creating joint tenancy, and his heirs brought suit to establish title on theory that there was agreement to vest entire title in the two parties as joint tenants, but that daughter-in-law failed to make necessary conveyance, evidence *held* not to support essential finding.

2. Evidence 🔑273(3)

Where executrix and heirs claiming under decedent sought to establish title to realty, decedent's letters and oral declaration as to the title were not admissible in their favor.

3. Specific performance 🔑102

Where father-in-law and daughter-in-law owned undivided interests in realty and

father-in-law executed conveyance to create joint tenancy, as any interest received by daughter-in-law thereunder returned to the father-in-law on her death in his lifetime, a suit by his heirs to establish title on the theory that there was a contract to vest entire title in two parties as joint tenants was not a suit, under the statute, to impress a trust on real estate secured from the father-in-law, but rather, a suit for specific performance of an alleged contract to transfer an interest in the real estate (Civ.Code, § 2224).

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Suit by Joseph P. Chamberland against Marguerite D. Whitney, as executrix of George L. Whitney, deceased, and others, in which the defendant named filed a cross-complaint against the plaintiff. From a judgment for defendants and cross-complainant, plaintiff appeals.

Reversed.

J. Vincent Hannon, of Los Angeles, for appellant.

Charles R. Stead, of Pomona, for respondents.

DESMOND, Justice pro tem.

The plaintiff in this case, claiming to be the owner of an undivided one-half interest in and to a certain parcel of real estate in Pomona, and alleging that the defendants were the owners, jointly, of the other undivided half interest, filed a complaint for partition. All the defendants resisted the suit, and the defendant Marguerite D. Whitney, as executrix of the will of George L. Whitney, filed a cross-complaint, claiming that the plaintiff was in fact a constructive trustee for the benefit of the defendants, George Whitney's heirs, of the undivided half interest which the plaintiff claimed to own. This claim was sustained by the trial court and judgment rendered accordingly. From that judgment, this appeal is taken. It is claimed that the evidence did not justify the findings of the trial court or the judgment based thereon; also, that the court erred in ruling upon the admissibility of certain testimony offered by the cross-complainant.

For a proper discussion of the facts, it will be necessary to describe specifically two adjoining parcels of real estate in Pomona. The parcel which the plaintiff sought to have partitioned, and which we shall hereafter call "A," is described as "the South 12.68 feet of Lot 10 and all of Lot 11 of Hicklin's Subdivision of the South ½ of Hicklin Tract in the City of Pomona in said County, as per Map recorded in Book 55 at page 19, Miscellaneous Records of said County." The other parcel immediately adjoins upon the north the parcel just mentioned, and may be described as "the North 44 feet of Lot 10 of Hicklin's Subdivision," etc. We shall refer to this parcel as "B." Parcel A is numbered 819 North Gordon street; parcel B, 833 North Gordon street. It appears from the record that on June 13, 1922, title to lots 10 and 11 above mentioned became vested, by deed of Browne, in George L. Whitney and Martha A. Whitney and Dudley P. Whitney, as joint tenants with right of survivorship. Dudley was the son of George and Martha Whitney. On June 25, 1924, all the above-named grantees, joint tenants, passed title to Arthur V. Ware, a single man, and upon the same day Ware reconveyed the north 44 feet of lot 10 (i. e., parcel B) to George L. Whitney and Martha A. Whitney, husband and wife, as joint tenants, and the balance of the property, namely, the south 12.68 feet of said lot 10 and all of said lot 11 (i. e., parcel A), to George L. Whitney, married, as his separate property, and Dudley P. Whitney, single, each an undivided half interest. On November 20, 1928, George L. Whitney and Martha Whitney conveyed record title to the north 44 feet of lot 10 (parcel B) to Dudley P. Whitney and Alvina E. Whitney, husband and wife, as joint tenants.

Within the next few years, all the above-mentioned members of the Whitney family, Martha, Dudley, Alvina, and George, passed away, and the present suit lies between a brother of Alvina Whitney, who is the plaintiff, Chamberland, and the children of Dudley Whitney (not by Alvina, but by a former wife), who are, of course, also the grandchildren of George Whitney. Martha, the wife of George, died on April 5, 1930; Dudley died next, on July 3, 1930, and left a will by which he bequeathed $500 to his father, George L. Whitney, and after certain other bequests left all the rest, residue, and remainder of his property to his wife, Alvina. This residue included the one-half interest of Dudley in parcel A, and by his death parcel B passed to his wife, Alvina, in full ownership, as surviving joint tenant. On September 16, 1930, George executed to Alvina an assignment of the $500 legacy mentioned in Dudley's will. Previously, on August 12, 1930, he had executed a joint tenancy deed, passing title to himself and Alvina as joint tenants to certain described real estate, including all of parcel A, which, however, as we have indicated, he did not own in entirety. That deed was recorded on September 17, 1930. Alvina died testate on the 9th of February, 1932. Her will was admitted to probate on March 8, 1932, and Margaret Babcock appointed executrix thereof. By her will all her property, except a legacy of $400 to Edward Charles Chamberland, was bequeathed to the plaintiff Joseph P. Chamberland, her brother and residuary legatee, but subject to a life estate in George L. Whitney.

The decree of distribution in the estate of Alvina did not mention the undivided half interest in parcel A, nor was that property listed in the inventory as part of her estate. But the decree contained an "omnibus clause," and it is under this decree that the plaintiff claims title to an undivided half interest in parcel A. George Whitney passed away on December 12, 1933, and a little later this suit in partition was instituted.

In resisting the action, and asking the court to declare a constructive trust, cross-complainant charged that Alvina took advantage of her father-in-law, a man 81 years of age, who reposed great confidence in her, by failing to disclose to him the true condition of the title to parcel A. It appeared at the trial that on August 12, 1930, the date when the joint tenancy deed was signed by George, transferring, by its terms, title to all of parcel A (and certain other real estate) to himself and Alvina, the attorney who, according to the court's finding, represented Alvina (but who, appellant claims, according to the evidence, represented George), was under the impression that George, as a surviving joint tenant of Dudley, was the owner of a one-half interest in parcel A, and, as the record owner of the other half interest, was in position to make Alvina and himself joint tenants as to the whole parcel. The court found that he so informed George and Alvina and that they both believed that the deed of George alone would be sufficient to accomplish that result. At the trial certain correspondence between the attorney and a title company showed conclusively that before the end of August, 1930, the attorney was definitely advised as to the true condition of the title, and the court found that he communicated that information to Alvina, but not to George; that Alvina, knowing that George was mistaken as to the facts, withheld from him the information that the recordation of his deed would make them joint tenants of his undivided half interest only, and that as to the other half she would thereafter remain the sole owner, as Dudley's residuary legatee. The court further found that when George delivered the deed of August 12th to the attorney, it was for the purpose of having it recorded when and if he could procure a policy of title insurance showing the whole title to parcel A vested in George and Alvina as joint tenants; that George would not have executed the $500 assignment (which the court found was consideration moving from George under the agreement of the parties) or the deed of August 12th if he had known the true condition of the title, and if he had not relied upon Alvina's promises and the confidence he had in her. There were additional findings to the effect that George remained ignorant of the "true condition of the said property," i. e., of the title to parcel A, until the time of his death; that the executrix of Alvina's estate failed to list in the inventory which she filed, or to assert during probate proceedings, any interest in parcel A; further, that during George's lifetime no interest or claim thereto was asserted by appellant. It was also found by the court that on August 12, 1930, George and Alvina agreed that the whole title to parcel A should be conveyed to both of them as joint tenants and not as tenants in common; that, pursuant to that agreement, George conveyed all his right to said property, but Alvina failed, neglected, and refused to convey her right. We construe this finding to mean that Alvina failed to convey her right when, according to findings, subsequently to August 12, she learned that such action on her part would be necessary to make George a joint tenant with her of the entire interest in the parcel.

[1] Reviewing these various findings, we cannot find evidence in the record to support some of the most vital of them. The attorney to whom George Whitney delivered the deed for record did not believe that he was told he could have it recorded when and if he could secure a certificate showing title to the entire property, parcel A, in George and Alvina as joint

tenants. When he learned from the title company the true condition of the title, he advised George concerning it, according to his testimony; and there is no testimony that he advised Alvina. He testified that upon George's saying, "I don't care anything about it myself; I want to protect Alvina," he wrote the letter of September 17th, in which he asked the title company to furnish him with a certificate showing an undivided half interest in parcel A to be held in joint tenancy by George and Alvina under George's deed; that that letter "was written after he had impressed upon me he was anxious to protect Alvina and get the title closed up."

[2] As to the finding that the assignment by George of his $500 legacy would not have been made if he had known the true condition of the title, we note that the only evidence relating to the assignment was to the effect that it was made to liquidate a debt owed by George to Alvina. We can find no evidence to support the finding that George agreed to assign the legacy as consideration for Alvina's making him a joint tenant of her half interest or in reliance upon any promise of her to do so. In fact, the theory of the respondent, upon which her case rests, and the findings in accordance therewith, that George never knew or suspected, up to the time of his death, that Alvina had any interest in the parcel, contradict this finding as to the reason why the assignment was made. In passing, we may observe that respondent testified that after Alvina's death she discovered that some question existed as to the title of parcel A. Just when the discovery was made does not appear from the record, except as it may be inferred from the testimony that it was when the witness investigated the matter of an inheritance tax payment, and the further fact that cross-complainant introduced in evidence a report showing payment by George Whitney of an inheritance tax in the estate of Alvina. But that the respondent discussed property affairs with her grandfather and that he understood them appears quite clearly from her testimony that he once told her that if the attorney who acted in these various matters "ever called at the house he would ask him why the 833 property (833 North Gordon street) had not been included in the joint tenancy agreement." Incidentally, this report that George was aware that parcel B (833 North Gordon street) was not held in joint tenancy by Alvina and himself does not square with the information which, according to the evidence, he gave another witness for the respondent who testified, over objection, as follows: "George L. Whitney wrote me personally, as I was his niece, from time to time, and he stated to me in these letters that everything had been arranged whereby both properties known as 819 and 833 North Gordon street, Pomona, California, belonged to himself and Alvina E. Whitney and that in the event of the death of one the survivor would have the whole property." Such a statement by George Whitney was, of course, self-serving, and should not have been admitted in evidence, under the rule set out in 10 California Jurisprudence, 1100: "Declarations of a person since deceased, not against, but in support of his own interests, and made outside the presence of the party sought to be bound by them, are not admissible in favor of those who claim rights which the declaration would maintain." Equally inadmissible was the testimony of Mr. Stead, one of the attorneys for cross-complainant, that George had told him, more than a year after Alvina had died, that he owned parcel A.

[3] All that Alvina received from George was a joint tenancy in his one-half interest in parcel A. Under the provisions of section 2224 of the Civil Code, she might have been declared an "involuntary" or a "constructive" trustee of that half interest, if she had outlived George and if the court had found that she obtained it from him through improper means, as for example, through fraudulent concealment of a mistake in regard to the title which she was bound to disclose to him. But she died before George, and whatever interest he had given her in joint tenancy immediately and by operation of law returned to him. It is apparent, therefore, that this is not a suit to impress a trust upon or to obtain legal title to real estate secured from George Whitney through improper means. It seems rather to be a suit to enforce specific performance of an alleged unwritten contract to transfer an interest in real estate, namely, the equivalent of a joint tenancy in Alvina's undivided half interest which she might have conveyed to George in her lifetime and which later would have ripened into full ownership by reason of his surviving her. But granting, without, by any means,

deciding, that in this case cross-complainant may invoke every rule of equity available to a plaintiff relying upon the principles by which a constructive trust in real estate may be established, we feel that the judgment cannot stand, because certain findings on material issues conflict, others are not supported by the evidence, and testimony which may have persuaded the trial court to the view adopted was erroneously admitted.

Judgment reversed.

I concur: YORK, J.

I concur in the judgment: HOUSER, P. J.

19 Cal.App.2d 567

CARPENTER v. PARK.

Civ. 9941.

District Court of Appeal, First District, Division 1, California.
March 16, 1937.

1. Partnership 🔑236

Original member of copartnership *held* personally liable on note of copartnership, though original member withdrew and new members came in and agreed to perform obligations of the old copartnership.

2. Partnership 🔑239(2)

Promises by members of various copartnerships, in taking over assets of old copartnership, to assume and pay the obligations of their predecessors, *held* supported by valuable considerations.

3. Frauds, statute of 🔑158(4)

Written agreement to take over assets of old copartnership and to assume and to pay its obligations *held* not within statute of frauds.

4. Pleading 🔑138

Right to proceed by way of cross-complaint depends on whether matter set up therein bears necessary relation to the matter constituting the cause of action, and, if such relation be present, it is immaterial that the relief sought is independent of that prayed for in the complaint (Code Civ.Proc. § 442).

5. Pleading 🔑138

Cross-complaint need not tend to diminish plaintiff's recovery but may demand affirmative relief distinct from that demanded in the complaint (Code Civ.Proc. § 442).

6. Contracts 🔑187(4)

By virtue of enforceable promise to debtor to pay his debt, promisor becomes, as between parties, true debtor, while the promisee occupies the relation of surety, and the creditor may enforce the original obligation against either or both (Civ.Code, §§ 1559, 2854).

7. Principal and surety 🔑179

After an obligation becomes payable, the surety, before he has paid it and whether he has been sued by a creditor or not, may maintain an action against the debtor to compel him to pay the debt or perform the obligation, the creditor being made a codefendant, provided the creditor can himself enforce performance, and neglects or refuses to do so (Civ.Code, § 1559).

8. Partnership 🔑242(2)

In action by holder of note of copartnership against original member, court properly permitted original member to join in cross-complaint one who had afterward joined copartnership under agreement to assume and pay copartnership's obligations (Civ. Code, §§ 1559, 2854; Code Civ.Proc. § 442).

◆

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Dorothy D. Eastin against Lewis G. Carpenter and others, wherein the named defendant filed a cross-complaint against Howard G. Park and others. From a judgment in favor of the named defendant on the cross-complaint, the cross-defendant appeals.

Affirmed.

Nathan Moran, of San Francisco, for appellant.

Leo J. Rabinowitz, of San Francisco, for respondent.

PER CURIAM.

The above action was commenced by Dorothy D. Eastin against defendants George D. Roberts, H. R. Plate, and Lewis G. Carpenter, who were copartners doing business under the name of Roberts, Carpenter & Co., to recover on a promissory note executed to her by the firm. Defendant Roberts answered separately, alleging his adjudication as a bankrupt. Defendant Carpenter by his answer alleged various defenses, and therewith filed a pleading, which he designated as cross-complaint, against Howard G. Park and others. Therein it was alleged that Park and the other cross-defendants named had for a sufficient consideration promised cross-complainant to pay the Eastin note, and their failure to do so, all to his damage in the amount thereof. Park moved to strike the cross-complaint on the grounds that the relief sought did not relate to or depend upon the note; that he was not a necessary party to the decision of any of the issues raised by the answers to the Eastin complaint; and that he was not a party to the contract alleged in her original complaint. The motion was denied, and he filed a demurrer with an answer to the cross-complaint, denying, among other things, the alleged promise.

The trial court entered judgment in favor of plaintiff Eastin against Carpenter and his firm for the amount prayed. It also found against Park on the issues presented by the cross-complaint and his answer thereto, and entered judgment against him and in favor of Carpenter for the amount of the note with interest. Park has appealed from that part of the judgment.

The business known as Roberts, Carpenter & Co. was carried on under that name by a succession of partnerships. It was established on November 1, 1927, the date of execution of the note in suit. On February 15, 1928, Plate withdrew, and the others continued under new articles, whereby they agreed to perform the obligations of the old firm—the note being one—in consideration of the transfer to them of the firm's assets. On April 11, 1928, George C. Harris entered the firm, and new articles, identical in substance with those last mentioned, were signed. Later L. S. Thomas became a partner, the obligations of the former partnership being assumed by a like provision. Following this, appellant Park joined the firm, and Harris and Carpenter withdrew. The new articles contained the following provision: "First: That the parties hereto do hereby enter into a partnership for the purpose of transacting a brokerage and investment banking business in stocks, bonds and other securities under the firm name and style of Roberts, Carpenter & Co., for the purpose and subject to all and singular the terms and conditions hereinafter specifically set forth, * * * The partnership heretofore existing between George D. Roberts, Lewis Carpenter and John L. Thomas is hereby terminated, and the parties hereto agree to take over the assets and liabilities of the former copartnership, Roberts, Carpenter & Co., and that the assets of this partnership, shall be and are the assets of said former partnership, and the parties hereto do hereby assume and agree to pay and perform all of the present or existing obligations of said former partnership in consideration of said former partnership transferring, assigning and setting over to the partnership hereby created the assets of said former copartnership."

[1, 2] It is clear that Carpenter was personally liable to plaintiff, and that the promises by the members of the various copartnerships to assume and pay the obligations of their predecessors were supported by valuable considerations. It was sought to be shown that Roberts at one stage of the history of the firm agreed to assume the note. However, the evidence fails to show a novation, and the court found in effect against this contention.

On the question whether appellant intended to assume the note different inferences might be drawn from the evidence. To attempt a recital thereof here would serve no useful purpose. It will be sufficient to say that the trial court's conclusions are fairly supported.

[3] The point is made that the agreement was within the statute of frauds the requirements of which were not met, but we find no ground for this contention.

Upon the merits the findings are fully sustained, the only remaining questions being whether the orders by the trial court denying the motion to strike and overruling the demurrer were erroneous.

[4-6] Section 442 of the Code of Civil Procedure provides that "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, or affecting the property to which the action relates he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint." It has been said that the right to proceed by way of cross-complaint depends upon whether the matter set up therein bears a necessary relation to the matter con-

stituting the cause of action, and, if such relation be present, it is immaterial that the relief sought is independent of that prayed for in the complaint; that the cross-complaint need not tend to diminish the plaintiff's recovery but may demand affirmative relief distinct from that demanded by the complaint. Hanes v. Coffee, 212 Cal. 777, 300 P. 963; California Trust Co. v. Cohn, 214 Cal. 619, 7 P.(2d) 297. By virtue of an enforceable promise to the debtor to pay his debt, the promisor becomes as between the parties the true debtor, while the promisee occupies the relation of surety, and the creditor may enforce the original obligation against either or both. Civ.Code, §§ 1559, 2854; Kreling v. Kreling, 118 Cal. 413, 50 P. 546. These relations are most frequently illustrated in cases which involve the assumption of mortgages. In this connection it has been said that, in order to avoid circuity of action and protect the mortgagor as the intermediate party from being compelled to pay the debt, and then to proceed for redress against the mortgagee who has assumed the mortgage debt, equity permits the mortgagee to bring all parties who are liable before the court and have their rights adjusted in a single suit. Hopkins v. Warner, 109 Cal. 133, 41 P. 868.

[7, 8] It is an established doctrine that, after an obligation becomes payable, the surety, before he has paid it and whether he has been sued by a creditor or not, may maintain an action against the debtor to compel him to pay the debt or perform the obligation, the creditor being made a codefendant, provided the creditor can himself enforce performance and neglects or refuses to do so. Civ.Code, § 1559; Kreling v. Kreling, supra; Josephian v. Lion, 66 Cal.App. 650, 227 P. 204; 4 Pomeroy, Equity Jurisprudence, § 1417; 18 Cal.Jur., Mortgages, § 383, p. 67. The right to such relief by way of cross-complaint was suggested, if not decided, in Robson v. O'Toole, 45 Cal. App. 63, 187 P. 110, and the rule is recognized in other jurisdictions. Jasper County Nat. Loan & Bldg. Ass'n v. Coen, 233 Ill. App. 511; Scott v. Norris, 62 Okl. 292, 162 P. 1085. In the present action the promise alleged is one which refers to, and as certainly relates to, the note in suit. The purpose of the statute is to avoid circuity of action, and the facts bring the case fairly within its terms.

The judgment is affirmed.

---

19 Cal.App.2d 572

RICHTER v. ADAMS et al.

Civ. 5773.

District Court of Appeal, Third District, California.

March 16, 1937.

1. Pleading 🔑87

New matter constituting affirmative or special defense, matters of confession and avoidance, equitable defenses generally, and matters of prevention, waiver, or excuse for nonperformance of contract must be specially pleaded.

2. Pleading 🔑409(4)
Trial 🔑396(2)

Failure to plead defense is not cured by introduction without objection of evidence in support thereof, or by finding in relation thereto.

3. Mines and minerals 🔑79(7)

In action to terminate interest of assignee in oil and gas lease for failure to make royalty payments as provided in assignment agreement, wherein answer denied noncompliance with agreement, admission of evidence of parol agreement for extension of time for making payments *held* prejudicial error.

4. Pleading 🔑245(4)

In action to terminate interest of assignee in oil and gas lease for failure to make royalty payments as provided in assignment agreement, wherein answer denied noncompliance with agreement, amendment of answer at close of suit to conform to proof of parol agreement for extension of time for making payment *held* not to cure error in admission of evidence of parol agreement under original pleadings (Code Civ.Proc. §§ 469, 470).

5. Pleading 🔑237(8)

Amendment of pleadings to conform to proof is not proper where amendment has effect of introducing new cause of action or defense, or substantially changing claim or defense or cause of action or nature of action or defense (Code Civ.Proc. §§ 469, 470).

6. Pleading 🔑237(8)

Although court should be liberal in allowance of amendments of pleadings to conform to proof, such amendments should not be allowed when they raise new issues not included in original pleadings and on which adverse party had no opportunity to defend (Code Civ.Proc. §§ 469, 470).

7. Trial ⚿397(1)

In action to terminate interest of assignee in oil and gas lease for failure to make royalty payments as provided in assignment agreement, wherein assignor filed amended complaint alleging that under terms of original lease assignees agreed to commence drilling of second oil well within sixty days from date of completion of producing well, and that assignees had breached such condition, and defendants admitted failure to commence drilling of second well within time required, but denied breach of conditions on ground that lessor consented that second well need not be drilled, failure to find on allegations of amended complaint *held* error, since allegation of answer amounted to affirmative allegation in nature of confession and avoidance, and placed burden of proof on assignees (Code Civ.Proc. § 1869).

◆

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by Edward R. Richter against Hugh Adams and others, doing business under the fictitious name and style of the A. R. C. Oil Company, and others. Judgment for defendants, and plaintiff appeals.

Reversed and remanded for new trial.

Frederick E. Hoar, of Bakersfield, and Swaffield & Swaffield, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for appellant.

Louis L. Swarthe, of Los Angeles, and Claflin & Dorsey, of Bakersfield, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment in favor of the defendants in an action to terminate the defendants' interest in a certain oil and gas lease for failure to make payments of royalties as provided in the written agreement whereby the defendants contracted with the plaintiff for purchase of the lease in question.

The action was to recover possession of the leasehold premises, and as incidental thereto to recover the value of oil produced and saved therefrom subsequent to the filing of the action. In this connection, Golden Bear Oil Company, Limited, is joined as a party defendant, that company having purchased certain oil products from the leased premises, with knowledge of the filing of this action and of plaintiff's claim to ownership of the oil in question.

On February 20, 1933, plaintiff, as lessee, secured from Mrs. Lizzie Glide, as lessor, the lease of the lands here in question and entered into possession of said property under said lease. Plaintiff was unsuccessful in his effort to produce oil on the property, having drilled thereon a well to the depth of about 1,900 feet, without having discovered petroleum. Plaintiff then ceased operations on his own account and entered into an agreement on December 5, 1933, with defendant Hugh Adams, wherein plaintiff, in consideration of the sum of $10,000, assigned his lease to Adams, $1,500 of said sum being paid upon the execution of the assignment, the remainder to be paid by Adams in the following manner: Adams to pay to the lessor Lizzie Glide 16⅔ per cent. of the production from said land—that being the royalty due the lessor—and to pay to plaintiff monthly 25 per cent. of the remaining 83⅓ per cent. of said production until the entire sum of $8,500 had been paid.

The agreement specifically provided that time was of the essence and the assignment of the lease was conditioned upon the faithful and due performance of all of the terms, conditions, and covenants of the Glide lease, and upon default by Adams to pay the money at the time and in the manner specified, or in the event of default of Adams to faithfully perform all the terms, covenants, and conditions of the Glide lease, Richter, the plaintiff herein, was given the right to re-enter, and at his option, terminate the interest of Adams and retake possession of the property and oust all parties therefrom.

One of the provisions of the Glide lease, important to this action, was that if oil was found in paying quantities in any well drilled by the lessee, the lessee was obligated to drill an additional well on said land.

Adams entered into possession of the property under said assigned lease, and on the 22d day of April, 1934, was able to commence production of oil. In the meantime he had entered into a partnership agreement with Fred W. Roberts and Bill Christie, and the three operated under the firm name and style of A. R. C. Oil Company.

It is admitted in the answer that during the month of April, 1934, some 1,100 barrels of oil were saved, and sold to the Golden Bear Oil Company, Limited, for which the defendant Adams received some $500. In the month of May the defendants admittedly sold to the same company some 6,680 barrels of oil, and received therefor in excess of $3,000. Defendant was not particularly definite as to the exact production during this period, but stated generally that all oil not reported as sold was used on the premises. Defendants failed to report to plaintiff the sale of oil as required by their agreement, but plaintiff discovered that fact early in May, and requested defendants on several occasions that they pay him the money to which he was entitled. Defendants were evasive, and said they would pay him as soon as they had received their money from the Golden Bear Oil Company, Limited. The evidence, however, shows that the defendants were being paid promptly for the oil as delivered, a fact not discovered by plaintiff until shortly before this action was filed on June 23, 1934. At no time did the defendants render to plaintiff a statement showing the amounts of oil saved or sold, and made no payment to him as required in the argeement of purchase, but the moneys received from the sale of the oil were apparently used for the paying of the creditors of the A. R. C. Oil Company.

The complaint sets forth generally the foregoing facts and asks that an accounting be had, and that the interest of the defendant Adams, and all claiming under him, be forfeited; that plaintiff be restored to the possession of the real property, and by a supplemental complaint that an accounting be had, and for general relief. The answer of the defendants, other than the Golden Bear Oil Company, Limited, admitted practically all of the allegations of the complaint except to deny that these defendants had failed, refused, or neglected to pay to plaintiff the moneys due him from the sale of any oil produced on the premises, and alleged that Adams had promptly paid to plaintiff all moneys due him under the terms of said contract for all oil produced, saved, and sold from said premises prior to the filing of the complaint, and that defendants had strictly complied with all of the terms and conditions of the lease in all particulars. The Golden Bear Oil Company, Limited, appeared by separate answer, claiming to be an innocent purchaser for value.

Upon this complaint and the answers the action went to trial. Upon the trial, over the objection of plaintiff, the court allowed the defendants to testify as to certain conversations wherein the plaintiff was alleged to have agreed, for a consideration of $300, to allow the defendants an additional sixty days in which to pay the amount due under the contract. All of this testimony was admitted over the objection of plaintiff, as not within the issues and not specifically pleaded, which objections were, however, overruled.

At the conclusion of the trial, upon the ex parte application of the defendants, the trial court permitted defendants to file an amendment to their answer "to conform to the facts proven," wherein it was alleged that the plaintiff had, in consideration of the sum of $300, granted defendant Adams sixty days thereafter within which to make the first installment payment due under the contract; and further alleged that plaintiff, in violation of said agreement, had refused to accept said money when tendered to him and had immediately filed this action and procured the appointment of a receiver.

The court made certain findings favorable to defendants, but failed to find whether or not the defendants had been excused from drilling a second well within sixty days from the date of the completion of the well here in question, as required in the lease from Mrs. Glide.

We do not deem it necessary at this time to consider in detail the alleged insufficiency of the evidence to support the findings, as the action of the trial court in the admission of evidence as to the alleged parol agreement and permitting the defendants to file an amendment to their answer under the guise of conforming to the proof, was prejudicial to the rights of plaintiff and justifies the granting of a new trial.

[1] As we have already pointed out, the only issue presented by the original pleadings was whether or not the defendants had complied specifically with the terms of the written agreement of purchase. The court permitted evidence of a parol agreement to be received and then allowed defendants to file an amendment to conform to that testimony. The rule is clearly expressed in 21 Cal.Jur. page 136, as follows:

"New matter constituting an affirmative or special defense must be specially pleaded in the answer; otherwise, it cannot be relied on. * * * So also matters of confession and avoidance, and equitable defenses generally must be specially pleaded. * * * Among other defenses ordinarily required to be specially pleaded are: * * * matter of prevention, waiver or excuse for nonperformance of a contract; * * *

[2] "Failure to plead a defense is not cured by the introduction without objection of evidence in support of it or by a finding in relation thereto, though the rule seems to be otherwise where there is merely an omission of an essential allegation."

In the case of Wienke v. Smith, 179 Cal. 220, 176 P. 42, 44, the court said:

"Waiver is an affirmative defense, and a defendant desiring to take advantage of it must set up in his answer the facts upon which he bases his claim." (Citing cases.)

[3] In Seebach v. Kuhn, 9 Cal.App. 485, 99 P. 723, plaintiff recovered judgment upon a building contract. Defendant appealed, contending that he was not required to pay the plaintiff for the last installment, due to the fact that the building had been destroyed by earthquake prior to the completion or acceptance of the work. Respondent contended he was entitled to recover the last installment upon the theory that he was ready and willing to perform the work before the earthquake occurred, but was prevented from doing so by the act of another independent contractor and the architect. The court held that no such issue had been raised in the pleadings, and that plaintiff could not be permitted to allege one cause of action and recover upon proving a different cause of action, and cited many case in support of that rule. It is obvious, therefore, that a defense of waiver was not before the trial court, and the court committed error in admitting evidence in this regard.

[4] Neither can it be charged that the subsequent amendment to conform to the proof cured the error in the admission of this evidence. In the case of Fournier v. Great Atlantic, etc., Co., 128 Me. 393, 148 A. 147, 151, 68 A.L.R. 481, the court said:

"It is urged, however, that this error was cured by the amendment later offered by which allegations of permanent injuries were added to the original declaration. This contention cannot be sustained. The general rule that amendments, not introducing a new cause of action, may be made to conform pleadings with proof, at any stage of the trial, is well settled. Kelly v. Bragg, 76 Me. 207; Waiczenko v. Oxford Paper Co., 106 Me. [108], 110, 75 A. 328; Charlesworth v. American Exp. Co., 117 Me. [219], 222, 103 A. 358, 359. But, allowable as the introduction of such an amendment may generally be, it cannot cure the error of the prior admission of evidence admissible only under the amended allegations. The common-law rule is that the right to amend pleadings so as to conform them to proof must be exercised prior to the introduction of the proof, if that, when offered, be objected to on the ground of variance between pleading and proof. 1 Enc. Pleading and Practice 585; 31 Cyc. 452; Rogers v. Union Stone Co., 130 Mass. 581, 39 Am.Rep. 478; Beard v. Tilghman, 66 Hun, 12, 20 N.Y.S. 736. Had the plaintiff, after the amendment was allowed, again introduced its proof of the permanency of Mr. Fournier's injuries, the evidence would have been admissible."

[5, 6] The law appears to be well established that an amendment to conform to the proof is not proper where such amendment has the effect of introducing a new cause of action or defense. The general rule in this regard is stated in 49 Corpus Juris page 493, as follows:

"A commonly recognized limitation upon the propriety of amendments to conform to the proof is that they must not introduce a new cause of action, or substantially change the claim or defense, or the cause of action, or the nature of the action or defense."

The rule in California is stated in sections 469 and 470 of the Code of Civil Procedure. These sections being interpreted as to allow an amendment to conform to the proof only when such amendment does not have the effect of substantially changing the cause of action or defense. Hancock v. Board of Education, 140 Cal. 554, 74 P. 44; Donian v. Danielian, 90 Cal.App. 675, 266 P. 817; McCully v. Gano, 116 Cal.App. 695, 3 P.(2d) 348; Lavely v. Nonemaker, 212 Cal. 380, 298 P. 976, 978. In the last case cited, the court, although holding that courts should be liberal in the allowance of amendments in order that pleadings may conform to the proof, said:

"But amendments of pleadings to conform to the proofs should not be allowed when they raise new issues not included in the original pleadings and upon which the adverse party had no opportunity to defend. Rosemead Co. v. Shipley Co., supra [207 Cal. 414, 278 P. 1038]; Bank of United States v. Foreman, 102 Cal.App. 756, 764, 283 P. 874."

Likewise, in the case of Bank of United States v. Foreman, 102 Cal.App. 756, 283 P. 874, the court held that amendments to the pleadings at or following the trial, before judgment, should not be allowed over the objection of the adverse party, which raised new issues that were not included in the original proceedings, and cited many cases in support thereof.

[7] We also believe the court erred in failing to find upon the allegation in the supplemental complaint, that according to the terms of the original lease the defendants agreed to commence the drilling of another oil well within sixty days from the date of the completion of the well in question, and that defendants had breached the foregoing condition in that respect. The defendants in their answer admitted that they had not commenced drilling of the second well within the time required, but "denied that said defendant Hugh Adams had breached said condition for the reason that the lessor named in said lease, who at all times herein mentioned was and still is the owner of said land, consented that said second well need not be drilled." This allegation amounted to an affirmative allegation in the nature of a confession and avoidance on behalf of the defendants and placed upon them the burden of proving the same, and a finding should have been made. Section 1869, Code Civ. Proc.; Shropshire v. Pickwick Stages, 85 Cal.App. 216, 258 P. 1107.

Other errors are cited, but inasmuch as this cause must be returned for a new trial, no benefit would be conferred by a discussion of these matters.

The judgment is reversed as to all defendants, and the cause remanded for a new trial.

I concur: THOMPSON, J.

---

20 Cal.App.2d 20

THARP v. SAN JOAQUIN VALLEY SECURITIES CO. et al. (PACIFIC FINANCE CORPORATION, Intervener).

Civ. 1749.

District Court of Appeal, Fourth District, California.

March 25, 1937.

1. Automobiles 🔑19

Evidence that buyer of automobile paid $500 on purchase price, took registration certificate in his own name, and affixed his own license plates, though he left automobile with dealer to use as demonstrator and used it himself only from time to time, *held* to justify finding that sale was bona fide as against finance company holding trust receipt on automobile (Civ.Code, § 3440).

2. Fraudulent conveyances 🔑135

Statute providing that sales of personalty not accompanied by actual and continued change of possession should be deemed fraudulent as to creditors and innocent purchasers, though applicable to sales of automobiles, is not necessarily controlling as to rights of innocent third parties to sale of automobiles, especially where passing of legal title is not in issue (Civ.Code, § 3440).

3. Sales 🔑473(1)

If personalty is delivered to a buyer who is engaged in retailing property of same kind and, with seller's knowledge, is placed on display for sale, holder of reserved title, lien, or other interest must see to it at his peril that retailer does not wrongfully offer it to the public, and is estopped to assert his lien or interest as against a bona fide subvendee for value.

4. Estoppel 🔑72

Where one of two innocent purchasers must suffer through acts or negligence of a third person, the loss should fall on the one who by his conduct created the circumstances which enabled third party to cause the loss.

5. Estoppel 🔑75

Where finance company engaged in financing retail automobile dealers delivered automobile to dealer under trust receipt, knowing that he intended to resell it, and dealer did resell it under conditional sales contract but kept possession of automobile under arrangement with buyer, finance company *held* estopped to assert its title or interest against innocent purchaser of the conditional sales contract, since by its own acts it enabled dealer to appear as full owner of the automobile and contract (Civ.Code, § 3440).

6. **Appeal and error** ⟹882(3)

Where complaint in intervention set forth facts which raised issue of estoppel, although term "estoppel" was not specifically used, and action was tried on issue of estoppel, lack of pleading or finding of court expressly raising issue of estoppel *held* not available on review.

◆

Appeal from Superior Court, Fresno County; H. S. Shaffer, Judge.

Action by J. C. Tharp against the San Joaquin Valley Securities Company and others, wherein Pacific Finance Corporation intervened. From a judgment for intervener, defendant San Joaquin Valley Securities Company appeals.

Affirmed.

Everts, Ewing, Wild & Everts, A. W. Carlson, and R. H. Reeve, all of Fresno, for appellant.

William C. Crossland, of Fresno, for respondent.

BARNARD, Presiding Justice.

One Ogelsby was engaged in the business of selling Reo automobiles in Porterville and Tulare. The San Joaquin Valley Securities Company, hereinafter called the appellant, was engaged in the business of financing retail dealers in automobiles and had been "flooring" cars for Ogelsby for more than a year and a half. On May 11, 1931, the appellant purchased a Reo automobile and delivered it to Ogelsby, taking back a trust receipt, an agreement of purchase, and a promissory note for the balance of the purchase price. It did not cause the automobile to be registered or licensed with the department of motor vehicles, and it was conceded at the trial that the car was delivered to Ogelsby with the intention that he should sell the same in the regular course of business and that the appellant knew that he was demonstrating and attempting to sell the car.

On July 8, 1931, Ogelsby sold the car to the plaintiff herein on a conditional sales contract, Tharp paying $100 down and agreeing to pay $135.33 monthly until the balance was paid. On July 10, 1931, Ogelsby sold his interest in this contract to the Pacific Finance Corporation, hereinafter called the respondent, receiving full payment therefor. The respondent sent a notice to Tharp that it had purchased this contract and Tharp acknowledged the notice. On July 8, 1931, Tharp also signed an application to register the car under the provisions of the California Vehicle Act (St.1923, p. 517, as amended). The car was duly registered showing Tharp as the registered owner and the respondent as the legal owner. The white slip was delivered to Tharp, and he made the payments due in August and September, 1931, to Ogelsby who turned them over to the respondent. The October payment was paid early in November by Tharp directly to the respondent. Ogelsby disappeared some time in October, 1931, and the appellant took possession of the automobile on October 15, 1931, at which time the automobile bearing Ogelsby's license plates, as dealer, was found at his place of business at Porterville.

On October 22, 1931, Tharp brought this action to recover possession of the automobile or its value in case delivery could not be had. The appellant answered, praying that the plaintiff take nothing by reason of his complaint and that it have judgment for recovery and possession of said automobile or for its alleged value in case delivery could not be had. The respondent intervened, its complaint alleging that Ogelsby was and for several years had been engaged in the business of selling Reo automobiles in the city of Porterville; that the car in question was delivered to his possession for the purpose of having him sell the same; that he exhibited and offered the car for sale; that on July 8, 1931, he sold the car to the plaintiff under a conditional sales contract calling for monthly payments; that Ogelsby retained title until the full amount should be paid; that on July 10, 1931, Ogelsby sold said conditional sales contract and all his right, title, and interest in the car to the respondent; that the plaintiff thereafter failed to make the payments due under the terms of the contract; and that the respondent is the owner of said car and entitled to its possession. The prayer was for a judgment against both plaintiff and appellant for the recovery of the possession of the car or for its alleged value in case delivery could not be had. As conclusions of law from the facts found, the court found that the respondent was entitled to judgment for possession of the automobile or for its value in case delivery could not be had, and the judgment was to the same effect. From that judgment, this appeal was taken.

The appellant contends that certain findings to the effect that it wrongfully took possession of the automobile on October 15, 1931, and that the respondent is the owner and entitled to possession of the car are not supported by the evidence. It is argued that the evidence conclusively shows that the purported sale of the car to Tharp was not a bona fide transaction, that Tharp signed the conditional sales contract merely to enable Ogelsby to raise money upon it, and that there was no actual or continued change of possession of the automobile within the meaning of section 3440 of the Civil Code.

[1] It appears from the evidence that at the time the conditional sales contract was signed Tharp signed an application to have the car registered; that a registration certificate was issued showing Tharp as the registered owner and the respondent as the legal owner; that the white slip was delivered to Tharp; that he placed his license plates on the car with the assistance of Ogelsby; and that he did not know that Ogelsby had taken these plates off and replaced them with his own dealer's plates until after the appellant took the car. Tharp testified that he had no place at his home to keep the car and that Ogelsby asked him to allow him to use the car as a demonstrator, to save the expense of buying another; that he took it home the day he bought it and took it back to Ogelsby's garage the next day; that he allowed Ogelsby to use the car as a demonstrator; that he himself used the car thereafter whenever he desired; and that on one occasion he had the car on a trip from Friday until Monday. Tharp paid about $500 on the purchase price of the car and the contention that he was acting in collusion with Ogelsby rests purely on suspicion. The evidence, as a whole, is sufficient to support the court's conclusion and the implied finding that Tharp entered into this contract in good faith.

[2] While section 3440 of the Civil Code applies in general to the sale of an automobile, that fact is not necessarily controlling. Washington Lumber, etc., Co. v. McGuire, 213 Cal. 13, 1 P.(2d) 437. That is particularly true in such a case as this, where the intervening rights of an innocent third party do not depend upon the passing of title, and where the issues raised and tried relate to the right of possession of the property rather than to where the mere legal title remains. Western States A. Corp. v. Bank of Italy, 104 Cal.App. 19, 285 P. 340; Moss v. Bowman, 116 Cal.App. 720, 3 P.(2d) 377. In the first of these cases the facts were quite similar to those here involved and the court said:

[3] "Defendants Bank of Italy and Mrs. Kennon urgently insisted in the court below, and do here, that, irrespective of the question of title, plaintiff having negligently permitted Ballard, a known automobile dealer, to appear as the apparent owner with the right of disposition of the car, should be estopped from asserting title as against them. There can be no question that the evidence clearly establishes an estoppel. It is well settled in this state that if personal property is delivered to a buyer who is engaged in the business of selling property of the same kind and, with knowledge of the seller, is placed on display for sale with such other property, the holder of the reserved title is estopped to assert it as against a bona fide subvendee for value. In such a case the rights of the innocent subvendee do not depend upon the actual title or authority of the party with whom he deals directly, but are derived from the act of the real owner, which precludes such owner from disputing, as against the innocent party, the existence of the title or power which, through negligence or mistaken confidence, he has caused or allowed to be vested in the party making the sale. (Pacific Finance Corp. v. Hendley, 103 Cal.App. 335, 284 P. 736 [285 P. 1048]). Here, so far as the evidence before us shows, plaintiff did nothing whatsoever to protect the rights of innocent purchasers, and the apparent title was at all times in Ballard. The Gaudin & Pahl company was never informed by anyone nor did it have any knowledge whatsover of any kind or character that plaintiff had any interest in the property. No bill of sale of the car was ever executed by the Ford Company to plaintiff corporation, nor was its alleged title ever registered with the motor vehicle division. Entire lack of notice of plaintiff's claimed interest misled respondents to their detriment.

[4] "The duty rests upon one financing a retail dealer to see to it that cars upon

which he has a lien or other interest are not left under the domain or control of such sale dealer on his salesroom floor, to be offered to the public. Secret arrangements which place it in the power of a dealer to deceive unsuspecting purchasers should be and they are condemned. (General Securities Corp. v. Reo Motor Co., 91 Cal.App. 16, 266 P. 576.) Whether, therefore, plaintiff had or had not any interest in the car is unimportant, for if it had, it negligently permitted Ballard, a known automobile dealer in this make of car, to appear as apparent owner with the right of selling the same and it should therefore be estopped from asserting its alleged title as against respondents, who are innocent purchasers, without notice. Where one of two innocent purchasers must suffer through the act or negligence of a third person, the loss should fall upon the one who by his conduct created the circumstances which enabled the third party to perpetrate the wrong or cause the loss."

[5] We think these principles are controlling here and that the appellant is estopped from asserting its alleged title as against the respondent who purchased the contract from a regular dealer without notice of the appellant's interest. There is no evidence that the respondent knew that Ogelsby had persuaded Tharp to allow him to use the car as a demonstrator when it was not required for his own use. The appellant, now claiming under a secret lien, by its own acts enabled Ogelsby to appear as the apparent owner with the right to sell the car. It now admits that it had knowledge that he was attempting to sell the same and that it fully expected him to do so.

[6] The appellant argues, however, that while the judgment herein is based upon the theory that the appellant is estopped from asserting its title to this automobile, such an issue was not pleaded. It is then argued that since the issue was raised by the evidence, the court committed reversible error in not making a finding thereon. The complaint in intervention, which was answered by the appellant, set forth facts which raised the issue of estoppel, although that term was not specifically used, and the action was tried upon the theory that such estoppel was in issue. The pleading cannot now be attacked. Johnson v. Schimpf, 197 Cal. 43, 239 P. 401. That the case was tried largely upon this issue clearly appears from the evidence, from the opinion filed by the trial judge, and from the findings. It appears from the findings that the court impliedly found against the appellant upon the issue of an estoppel and, under the circumstances, the absence of an express finding in that connection does not warrant a reversal. Fair Oaks Bank v. Johnson, 198 Cal. 196, 244 P. 335.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

8 Cal.2d 463

PARSONS v. FULLER.

L. A. 16102.

Supreme Court of California.

March 26, 1937.

Automobiles 🔑181(7)

Motorist who, after being warned many times by guest, continued to drive at excessive speed and who lost control of automobile which overturned when driven off edge of highway in an effort to avoid hitting obstruction which guest had previously called to attention of motorist *held* guilty of "willful misconduct," authorizing guest's recovery for injuries sustained (St.1931, p. 1693, § 141¾).

"Willful misconduct" depends upon the facts of a particular case, and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom.

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Dick R. Parsons against Leo Fuller. From an adverse judgment, the defendant appeals.

Affirmed.

Prior opinion, 60 P.(2d) 549.

C. A. Pinkham and Schell & Delamer, all of Los Angeles, for appellant.

Hedley Richmond and Welburn Mayock, both of Los Angeles, for respondent.

CURTIS, Justice.

A transfer of this cause from the District Court of Appeal was ordered solely for the reason that there was a possible conflict between the opinion therein and the two cases of McLeod v. Dutton, 13 Cal.App.(2d) 545, 57 P.(2d) 189, and Hall v. Mazzei, 14 Cal. App.(2d) 48, 57 P.(2d) 948, 949. We have made a further study of those two cases, and conclude that neither of them conflicts with the opinion of the District Court of Appeal in the present cause. In each of those cases, it was sought to hold the driver of the car for injury to a guest riding with the driver. In the case of McLeod v. Dutton, supra, the driver of a Cord car had been racing with a Packard car shortly before he collided with a Dodge car in which collision the guest was injured. He had passed the Packard, and had turned into the right or north lane of the highway in front of the Packard when he collided with a Dodge car that was attempting to cross the highway in front of him. When the front half of the Dodge car was on the north side of the white line and the rear half was on the south side of the white line, the Cord car came forward and attempted to pass on the north side, but failed in the attempt, and the collision occurred. The facts presented a clear case of negligence, but as the opinion therein held, the acts of the driver did not constitute willful misconduct.

In the case of Hall v. Mazzei, supra, the driver of the car was attempting to tighten the windshield of the car which had become loose and at the same time was driving her car at a speed of 45 miles per hour with one hand. The guest protested at the rate of speed at which the car was traveling at the time of the tightening of the windshield. During this time, a Ford coupé passed the car in which the guest and driver were riding, and was between three and four hundred feet in front of them when the driver finished fixing the windshield. The driver then increased the speed of her car, and attempted to pass the Ford coupé in front of her. In doing so, she overturned her own car with the result that she was killed and her guest was injured. The guest testified that the car in which she was riding was traveling 60 miles an hour at the time the driver attempted to pass the Ford coupé.

She also stated that she said to the driver when they were attempting to pass the Ford coupé, "Let's not try to pass it," but the latter only laughed and kept on. In affirming the judgment in favor of the defendant, the court stated that the operation of adjusting the windshield had been completed at a considerable distance from the place of the accident; that there were soft shoulders on both sides of the pavement, but the pavement was of sufficient width to permit the deceased to drive her car at a speed of even 60 miles an hour and safely pass the other car without serious danger of leaving the pavement. While it was carelessness for her to permit her car to leave the pavement, there was nothing to indicate that such an act was the result of anything more than negligence and that, "It was a momentary lapse in the exercise of care that had disastrous results and caused her death and the serious injury of her friend."

A reading of the present opinion of the District Court of Appeal we think will show an entirely different course of conduct on the part of the defendant in this case and that his acts, persisted in for some hours and over many miles of travel, after repeated protests on the part of his guest, and while they were traveling over a mountain road with frequent curves and at an excessive rate of speed, compel the conclusion that he was guilty of willful misconduct within the settled meaning of that term as defined by the authorities, many of which are cited in said opinion. We, therefore, adopt the opinion of the District Court of Appeal, prepared by Justice pro tempore Desmond, as the opinion of this court. It is as follows:

"Upon the ground of insufficiency of the evidence, defendant appeals from a judgment awarding damages to plaintiff in a jury-waived trial.

"Defendant, accompanied by plaintiff as his guest, started in his automobile for Boulder Dam, leaving Los Angeles in the morning of November 29, 1934. They were accompanied by a man named Liston and after a little while by an unknown 'hitch-hiker.' Defendant traveled at a speed ranging as high as 65 miles per hour between Los Angeles and Ontario, where the party stopped for breakfast. Plaintiff complained of this fast driving before they left Los Angeles. 'I noticed how fast he was going and I told him, I said, "Don't go too fast. This is a pleasure trip. It makes me nervous. I would appreciate it if you drove slower." He said, "It am going to, Dick. I am not going to drive very fast." I said, "That is fine and dandy," but he continued doing it.' After breakfasting in Ontario, 'I came out of the restaurant to get back in the car and I said, "Leo," I said, "you are driving too fast. It makes me nervous. I am not enjoying the trip. I would rather go back to Los Angeles than go so fast, but if you will drive slower everything will be fine." I said, "When I left home I told you I wouldn't go over 45." I said, "I won't complain at 45, but anything over that speed makes me too nervous." He said, "I won't go over 45." '

"Notwithstanding this promise on the part of the defendant, he continued to drive thereafter occasionally at a speed estimated by plaintiff as 65 miles per hour, and at 60 miles per hour, according to his own admission. Plaintiff testified that he protested several times and finally, when nearing the summit of the grade extending through Cajon Pass, saw a sign 4 feet by 4 feet in the highway approximately one-fourth to one-half mile ahead. At that time, plaintiff testified, defendant was traveling about 65 miles per hour.

" 'Q. Did you or did you not call attention—call Mr. Fuller's attention to the sign at that time? A. I did.

" 'Q. What, if anything, did you say to him? A. I noticed the speed he was going. I could see the speedometer. I said, "Leo, you are going too fast." I said, "You see that sign down the road?" He said, "Yes." I said, "For God's sake, get over to this side of the line. You won't make the turn." He said, "Everything will be all right."

" 'Q. From that time on did he increase or decrease the speed of this car? A. Increased it.

" 'Q. At the time you brought the sign to his attention was he traveling on the right-hand or lefthand side of the pavement? A. He was straddling the white line down the center of the boulevard.

" 'Q. From the time that you brought it to his attention and he stated he would and everything was going to be all right and speeded up, will you describe what occurred from that time on to the accident? A. Well, at the time I called his attention to the sign, the way I recollect it, it was only a few seconds until he was at the sign. To keep from running over the sign he guided his car to the right and the front wheels over onto the gravel on the side of the road and he started to skid and he turned loose of the steering wheel and threw both arms that way (indicating) locked around his head, and Mr. Liston did the same thing, and the man in the back seat with me did the same thing, and we went over the bank, and that is about all I know.

" 'Q. At the time you brought the sign to his attention you were driving some 60 miles an hour or better to the time you approached the sign and he endeavored to whip around it, did he increase his speed? A. Increased.'

"There was no contradiction of this testimony, except that defendant estimated that he dropped his speed from about 60 miles per hour to between 45 and 50 miles per hour. Mr. Liston testified that he continued at 'Practically the same speed. He didn't slow down when Parsons told him about the sign, he kept on going. * * * Well, we come around that sign and hit that soft gravel, the car glided right out through the country, and a fellow told me it turned over four times.

" 'The Court: No. Just what you recall.

" 'Q. By Mr. Mayock: You remember you glided out through the country and through the air? A. Well, through the air, through the air, and after the first hit I don't know any more.

" 'Q. Did you examine afterwards where the first—where the car hit the first time after leaving the highway? A. 60 feet down.

" 'Q. It came to a complete stop how far down? A. Approximately 85 feet.'

"Upon these facts appellant contends that the court was not warranted in finding that the injuries suffered by respondent were proximately caused by the willful misconduct of appellant. Under section 141¾ of the California Vehicle Act, as enacted in 1929 (St.1929, p. 1580), recovery might be had for injury or death proximately resulting to a guest passenger 'from the intoxication, wilful misconduct, or gross negligence of such owner, driver or person responsible for the operation of such vehicle.' The Legislature of 1931 (St.1931, p. 1693) amended this section by striking out the words 'or gross negligence,' and since then the courts have been called upon frequently to determine where the dividing line lies between willful misconduct and gross negligence. Meek v. Fowler, 3 Cal.(2d) 420, 45 P.(2d) 194; Howard v. Howard, 132 Cal.App. 124, 22 P.(2d) 279; Walker v. Bacon, 132 Cal.App. 625, 23 P.(2d) 520; Turner v. Standard Oil Co., 134 Cal.App. 622, 25 P.(2d) 988; Sanchez v. Rissen, 12 Cal.App.(2d) 152, 55 P.(2d) 292; Candini v. Hiatt, 9 Cal.App.(2d) 679, 50 P.(2d) 843; Lennon v. Woodbury, 3 Cal.App.(2d) 595, 40 P.(2d) 292. All these cases, and others bearing on the same question, we have read, including the recent cases cited by appellant in his reply brief: Weir v. Lukes, 13 Cal.App.(2d) 312, 56 P.(2d) 987; Bartlett v. Jackson, 13 Cal.App.(2d) 435, 56 P.(2d) 1298; McLeod v. Dutton, 13 Cal.App.(2d) 545, 57 P.(2d) 189; Horn v. Volko, 13 Cal.App.(2d) 582, 57 P.(2d) 175, and Hall v. Mazzei, 14 Cal.App.(2d) 48, 57 P.(2d) 948.

"It is unnecessary, for present purposes, to attempt to summarize these opinions or to differentiate one from the others; rather we shall refer to the language in Sanford v. Grady, 1 Cal.App.(2d) 365, at page 371, 36 P.(2d) 652, 655, 37 P.(2d) 475, as sufficiently justifying the court's finding in the instant case.

" ' "Willful misconduct" is defined in the case of Norton v. Puter [138 Cal.App. 253] 32 P.(2d) 172, 174, in which case a hearing was denied by the Supreme Court, as follows:

" ' "Willful misconduct depends upon the facts of a particular case, and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom. Helme v. Great Western Milling Co., 43 Cal.App. 416, 185 P. 510, 512; Olson v. Gay, 135 Cal. App. 726, 27 P.(2d) 922; Walker v. Bacon, 132 Cal.App. 625, 23 P.(2d) 520; Howard v. Howard, 132 Cal.App. 124, 22 P.(2d) 279. Webster's New International Dictionary, p. 1379, defines misconduct as 'wrong or improper conduct; bad behavior; unlawful behavior or conduct; malfeasance.' 40 C.J. p. 1221. Willfulness necessarily involves the performance of a deliberate or intentional act or omission regardless of the consequences. In Helme v. Great Western Milling Co., supra, it is said:

" ' " ' "Willful misconduct" means something different from and more than negligence, however gross. The term "serious and willful misconduct" is described by the Supreme Judicial Court of Massachusetts as being something "much more than mere negligence, or even gross or culpable negligence," and as involving "conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences." In re Burns, 218 Mass. 8, 105 N.E. 601, Ann.Cas.1916A, 787. The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute "willful misconduct" there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. Smith v. Central, etc., Ry. Co., 165 Ala. 407, 51 So. 792.'"'

"We believe that the court properly emphasizes knowledge or appreciation 'that danger is likely to result.' To us it seems clear that one who, while driving an automobile, knowingly flirts with danger and, without necessity or emergency compelling him, 'takes a chance' on killing or injuring himself and others, who may be so unfortunate as to be riding with him, is guilty of willful misconduct."

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; EDMONDS, J.; LANGDON, J.; SEAWELL, J.

---

8 Cal.2d 473

JOHNSON et al. v. CITY OF SANTA MONICA et al.

L. A. 16037.

Supreme Court of California.

March 26, 1937.

Rehearing Denied April 22, 1937.

Automobiles 🔑227(2)

Defendant truck driver who, having first observed that rider had lost control of horse approaching from truck driver's left on intersecting street, when horse had just about reached intersection and truck was entering intersection, immediately turned to right and put on brakes, *held* not negligent with respect to injuries rider sustained when horse ran into truck, as against contention that truck driver failed in duty to use all possible means to avoid accident after observing rider in peril.

In Bank.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Vera Johnson and husband against the City of Santa Monica and others. Judgment for plaintiffs, and defendants appeal.

Reversed.

For prior opinion, see (Cal.App.) 59 P.(2d) 431.

George H. Moore, of Wilmington, and Gerald O'C. Egan, of Los Angeles, for appellants.

Arthur L. Ball, Earl A. Littlejohns, and Arthur S. Guerin, all of Los Angeles, for respondents.

PER CURIAM.

The plaintiffs, husband and wife, brought this action to recover damages for personal injuries suffered by the wife when a horse she was riding ran into a truck loaded with a ton and a half of broken marble and operated by the defendant McEntee. The latter was driving the truck in the employ of the defendant City of Santa Monica. The court made findings and rendered judgment in favor of the plaintiffs. The defendants prosecute this appeal on the ground that the evidence does not support the finding that the defendant McEntee was guilty of negligence.

The accident occurred on the morning of May 25, 1935, at the intersection of Westminster avenue and Centinella boulevard in Los Angeles county. Westminster avenue is a dirt road which runs in an easterly and westerly direction and ends at the intersection at right angles with Centinella boulevard from the west. Centinella boulevard is a paved highway. The vicinity was sparsely settled. Extensive unfenced plowed fields opened on both sides of Westminster avenue. The plaintiffs lived on Wasatch street, off Westminster avenue, a distance of approximately three blocks from the intersection of Centinella and Westminster. They had purchased a twelve year old horse three weeks previously. Since its purchase the horse had been ridden once by the plaintiff's son about twelve days before the accident. The balance of the time it had been kept on a tether. The plaintiff wife was about thirty-four years of age and had not ridden a horse for fourteen years. On the May morning mentioned she mounted the horse, and with a companion, a Mrs. Grammer, who was riding another horse, she started out toward Westminster avenue. Her horse turned into Westminster toward Centinella and began to gallop. As it approached the intersection it increased its speed and when the horse reached the intersection it gave two or three lunges forward and ran head on into the cab of the city truck, catapulting Mrs. Johnson on to the ground on the opposite side of the truck.

The defendant McEntee was driving the truck northerly on Centinella at a speed of about eighteen miles per hour and on the easterly side of the highway. An automobile was immediately ahead of him and another city truck was following him. Behind this second truck witnesses Siegal and Kirkham were riding in an automobile. When McEntee observed the plaintiff wife she and the horse were about 125 feet from the intersection. When the horse had just about reached the intersection McEntee first observed that the plaintiff wife had lost control of her horse. At that moment his truck was entering the intersection. He immediately turned to the right and put on the brakes. He stopped off the highway to the right within twenty feet after the horse ran into the truck.

There is a lack of any substantial evidence of negligence on the part of the defendant McEntee. There is no substantial dispute as to what occurred. The plaintiff wife, called as a witness, testified that she remembered nothing from the time the horse began to trot, which was some considerable distance westerly from Centinella boulevard, until she recovered consciousness in the hospital. Her companion, Mrs. Grammer, did not appear as a witness.

The theory upon which it was sought to hold the defendant city was that it was the duty of the driver of the truck to use all possible means to avoid the accident after he observed the plaintiff wife in her perilous position (citing Townsend v. Butterfield, 168 Cal. 564, 143 P. 760, and Eddy v. Stowe, 43 Cal.App. 789, 185 P. 1024), but that by his conduct he did not meet this test. It is assumed that, even without negligence on his part, it was the duty of McEntee by the exercise of ordinary care to avoid the accident. But this duty arose only at the time he observed the plaintiff wife in her perilous position. That moment was when she was entering the intersection. The driver of the truck then acted at once and clearly in a manner to meet all obligation cast upon him by the law. It is not pointed out what he did not do that he was required to do under the circumstances. Certainly it was not incumbent upon him to stop his truck merely because a horse and rider were approaching the road on which he was traveling, at least until he observed that the horse had become unmanageable. Any guess as to what he might have done to avoid the accident is in the realm of surmise and conjecture and has no factual basis in the record. The wife was riding an unmanageable and apparently locoed horse. Its strange actions resulted in misfortune to the plaintiffs, but the defendants have not on the undisputed evidence been shown to be responsible therefor.

The judgment is reversed.

---

8 Cal.2d 476

SAMPSON v. CENTURY INDEMNITY CO.

L. A. 16101.

Supreme Court of California.

March 26, 1937.

1. Appeal and error 🔑102

No appeal lies from order sustaining general demurrer to amended complaint.

2. Insurance 🔑146(3)

Any uncertainty or ambiguity in insurance contract must be construed most strongly against insurer and in insured's favor.

3. Insurance 🔑146(1)

In determining whether provision of automobile liability insurance policy for payment by insurer of all interest accruing after entry of judgment against insured until insurer's payment, tender or deposit in court of part of judgment not exceeding its liability on policy, renders insurer liable for interest on entire amount of judgment, Supreme Court must construe policy in its entirety and endeavor to ascertain parties' mutual intention at time of its execution from entire instrument (Civ.Code, § 1641).

4. Insurance 🔑598

Term "all interest," in provision of automobile liability insurance policy that insurer should pay all interest, accruing after entry of judgment against insured, until insurer paid, tendered, or deposited in court part of judgment not exceeding limit of its liability on policy, *held* to mean all interest on part of judgment for which insurer was liable, not on entire judgment.

[Ed. Note.—For other definitions of "All Interest," see Words & Phrases.]

5. Insurance 🔑146(1)

While uncertainties and ambiguities in insurance policies must be resolved against insurer, court must avoid creation of uncertainty or ambiguity by putting strained and unnatural construction on terms of policy.

6. Insurance 🔑146(1)

Term of insurance contract is not uncertain or ambiguous if its meaning can be ascertained by fair inference from other terms thereof.

7. Interest 🔑1

Value of use of money is equal to the accrued "interest," which is only a consideration paid for use of money or forbearance in demanding payment thereof when due.

[Ed. Note.—For other definitions of "Interest," see Words & Phrases.]

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Robert K. Sampson, trustee in bankruptcy for the estate of Robert Farris, a bankrupt, against the Century Indemnity Company. From a judgment for defendant and an order sustaining a general demurrer to plaintiff's amended complaint, plaintiff appeals.

Affirmed.

For prior opinion, see (Cal.App.) 60 P. (2d) 318.

Liggett & Liggett, of San Diego, for appellant.

Noon & Noon and Charles A. Brinkley, all of San Diego, for respondent.

CURTIS, Justice.

[1] This appeal is from a judgment in favor of the defendant after the sustaining of a general demurrer to plaintiff's amended complaint. There is also an appeal from the order sustaining the demurrer. The latter appeal is dismissed as no appeal lies from such an order. The statement of facts is taken from the allegations of the amended complaint. The plaintiff is the trustee of the estate of Robert Farris, a bankrupt. In July, 1929, the Century Indemnity Company, the defendant herein, issued to the said Robert Farris its automobile insurance policy in the limited sum of $10,000, whereby the defendant agreed to pay "all sums which the assured shall be liable to pay by reason of the liability imposed upon him by law for damages because of bodily injuries * * * accidentally sustained by any person, caused by the ownership and maintenance or the use of" the assured's automobile subject to the limit of liability stated therein which, as before noted, was the sum of $10,000. The policy of insurance further provided that the insurer agreed also "to pay all costs * * * *also all interest accruing after entry of judgment until the Company had paid, tendered, or deposited in Court such part of such judgment as does not exceed the limit of the company's liability thereon.* * * *" While said policy of insurance was in full force and effect, one Gerda Hart accidentally sustained bodily injuries caused by the ownership and maintenance and use of the assured's automobile, and thereafter the said Gerda Hart, in the superior court of the county of San Diego, recovered a judgment in the sum of $20,000, besides interest and costs, against the said Robert Farris; said judgment being for and on account of the aforesaid bodily injuries. No part of said judgment has been paid, except the sum of $10,000 principal, the costs of said action, and the sum of $1,874.55, interest on said judgment, which said payments were made by the defendant, the Century Indemnity Company. It is further alleged that the defendant "is indebted to the said Robert Farris in a sum equal to the interest upon the sum of $10,000 at the rate of seven per cent per annum from the 3rd day of March, 1931," the date of the judgment rendered against Robert Farris in the action instituted against him by the said Gerda Hart, until paid in full, amounting at the "date hereof to the sum of $2,737.77, no part of which has been paid." Then follow allegations that the said Gerda Hart had filed her claim against the estate of said bankrupt for the unpaid portion of said judgment and that said claim had been allowed in the bankruptcy proceedings. To this amended complaint, stating facts substantially as herein set out, the defendant filed a demurrer, both general and special which was sustained by the trial court without leave to amend. From the judgment thereafter entered against him, the plaintiff has appealed.

In his opening brief, the appellant states that the only question of law involved herein is the interpretation of the provisions of the insurance policy as to payment of interest. It is appellant's contention that the policy must be construed to give protection to the insured against all interest that became a liability against the insured upon the entire judgment recovered against him in the action brought by Gerda Hart, notwithstanding the judgment was for more than $10,000. Stated concretely, appellant contends that under the terms of the policy the insurance company is liable for the legal interest not only on the principal sum of $10,000 but on the entire judgment of $20,000 from the date of its entry until the company paid the $10,000 and such interest as it was legally liable to pay. We are not concerned with the question of costs as the respondent has paid them in full.

[2] Appellant bases his contention upon the italicized words of the policy quoted above. He argues that this provision of the policy is at least ambiguous and uncertain and that it cannot be determined therefrom whether the company has made itself liable for interest only upon the limited amount of the judgment which it is obligated to pay, or upon the entire judgment, and that in accordance with the well-established principle of law that any uncertainty or ambiguity in a contract of insurance is to be construed most strongly against the insurer and in favor of the insured, the court must interpret this provision of the policy of insurance as obligating the insurer to pay interest on the entire amount of the judgment after its entry and until payment is made by the company of its part of said judgment. The principle of law relied upon by appellant is firmly established in this state. Everett v. Standard Accident Ins. Co., 45 Cal.App. 332, 187 P. 996; O'Connor v. Grand Lodge A. O. U. W., 146 Cal. 484, 80 P. 688; Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 424, 213 P. 42, 26 A.L.R. 123.

[3] It remains, therefore, for us to consider the questioned provision of the insurance policy with the view of determining whether it is so uncertain and ambiguous as to bring it within the scope of the principle of law relied upon by the appellant. In determining the meaning of this provision of the insurance policy, we are not limited to a consideration of this provision alone, but it is our duty to construe the policy in its entirety, and taking the instrument by its four corners, endeavor, if possible, to ascertain the mutual intention of the parties as it existed at the time of the execution of the instrument. Section 1641 of the Civil Code states the rule in the following language: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

[4] While the entire policy of insurance under which the appellant claims to be entitled to a judgment against the respondent is not before us, sufficient of its terms are set forth in the amended complaint to show that it is a limited policy of insurance, and that the maximum liability of the respondent thereunder, besides costs and interest, in case either of such items is incurred, is the sum of $10,000, and this is so, even if the claim of the injured party is reduced to judgment. In the latter case, the company is liable for only $10,000 of the principal of the judgment, notwithstanding the judgment may be for a much larger amount. It hardly seems probable, therefore, that the parties to the policy of insurance, after expressly limiting the liability of the company to the principal sum of $10,000, intended to make it liable for interest on any greater amount. Surely we would not be justified in so construing the policy unless it contains language clearly expressing such an intention. We find no such language in the policy. Respecting the liability of the company to pay interest, the policy provides that the company shall pay all interest accruing during a certain specified time. Without such a provision in the policy, or one similar thereto, the company would not be liable for any interest whatever on the judgment. Tulare County Power Co. v. Pacific S. Co., 43 Cal.App. 315, 327, 185 P. 399. Possibly it was for the purpose of avoiding the result reached in that case that the provision respecting the payment of interest by the company was inserted in the present policy. "All interest," as used in the provision above quoted, means all interest on that part of the judgment for which the company was liable, and not all interest on the entire judgment as contended by the appellant. To construe this provision to mean that the company had agreed to pay the interest to become due on that part of the judgment which the company was not legally liable to pay would be an unnatural and strained construction of this provision of the policy. In our opinion, the only fair and reasonable inference to be drawn from this provision of the policy when considered with its other terms is that the company was to pay interest after judgment only upon that part of the judgment for

which it was liable. So construed there is no ambiguity or uncertainty in the terms of the policy and therefore the rule of construction contended for by appellant has no application.

[5, 6] "While uncertainties and ambiguities in insurance policies are to be resolved against the insurer, courts must avoid putting a strained and unnatural construction on the terms of a policy and thereby creating an uncertainty or ambiguity. No term of a contract is either uncertain or ambiguous if its meaning can be ascertained by fair inference from other terms thereof. There is no difficulty in so ascertaining the intention of the parties to this action as to the place of payment, and the court must give effect to that intention." Burr v. Western States Life Ins. Co., 211 Cal. 568, 576, 296 P. 273, 276.

[7] There is another reason in our opinion why the parties to the policy of insurance never intended to make the company liable for interest on the entire judgment during the time intervening between its entry and the payment of the company's part thereof. That is, that the insured sustained no loss by reason of the delay on the part of the company in the payment of its part of the judgment. During this delay, the insured had the use of the money due on that part of the judgment for which the company was not liable. "The value of the use [of money] is equal to the accrued interest, that being only a consideration paid for the use of money or for forbearance in demanding it when due." Tulare County Power Co. v. Pacific S. Co., supra, 43 Cal. App. 315, at page 330, 185 P. 399, 405. In that case the court quoted with approval the following statement from the opinion in the case of Maryland Casualty Co. v. Omaha Electric L. & P. Co., 157 F. 514, 519, 85 C.C.A. 106: "The argument of plaintiff's counsel that the defendant, by exercising its right of appeal, and by superseding the execution of the judgment pending that appeal, caused the accumulation of interest in question, and thereby created an additional charge against the plaintiff for which it should be held responsible as a loss to the plaintiff, is more specious than sound. The fallacy rests in a failure to recognize the advantage which the appeal gave the plaintiff. By reason of it plaintiff was permitted to retain and use the $5,000, which otherwise would have been paid out by it. The value of the use is equal to the accrued interest, that being only a consideration paid for the use of money or for forbearance in demanding it when due. Accordingly the assured lost nothing by the delay occasioned by the appeal or by paying the interest which accumulated pending the appeal. The assured stood after paying the interest exactly as it would have stood if it had paid the judgment of $5,000 on January 3, 1902, when originally rendered. Nothing was lost by the appeal, as the interest ultimately paid was neutralized by the use and enjoyment of the money before that time." As the insured in the present action could lose nothing by reason of the delay in the payment by the company of its part of the judgment, it is hardly reasonable to suppose that the parties to the policy of insurance intended that he should be compensated for a loss which he would not sustain. While it may be beside the question in this case involving the ruling of the court upon defendant's demurrer, apparently the delay in making said payment was due to an appeal taken by the insured from the judgment rendered against him. See Hart v. Farris, 218 Cal. 69, 21 P.(2d) 432. One of the grounds of that appeal was that the judgment was excessive. Evidently the appeal, at least on this ground, was for the benefit of the insured, if not for his sole benefit. It may be inferred from the record in that case that the delay in the payment on the part of the company of its part of said judgment was due entirely to the appeal taken from the judgment in said action by the insured, and not to any fault of the respondent.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; EDMONDS, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.

8 Cal.2d 482

KNOUSE v. NIMOCKS.

NIMOCKS v. KNOUSE et al.

SAME v. KNOUSE.

L. A. 16044, 16045, 15549.

Supreme Court of California.
March 26, 1937.

1. Judges ⚷47(2)

A judge of the District Court of Appeal was disqualified to sit in such court on the trial or hearing of an appeal in an action where he had previously ruled on a demurrer filed in the action when pending in the Superior Court (Code Civ.Proc. § 170a).

2. Courts ⚷488(1)

Upon transfer of an appeal from the District Court of Appeal to the Supreme Court, opinion and decision of the District Court of Appeal become a nullity and of no force or effect, either as a judgment or as an authoritative statement of any principle of law therein discussed, unless approved or adopted by the Supreme Court.

3. Executors and administrators ⚷221(9)

In action by testatrix' agent against executor on testatrix' note, evidence *held* to sustain finding that note was executed when testatrix was mentally incompetent, thus precluding agent's recovery.

4. Release ⚷57(1)

In executor's actions against testatrix' agent on agent's guaranty of note assigned to testatrix and to rescind mortgage transaction in which agent loaned testatrix' money but took mortgage and brought foreclosure action in own name, where agent pleaded as defenses instruments releasing agent from all testatrix' claims, evidence *held* to sustain finding that releases were executed when testatrix was mentally incompetent, thus precluding agent's relying on instruments.

5. Appeal and error ⚷1010(1)

Appellate court may not disturb trial court's finding sustained by evidence.

In Bank.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Three actions, by Q. A. Knouse against Walter S. Nimocks, executor of the last will and testament of Mary Elizabeth Van Wagoner, deceased; by Walter S. Nimocks, executor of the estate of Mary Elizabeth Van Wagoner, deceased, against M. L. Knouse and Q. A. Knouse; and by Walter S. Nimocks, executor of the estate of Mary Elizabeth Van Wagoner, against Q. A. Knouse. From adverse judgments, and from orders denying motions for new trial, Q. A. Knouse appeals.

Judgments affirmed, and appeals from orders denying motions for new trials dismissed.

Prior opinion, 59 P.(2d) 612.

William Ellis Lady, of Los Angeles, for appellant.

W. C. Shelton and George W. Burch, both of Los Angeles, for respondent.

CURTIS, Justice.

[1, 2] The above-entitled actions were consolidated and heard together in the superior court, and also in the District Court of Appeal, one opinion having been rendered in the decision of all three cases, as will more fully appear hereinafter. They were transferred to this court for the reason that the record in one of said cases showed that Judge Roth, who wrote the opinion in the District Court of Appeal, had previously ruled upon a demurrer filed in said action when the same was pending in the superior court. Section 170a, Code of Civil Procedure, provides that a justice or judge before whom a cause or question may have been tried or heard shall not sit or act in an appellate tribunal, on the trial or hearing of such cause or question. This provision of the Code disqualified Judge Roth from hearing or participating in the decision of said cause in the District Court of Appeal. Just what effect this disqualification of Judge Roth might have had upon the decision of the District Court of Appeal had we not granted a transfer of said cause, is now a matter of no consequence. The opinion and decision of the District Court of Appeal, by our order of transfer, have become a nullity and are of no force or effect, either as a judgment or as an authoritative statement of any principle of law therein discussed. As stated by us in a former action, the opinion may serve as a brief on the legal questions involved therein, and may be adopted by this court as its opinion in the pending action. In re Estate of Kent, 6 Cal.(2d) 154, 156, 57 P.(2d) 901. But without some further express act of approval or adoption of said opinion by this court, that opinion and decision are of no more effect, as a judgment or as a

precedent to be followed in the decision of legal questions that may hereafter arise, than if they had not been written. Nothing that was said in the case of Kaysser v. McNaughton, 6 Cal.(2d) 248, 256, 57 P.(2d) 927, may be taken as declaring a different rule. There appears to be a sharp conflict in the authorities as to the legal status of a decision handed down by a court consisting of a number of members in which a disqualified member participates. Cor.Jur. p. 1023, § 202. For the reason just stated, we are not now concerned with this question. The order of transfer of said cause to this court for hearing was largely prompted by the situation that the opinion of the District Court of Appeal was prepared, and the decision participated in, by a disqualified member of the court rather than by any disagreement on our part with the conclusion reached therein. The opinion prepared by Judge Roth disposes of all questions presented on the appeal which were material to the issues involved. From an examination of the evidence, including the original exhibits in the case, and the law applicable to the facts as found by the court, we find ourselves in perfect accord with the statement of the case as made by Judge Roth and the conclusions reached by him as set forth in the opinion prepared by him. We therefore adopt the same as the opinion of this court. It is as follows:

"The three cases here involved were tried together in the court below, because all actions arise out of the same relationship; and the same evidence, except for the peculiar variations incident to the separate transactions involved, is pertinent to each case. Separate judgments were rendered and separate appeals taken from such judgments and from orders denying motions for new trial. All three appeals will be treated and disposed of in one opinion. All of the actions are vitally affected by the relationship which existed between appellant Q. A. Knouse, and Mary Elizabeth Van Wagoner, deceased (hereinafter referred to as deceased), respondent's testate, who died on October 20, 1931. The trial court found from abundant evidence which is uncontradicted this relationship to be as follows:

" 'That prior to the 27th day of July, 1927, the said deceased, Mary Elizabeth Van Wagoner, was left a widow by her husband's death, and that ever since the death of said husband, and at all times referred to in the complaint, the defendant Q. A. Knouse acted as the agent, trustee, and confidential business advisor of said deceased, Mary Elizabeth Van Wagoner. In such capacity said defendant invested all of her money for her and collected all interest and income from such investments for her and deposited the same in his own personal bank account and paid the said deceased interest on her investments, such as mortgages and deeds of trust, with his own personal checks, so that said deceased never knew when said interest was paid to her, whether the interest paid to her was paid by the mortgagors, or paid by the said defendant, although the said payments were represented to be paid by the mortgagors. That such mortgage or trust deed loans as defendant made for the deceased he customarily made in his name, and thereafter assigned them to the deceased. That a number of such loans were building loans, wherein the deceased would pay over to defendant the entire amount of said loan, and he would put the same in his own bank account and pay the same out to the mortgagor as the building progressed. That on said mortgage and trust deed loans defendant collected from the borrower a 3 per cent. commission and kept it, and required the said borrower to purchase insurance on the building so mortgaged through him as an agent, and on which he collected and retained a commission.'

"In action L.A.No.16044, appellant Q. A. Knouse as plaintiff sued respondent as defendant on a promissory note in the sum of $2,012, alleged to have been executed by deceased for a valuable consideration. Appellant, as the foregoing finding indicates, was the trusted and confidential agent of deceased. On July 28, 1927, he, on a building loan arrangement, loaned $5,000 to Ripley H. and Chloe Hope, husband and wife, which was evidenced by a promissory note secured by a mortgage, both of which instruments were made out to appellant as payee and mortgagee, respectively. There was, however, nothing irregular in the fact that the note and mortgage were made in Knouse's favor rather than in favor of deceased, because the evidence also shows without contradiction that Knouse handled all of deceased's business in that manner, even to the point of carrying certain funds of deceased in his own bank account. In the instant transaction, however, Knouse testified that the mortgage was recorded and returned to him on August 15, 1927, and that some time between then and August 30, 1927, he transferred the note to deceased by indorsing the same over to her, but without recourse on him. He claimed further that he executed an acknowledged assignment of the mortgage to deceased. None was ever found, nor was one ever recorded. It also appears from the evidence that in spite of the alleged delivery of the note from appellant to deceased that all subsequent payments of interest on the note were indorsed thereon by Knouse in his own handwriting. Shortly after the full $5,000 had been loaned to the Hopes, the successors in interest of the Hopes defaulted in payment of interest, and within approximately a year thereafter appellant in his own name brought an action to foreclose the mortgage, alleging in the foreclosure complaint that he was the owner and holder of the note and mortgage. The foreclosure action was brought on December 2, 1929. In the meantime, however, appellant continued to pay interest to deceased on the Hope note until on or about July 6, 1931, on which later date he presented to deceased an account which had appended to it a promissory note in the sum of $2,012, payable to appellant within six months thereafter, which he caused deceased to sign, and which she did sign on that date.

"The instant action is upon said promissory note, the appellant contending that it represented interest payments which had been made to deceased after default on the Hope note, as well as money which he had advanced for payment of taxes for the property securing the Hope mortgage. On this particular subject of advancements, the trial court found on adequate evidence, '* * * That not over $1,200 in interest had been so advanced, nor had over $420 of advances for taxes on said mortgaged property ever been made by plaintiff. That plaintiff * * * obtained a note from said decedent for approximately $500 in excess of said interest payments and alleged advances for taxes.'

"The trial court also found upon sufficient evidence, 'that all said payments were made on said Hope mortgage by plaintiff voluntarily, and not at the request or with the knowledge of said deceased. That at the time said plaintiff obtained the note sued on in this action he claimed the ownership of said Hope mortgage and was foreclosing the same in his own name as owner and without the knowledge of said deceased. That there was, therefore, no consideration whatever for the execution of said note.'

"There was much evidence introduced as to the physical and mental condition of deceased, and based upon this evidence, the court found as follows: 'That at the time said purported account and promissory note were presented to said Mary Elizabeth Van Wagoner by plaintiff, she was an aged woman of about 65 years, and was suffering from a fibroid tumor in the uterus from which she had been suffering for many years, and was also suffering from anemia in an advanced stage, and from dropsy, and was mentally incompetent to transact any business.'

"In action L.A.No.16045, the evidence shows that on September 4, 1930, appellant Q. A. Knouse, and his wife, M. L. Knouse, loaned $4,200 to Miles W. Heimbecher and Mildred A. Heimbecher; that subsequently the Knouses assigned the Heimbecher note to deceased and guaranteed its payment. The Heimbecher note was defaulted, and respondent, as executor of the estate of deceased, sued appellant and his wife on their guaranty. In defense they pleaded a release which was executed by deceased on May 1, 1931, approximately five months prior to her death. The court found from ample evidence that the deceased was incompetent when she executed the release and that there was no consideration for the same. These findings were based on the same evidence as were the findings in the Hope note case, with additional evidence as to the mental and physical condition of deceased on the date of the execution of the alleged release.

"In action L.A.No.15549, respondent, as executor of the estate of deceased, sued for a rescission of the Hope mortgage transaction, alleging the facts which we have already recounted in our treatment of action No.L.A.16044, and additional facts accounting for his failure to bring the action for rescission at an earlier date by reason of negotiations for compromise which were had between respondent and appellant from the time respondent first learned the facts with reference to the said Hope transaction up to the time of the bringing of the action. Appellant raises no question of laches, however, and relies primarily upon his separate defense to said action pleaded as follows: 'That shortly prior to the death of said Mary Elizabeth Van Wagoner, (she) * * * for a valuable consideration released and discharged this defendant from any and all claims of every kind, nature and description whatsoever, by reason whereof plaintiff does not now have any claim against this defendant.' The pleading referred to two releases, the first executed on January 4, 1930, and the second on May 1, 1931. It will be recalled that the Heimbecher transaction took place between the two dates on which the releases were executed. With reference to this defense of release, the trial court found: 'That it is not true that shortly prior to the death of said Mary Elizabeth Van Wagoner, she, for a valuable consideration, or otherwise, or at all, released or discharged the defendant from any and all claims of every kind, nature and description whatsoever. In this connection, the court finds that the two purported releases, introduced into evidence by defendant, signed by said deceased * * * and purporting to release said defendant from any and all liability to her, were obtained through and by the undue influence of the defendant, who at the time said purported releases were signed by said deceased, and for many years prior thereto had been her confidential agent, trustee and financial advisor * * * that at the time said purported releases were signed by said deceased that she was wholly incompetent mentally by reason of illness and old age, to transact any business whatever and that defendant in obtaining said releases gave to said deceased no consideration whatever therefor, and that said releases were fraudulently obtained by said defendant.'

"The trial court also found as facts: 'That in the spring of 1932, plaintiff became suspicious of defendant and demanded delivery of any notes and mortgages in his possession belonging to the estate of said deceased. That even then defendant did not disclose that he had brought suit to foreclose said Hope mortgage as his own property and in his own name, but stated that plaintiff might have some trouble with the Hope mortgage, but that it would be all right. That it was not until the month of May, 1932, that defendant [plaintiff] discovered that said foreclosure suit was pending in the name of the defendant, and that the mortgagors had paid interest thereon for only fifteen months.

" 'That thereafter plaintiff and his attorney made a complete and thorough investigation of the handling of deceased's affairs by the defendant, and particularly the said Hope mortgage transaction. That after the plaintiff discovered that defendant had brought suit to foreclose the said Hope mortgage as his own property and in his own name, and that the prosecution of said suit had been grossly neglected for more than two years, the defendant then offered to turn the prosecution of said suit over to plaintiff, and to substitute the plaintiff herein as plaintiff in said foreclosure action.

" 'That after a full investigation of the entire transaction and on or about the 5th day of July, 1932, the plaintiff in writing notified defendant that he refused to accept the said Hope note and mortgage, or to allow substitution of himself for the said defendant, and did on said date rescind the purported assignment thereof to said deceased, and did thereupon tender back to defendant the said note and mortgage, and demand the payment to the plaintiff of the sum of $5,000 and interest thereon from the date of the payment thereof to said defendant by said deceased, less such sums of money as might have been received by said deceased from the defendant as interest thereon. That no objection was made to the form of said notice of rescission by defendant or said tender, but said defendant refused to pay the plaintiff said sum of $5,000, and interest as demanded. That between the 5th day of July, 1932, and the date of filing of said action, the plaintiff and defendant negotiated from time to time in an effort to effect a compromise of said claim or demand of the plaintiff, but such negotiations were finally abandoned, shortly before this action was commenced.'

[3, 4] "With reference to the physical and mental condition of deceased, appellant himself testified:

" 'Q. Didn't you know that, in July of 1931, this woman didn't have long to live? A. I didn't know how long she would live.

" 'Q. You thought she was going to die shortly, didn't you? A. Well, I thought that for five or six years before she died. I didn't think she would live so awfully long.

" 'Q. You had the feeling all the time, for four or five years, that she was approaching the end, before she did die? A. Yes, sir.'

"A Dr. Nimocks, physician to deceased and her lifelong friend, testified in part: 'Well, she was a woman about 72, and she was very much overweight. She was anemic. * * * She had known that she had had a fibroid tumor for 25 years and * * * had hemorrhaged periodically most of the time since then. Sometimes she would go for months without any severe hemorrhage and then again she would just hemorrhage a little, and then again, sometimes she would have quite a severe hemorrhage * * * two years before I took care of her, she was very sick, and they had had a consultation of physicians * * * she was in the hospital. And she had a heart lesion. She had a regurgitation, which was caused undoubtedly from weakened condition due to the hemorrhage. She also had some miocarditis, not so severe at that time, but it grew more severe as she continued hemorrhaging, her health was gradually failing as it would from repeated hemorrhages * * * in November, 1930. Her hemoglobin at that time was 35 per cent, and her red cells were about three million, and her color index was only 3 per cent—or rather, three-tenths of a per cent. * * * In fact, she couldn't walk through the house without getting short of breath, and if she went upstairs, she had to stop and rest. * * * I advised that she not be allowed to come downstairs. * * * And I tried then to have her take iron hypodermically, but she objected to it. She had quite a fear of the hypodermic needle, so I gave her a tonic of iron and other blood builders. * * * She was a very difficult patient, because she would refuse to take medicine. She would take a few doses and then refuse to take it any more, and from that time on, she gradually grew weaker and failed. I think about the 12th of April, that was the last time she was ever out of the house. * * * And the first of July, she went upstairs and was never downstairs again after that. * * * She should have been in bed * * * but she refused to do that, and insisted upon being up, * * * in the month of February (1931) she had a much more severe hemorrhage than she had been having, and was in bed for ten days and was very anemic. * * * She had quite a dropsical condition * * * in the legs * * * all that last summer * * * there was considerable dropsy in the abdomen,—considerable fluid in the abdomen. * * * It lowers all the processes of the body, and the mentality, as well as the rest. She used to say to me, when I would ask her about the hemorrhage, "Oh, I can't remember. Don't remember whether I hemorrhaged yesterday or not. I can't remember about it." She used to put her hand out like this, (illustrating) and say, "I can't remember, I am getting so I can't remember."

"'Q. That condition that you observed, regarding her statement as to failing memory,—how many months before that did you notice that condition? A. Well, more or less from the time of the call I made in November, 1930, but it grew more so, very much more so, along about April, and from then on.

"'Q. Was there any decided breakdown of Mrs. Van Wagoner after April, as the days went by, or the weeks? A. No; not decided. It was just a gradual decline, and she gradually grew weaker, and had more labored breathing on exertion, due to the lack of blood. * * * No, I would not say she was capable of reasoning and thinking after that. (April 12, 1931.) She couldn't keep her mind on anything any length of time. * * * She was very careless about the hemorrhage, and about leaving the evidences of it about the house. * * *

"'Q. I will ask you if, in your opinion, on the first day of May, 1931,—whether she was capable of transacting business and knowing the purport of a business transaction? A. I don't think so.'

"Dr. Rufus S. David testified in part:

"'Q. What is the effect upon the mentality of a patient who has a blood count of * * * 28 hemoglobin? A. It all depends on the age of the patient. * * * With a woman of her age, you couldn't expect to get any coherent answer * * * that you can depend upon. * * * I told her she should stay absolutely quiet in bed, and with the foot of the bed elevated * * * and she was out of bed, trying to move around. * * *

"'Q. In your opinion, at that time, could she take care of business matters? A. No.

"'Q. Or analyze them, or knew what was being done? A. No. * * * the woman must have been in that condition a year or more,—I would say at least a year.' There was other evidence to the same effect.

[5] "It is apparent that the finding, with reference to the incompetency of the deceased at the time she executed the note in the first action, and the releases, which were pleaded as defenses in the latter two, is amply sustained by the evidence. It follows that we could not, even were we disposed to do so, disturb this finding on appeal. 2 Cal.Jur. p. 921, paragraph 543; Andrews v. Reidy, 131 Cal.App. 334, 336, 21 P.(2d) 457. We find no other points on appeal which merit specific attention."

The judgments in all three cases are respectively affirmed, and since there is no appeal authorized from an order denying motion for a new trial on facts such as these, the appeal in each case from such order is dismissed.

We concur: WASTE, C. J.; EDMONDS, J.; THOMPSON, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

8 Cal.2d 522

CORONA FOOTHILL LEMON CO. et al. v. LILLIBRIDGE et al.

L. A. 15308.

Supreme Court of California.

March 29, 1937.

Rehearing Denied April 26, 1937.

1. **Waters and water courses 🔑152(8)**

Evidence in suit involving right to underground water *held* to sustain finding that entire Corona area in which plaintiffs' and defendants' lands were located constituted a water basin or underground reservoir.

2. **Waters and water courses 🔑152(8)**

In suit to determine right to underground water, evidence *held* to sustain finding that there was no surplus water over and above amount required to serve reasonable beneficial use on overlying land, justifying decree enjoining defendants from exporting water.

3. **Waters and water courses 🔑152(10)**

In suit involving right to underground water and right of defendants to export water, where evidence showed that there was no surplus water over and above amount required to serve reasonable beneficial uses on overlying lands, and court found that overlying landowners put all water in field to reasonable beneficial use and that it was necessary to augment supply by importation of outside water, determination of extent and character of correlative rights of parties and of amount of water to which each was entitled, *held* not necessary before determination of whether there remained surplus water subject to exportation by defendants (Const. art. 14, § 3, added in 1928).

4. **Waters and water courses 🔑152(1)**

Actions involving water rights are often, in effect, actions to quiet title, but there may properly be an action to enjoin withdrawal and exportation of underground water where quieting of title is not involved.

5. **Pleading 🔑72**

Prayer of complaint must be read in light of allegation of complaint.

6. **Waters and water courses 🔑152(5)**

In suit to determine defendants' right to export underground water, prayer containing request that court determine respective rights of plaintiffs and defendants in underground waters *held* immaterial where body of pleading contained no averments which called for adjudication of respective rights of overlying landowners as between themselves.

In Bank.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Suit by the Corona Foothill Lemon Company and others, against Charles E. Lillibridge and others. From an adverse judgment, defendants appeal.

Affirmed.

W. G. Irving, of Riverside, A. W. Rutan, H. C. Head, Rutan & Mize and Head, Wellington & Jacobs, all of Santa Ana, and Barker & Keithly, of Los Angeles, for appellants.

Walter S. Clayson, of Corona, and Scarborough & Bowen, of Los Angeles (Guy Richards Crump, of Los Angeles, of counsel), for respondents.

EDMONDS, Justice.

The controversy presented by this case concerns the right to underground waters.

The respondents are owners of lands overlying what they claim to be the Corona basin. The appellants, it is charged in the complaint, about the month of July, 1930, began pumping water in large quantities from wells situated on their lands also in the basin, which water they transported through an open ditch into the Santa Ana river and finally to points outside of the basin; that during the summer and fall of 1930 appellants so exported from the basin more than 500 miner's inches of water per day (the term "miner's inch" being used to specify 1/50th of a cubic foot of water per second), and sold such water for use on lands in Orange county, more than 10 miles from the basin; that between October, 1930, and March, 1931, appellants bored additional wells and enlarged their pumping plants and facilities for the purpose of increasing their exportation of water; that about April 1, 1931, they resumed their exportation activities and transported from the basin large quantities of water, allegedly in excess of 800 miner's inches, continuous flow. It is also alleged that appellants' pumping operations and exportation of water have depleted the water in the basin, and that a continuance of these acts will exhaust it, to the respondents' irreparable loss and injury.

Appellants Lillibridge and Anaheim Sugar Company filed separate, similar answers denying the material allegations of the complaint and setting up separate defenses. They admitted exportation of water, but specifically denied that their activities had or would in the future injure the respondents or lower the water plane under the respondents' lands. Their main defense, which is also their major contention on appeal, is that there is no such physical or hydrological structure as the 25-square mile Corona underground water basin described in the complaint. They allege that the sole underground water basin existing within the exterior limits of the 25 square miles referred to as the Corona area is a smaller area or underground reservoir known as Temescal wash or Temescal underground reservoir, having a superficial area of about 4.7 square miles (specifically described), over which lie their lands and the lands of some, but not all, of the respondents. The pleadings thus placed sharply in issue the existence and extent of the underground reservoir in the Corona area, the alleged injurious effect of appellants' activities, and the rights of the parties with respect thereto.

On issues so joined the cause went to trial. By stipulation during the trial the plaintiffs Corona Foothill Lemon Company, Quilici, and Kirkley were permitted to withdraw and the complaint as to their claims was dismissed. At the close of the trial the court made findings in favor of the remaining plaintiffs, in substance upholding the allegations of their complaint. The court found that Corona basin exists with exterior boundaries as alleged by the respondents; that it has a natural water supply, with water therein everywhere in contact, constituting a natural underground reservoir. It found that the natural supply in the basin does not amount to as much as the annual supply required and now put to a reasonable and beneficial use on lands overlying the basin, but that the natural supply has been augmented for many years by water imported into the basin by Temescal Water Company; that even with such additional imported water spread upon lands in the basin there is no surplus of water therein and not more than the amount necessarily required for domestic uses and irrigation of overlying lands. It found that appellants' pumping and exportation operations had been conducted substantially as alleged and that these activities had materially lowered the water plane in Corona basin and in the respective wells of respondents and were depleting and would ultimately exhaust the water therein, to the respondents' irreparable loss and injury.

The judgment upon these findings decreed that appellants and respondents "have equal and correlative rights in, and are entitled to take water from, said body of underground percolating water within said Corona basin for reasonable and beneficial uses upon lands overlying said basin and entitled thereto"; that the present uses of water by the parties on overlying lands are reasonable and beneficial, but that respondents' rights are paramount to the rights of appellants to export water, which exportation has caused and will continue to cause the respondents irreparable loss and injury. By the judgment the appellants are permanently restrained and enjoined from withdrawing water for any purpose other than reasonable and beneficial uses on overlying lands. The appeal is from this judgment.

The city of Corona is, and for many years has been, the center of one of the principal citrus developments in the state of California. It is situated in the northwesterly part of Riverside county, in the lower Temescal Valley. The water supply for this area is obtained from wells sunk in the valley and from water imported from other sources by the Temescal Water Company.

The gravamen of respondents' complaint is that, as overlying landowners, they have the paramount right to all water which naturally finds its way into the basin which they contend exists in the lower Temescal Valley. They assert that there has been a gradual lowering of the water plane over a period of many years, which has persisted despite a substantial artificial addition to the supply from foreign sources, and that the effect of the continued exportation of water by appellants will be to deplete and exhaust the basin, thus depriving them of the water necessary for irrigation and for domestic use.

Temescal Valley extends from Elsinore Lake to the Santa Ana river. Its natural water supply, except in years of extraordinary rainfall, is derived at least in part from local precipitation, drainage from the adjacent mountains and hills, and percolation which feeds into the lower Temescal Valley through the Arlington gap, almost due east of the city of Corona. An additional supply is obtained from return waters placed upon the lands in the lower valley from the imported supply furnished by the Temescal Water Company. Temescal creek, which forms the drain of the valley, is an intermittent stream, with no surface flow except during and immediately after heavy rains.

To the west of the valley lie the Santa Ana mountains, and to the east the Gavilan hills and La Sierra ridge. Approximately 3 miles southeast of the center of Corona, the valley narrows to a natural cut in the hills, and at this point there is a geological obstruction in the floor of Temescal creek, generally referred to as a submerged dam. This not only forms a natural barrier or division between the Upper or Little Temescal Valley and the lower valley, but it also divides the upper underground water basin from the lower basin. Above the submerged dam, the valley at its widest point is approximately 2 miles wide; the average width is considerably less. Below the submerged dam, the valley widens out and forms what is known as the Corona area. The lands of respondents Otis, Fisher, Kuster, and Waterbury, as a copartnership and as individuals, a small portion of the Clark lands, and the lands of appellants overlie that portion of the Corona area called Temescal wash. The greater portion of the Clark lands and the lands served by respondent Orange Heights Water Company are situated in the remainder of the area north and south of Temescal wash.

Respondents claim that the entire Corona area, a triangularly shaped territory of about 25 square miles surrounding the city of Corona, contains an underground basin with the water therein everywhere in contact. They assert that all of this area is a portion of the hydrographic basin of Temescal creek and its tributaries, extending some 5 miles upstream from the point of confluence of this creek with the Santa Ana river.

The position of the appellants is that the only part of the Corona area which may be properly denominated an underground water basin or reservoir is that called Temescal wash, a strip of approximately 4.7 square miles which follows the course of Temescal creek. The strip may be roughly pictured as the trough of a valley. The sloping sides of the valley to the north and south are called respectively the Norco Mesa and Corona slope and have an area of some 21 square miles. This formation, with its trough and sloping sides, comprises the 25 square miles designated as the Corona area. If the northerly and southerly slopes join with Temescal wash to constitute one water basin, as respondents contend and as the trial court found, then concededly there is no surplus water in the basin for exportation. But if the extent of the underground reservoir is limited to Temescal wash, as the appellants attempted to prove, then there may or may not be surplus water available for exportation and use outside the basin.

The trial court found, as already stated, that Corona basin exists to the extent and with exterior boundaries as alleged by respondents. Appellants' major contention on appeal is that the evidence does not justify this finding. The trial was a protracted one and the record shows voluminous evidence of a highly conflicting nature. Well qualified witnesses on each side testified concerning the geology of the area, its hydrology, and the relative permeability of soils in Temescal wash, on Norco Mesa and on the Corona slope. Underlying water contours were traced and the discharge of the various wells throughout the area was stated. The record presents thirteen volumes of evidence, more than 6,600 pages, and numerous exhibits.

Appellants argue that respondents failed to sustain the burden of proof and show by a preponderance of the evidence that the entire Corona area constitutes a water basin or underground reservoir, as appellants define that term. Appellants contend that in Norco Mesa and Corona slope no substantial amount of water has ever been found and that such as has been found is mere soil water. They also contend that only in that portion of the Corona area denominated Temescal wash can there be found sand and gravel of free permeability or other porous material capable of holding a subterranean supply of water movng slowly through the land by the process termed percolation; that only in Temescal wash can water be obtained in any quantity sufficient for the development and improvement of overlying lands.

In support of this contention, appellants first refer to evidence describing the geology and hydrology of the area and its underground formation as depicted by various map and model exhibits and as explained by the respective expert witnesses. Much of this evidence is necessarily of a highly technical character. It adverts to the claimed formation of the Corona area as one of several depressed fault blocks caused by the uplifting of the Santa Ana mountain range, to the development of Temescal creek along the general course of the fault zone, to the history of the Santa Ana river and its tributaries, and to the history and age of respective rock formations and alluvium deposits throughout the territory. Between geologists and hydrologists there are substantial points of agreement and also decided points of material disagreement. This evidence all bears upon the ultimate fact as to whether the entire Corona area constitutes a single underground water basin or reservoir.

Appellants also produced evidence to show that the formations in Norco Mesa and Corona slope, of granite and metaphoric rocks, cretaceous rocks and marine sedimentary rocks of the eocene and tertiary age, are practically impervious to water except where fractured or faulted, whereas the formations of Temescal wash are of more recent origin, composed of sands, gravel, and recent allivium deposits, highly permeable and saturated with water, constituting the only underground reservoir existing in the area. But there is in contradiction of this evidence ample proof which, if believed by the trial court, supports its conclusion that the underground reservoir embraces the entire Corona area.

As already pointed out, the Corona area lies in a "U" formed valley dropping toward the confluence of Temescal creek with the Santa Ana river. Corona slope and Norco Mesa form the sloping sides of this valley; Temescal wash is the trough or drain, and respondents admit that it therefore yields a larger quantity of water than is to be found elsewhere in the valley. They strenuously deny, however, that Temescal wash marks the limits of the underground basin existing in the area, and they refer to abundant evidence supporting their position. There is much to show that the recent alluvium and other water-bearing deposits of the Corona area are not confined to Temescal wash, but continue throughout the Corona slope and Norco Mesa, excluding only the kidneys, lozenges, monadnocks, or islands of impermeable material which are to be found in any basin. In other words, there is evidence that permeable materials exist in the entire Corona area and are all interconnected around and about in various ways to constitute one basin with water in contact throughout. There is evidence that underground water from Corona slope and Norco Mesa is in contact with the water in the Temescal wash and that there is underground seepage and percolation from both slopes in contact with the underflow of the Temescal underground area. It also appears that the entire Corona area, with the exception of the islands referred to, has pores saturated with water, and that to this extent the water is in contact throughout the area.

[1] Appellants contend that the output of wells bored on the Corona slope and Norco Mesa demonstrate that those areas are not part of the common underground water basin, and they contrast the large discharge of wells in Temescal wash with the smaller output of wells on the slopes. In fact both parties make exhaustive reference to well logs, water contours, well data, location of wells, classes thereof, output, and observations, and measurements of water elevations in support of their respective contentions. They advance conflicting claims as to the correctness or incorrectness of the water contours as depicted on certain of the exhibits, and they draw different conclusions as a result of their respective reviews of this proof. But within this evidence, which from its nature does not lend itself easily to concise review, there is found ample support for the conclusions of the trial court.

[2] Appellants' second contention is that the court erred in finding that there was no surplus water over and above the amount required to serve reasonable beneficial uses on overlying lands. But in making this contention appellants concede that if the entire 25 square mile Corona area constitutes a territory entitled to draw water from the underground basin, then there is no surplus of water over and above that required to serve the paramount rights of overlying landowners. As the evidence supports the trial court's findings concerning the extent and boundaries of the basin, this second contention has no merit.

Lastly appellants urge that the trial court erred in failing to determine the extent and character of the correlative rights of the parties; that is, that the trial court should have adjudicated, as between the overlying owners, the amount of water to which each was entitled before undertaking to decree whether there remained in the basin any surplus water which might be subjected to appropriation and exportation by appellants. In this connection, appellants rely largely on the recent case of Tulare District v. Lindsay-Strathmore Dist., 3 Cal.(2d) 489, 45 P.(2d) 972.

The Lindsay-Strathmore Case was an action by appropriators, riparian owners, and overlying landowners to quiet their title to the surface and underground waters of the Kaweah Delta as against the defendant irrigation district and to enjoin the district from pumping water and transporting it out of the Kaweah watershed. The trial court found that defendant's exportation activities were injuring plaintiffs and gave judgment perpetually enjoining the irrigation district from pumping or transporting water for use without the delta. It did not decree, as between the parties plaintiff, the amount of water to which each was entitled.

Upon appeal this court modified the judgment and ordered a new trial as to particular issues. The opinion points out that so far as plaintiff riparian owners were concerned, the trial court predicated its findings upon the doctrine (which was the law at the time the judgment was entered) that a riparian owner, as against an appropriator whose right had not ripened into a right by prescription, was entitled to the full flow of the stream without diminution by the appropriator. However, after the trial of the case, article 14, section 3, of the Constitution (the amendment added in 1928) became effective and applicable to the case. This amendment made the rights to water as between riparian or overlying owners and appropriators dependent upon the amount which each was putting or could put to a reasonable beneficial use. This court held that under the constitutional mandate it became necessary to determine whether the riparian and overlying owners in the particular field, considering the needs of all, were putting the waters to reasonable beneficial use and whether, after a consideration of such use, there was a surplus in the water field subject to appropriation by defendant.

The logic of the holding is obvious. As the rights of the riparian and overlying landowners were limited to the amount of their actual or prospective reasonable beneficial use of the water, and the rights of the appropriators were limited by their respective appropriations, the amount to which each was entitled had to be adjudicated before it could be determined whether there was a surplus in the field subject to appropriation.

[3] But in the present case the evidence shows there was no surplus. Also, the trial court made complete findings as to the very elements lacking in the Lindsay-Strathmore Case. In the present case the court found the overlying owners were putting all water in the field to reasonable beneficial use, and that it was necessary to augment the supply by importation of outside water in order to supply their requirements for reasonable and beneficial use. This finding conclusively shows there is no surplus for exportation, and it was unnecessary to determine the amount of water to which each of the respondents was entitled. Such a determination would not be decisive in the present case as all of the water users whose lands overlie the Corona basin are not parties to the judgment.

[4] Appellants argue that every action involving water rights is an action to quiet title wherein the exact amount of water to which each party is entitled must be decreed. Actions involving water rights are often, in effect, actions to quiet title, as said in the Lindsay-Strathmore Case. But this general language does not cover all cases, and there may properly be an action such as the present one to enjoin the withdrawal and exportation of water where the quieting of title is not involved. Strong v. Baldwin, 154 Cal. 150, 97 P. 178, 129 Am. St.Rep. 149; Omnes v. Crawford, 202 Cal. 766, 262 P. 722.

[5, 6] The prayer of respondents' complaint must be read in the light of its allegations. When so read, it is immaterial that the prayer contains a request that the "court determine and adjudge the respective rights of the plaintiffs and defendants herein, in and to the underground waters of Corona basin," for the body of the pleading has no averments which call for an adjudication of the respective rights of overlying owners as between themselves. The gist of the charge is that the entire Corona area constitutes an underground reservoir and that there is therein no surplus water subject to appropriation. This was also the theory upon which the case was tried. No record was made by either side which would serve as a basis for adjudicating the amounts used by the respective overlying owners. Neither was this necessary in view of the concession that if the larger area constitutes the basin, then there is no sur-

plus water not already being put to a reasonable beneficial use on overlying lands.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; THOMPSON, J.

19 Cal.App.2d 708

PEOPLE v. MILLER.

Cr. 2944.

District Court of Appeal, Second District,
Division 1, California.

March 24, 1937.

1. Criminal law 🔑351(10)

False statements made by one accused of the commission of a criminal offense constitute proper evidence of consciousness of guilt.

2. Robbery 🔑24(3)

Evidence *held* to sustain robbery conviction where victim identified defendant as robber, and where defendant, when accused of commission of the robbery, made false statement as to his whereabouts at time of robbery.

3. Criminal law 🔑939(1), 958(4)

Before motion for new trial on ground of newly discovered evidence may prevail, defendant must establish exercise of due diligence in endeavoring to discover such evidence before trial of action and to produce the evidence thereat, and also when motion comes on for hearing present affidavits of witnesses by whom newly discovered evidence is expected to be given, unless time is required to procure such affidavits (Pen. Code, § 1181, subd. 7).

4. Criminal law 🔑939(1), 958(4)

Court *held* not to have abused its discretion in denying defendant in robbery prosecution a new trial on ground of newly discovered evidence that inmate of penitentiary who resembled defendant had been near locality of robbery, and that a picture of the inmate was to be obtained, where there was no showing that inmate would give an affidavit nor that defendant made any effort to make early discovery of alleged evidence and produce it nor of time when information was received regarding such evidence (Pen.Code, § 1181, subd. 7).

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Charles Miller was convicted of robbery, and he appeals.

Judgment affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

HOUSER, Presiding Justice.

From a judgment of his conviction of the crime of robbery, as well as from an order by which his motion for a new trial was denied, defendant has appealed to this court.

Although stated severally and from different respective viewpoints, three of the points upon which appellant relies for a reversal of the judgment depend for their success upon the single specification, to wit, that the evidence was insufficient to support the judgment. In that connection, the principal evidence of guilt consisted in the identification, by the victim of the robbery, of defendant as the person who committed the crime. However, in addition thereto, it appeared that at a time after defendant had been arrested for the commission of the offense and was being detained in jail, at which time, in the presence of defendant, the victim asserted that defendant was the guilty person, on defendant's inquiry regarding the reason for such identification, and thereupon being informed that it was on account of the fact that he had "held me (the victim) up about two and a half years ago,"—in substance, defendant stated that such a thing was impossible, for the reason that he was "in jail at the time;" whereas, on the trial of the action it was testified by each of several witnesses, including defendant himself, that at the time in question defendant was not in jail, but that in fact he and his father were living together in an apartment house in the city of Pasadena.

[1] False statements made by one who has been confronted with an accusation of the commission by him of a criminal offense have repeatedly been held to constitute proper evidence of consciousness of guilt.

In the case of People v. Sampsell, 104 Cal. App. 431, 286 P. 434, 438, it was said: "As held in People v. Peete, 54 Cal.App. 333, 202 P. 51, false declarations made by an accused for the purpose of misleading or warding off suspicion, though not conclusive of guilt, may, nevertheless, strengthen the inference arising from the facts." To the same effect, in People v. Cole, 141 Cal. 88, 74 P. 547, language taken from the opinion of Judge Cooley, in People v. Arnold, 43 Mich. 303, 5 N.W. 385, 38 Am.Rep. 182, was used as follows: "Thus, it may be shown that he made false statements for the purpose of misleading or warding off suspicion; though these are by no means conclusive of guilt, they may strengthen the inference arising from other facts." See, also, People v. Farrington, 140 Cal. 656, 74 P. 288; People v. Clark, 2 Cal.App.(2d) 743, 38 P.(2d) 796; People v. Zabriski, 135 Cal.App. 169, 26 P.(2d) 511; People v. Peccole, 92 Cal.App. 470, 268 P. 473; People v. Garcia, 83 Cal. App. 463, 256 P. 876; People v. Johnson, 51 Cal.App. 464, 197 P. 135; People v. Cox, 29 Cal.App. 419, 155 P. 1010.

From testimony that was given by the victim of the robbery, it appears that the greater part of the face of the robber was concealed from view by means of a cap which he wore pulled down over the upper part of his face. His eyes were not visible; nor below his collar was any portion of his face or neck to be seen. In other words, all that the victim could see of the facial anatomy of the robber was that which lay between the lower half of his nose and immediately above his collar. The victim of the robbery had never seen the robber before the occasion when the robbery occurred; nor did he ever see him again until after nearly two and one-half years had elapsed following the date of the robbery. Nevertheless, the identification of defendant as the robber, by the victim, was unhesitating, complete, and most positive. However, on the trial, in addition to the bare fact of identification, the victim described the outer clothing and the cap which he stated were worn by the robber at the time when the crime was committed, but otherwise was unable to give details as to his shoes, necktie, etc. His suit of clothes and his cap were described as "a brown suit, with white or gray stripes, * * * about three-quarters of an inch, with a light tweed cap." But regarding the rest of the robber's clothing the victim said, "I don't recall any other articles of clothing, the color, design, or anything." However, "his hair was blond." He "saw his sideburns below his cap." The victim first testified that the robber "shoved a gun in my stomach;" but on cross-examination stated that the robber had his hand in his pocket and that the victim saw the "outline" of what appeared to be a "gun" in the coat of the robber; that the robber was about "five feet eight inches" tall, and that he weighed from 138 to 150 pounds.

On behalf of defendant, each of several witnesses in substance testified that, although she had known defendant very well for some time preceding the date of the robbery, she had never seen him wear either a brown suit of clothing or a cap of any description; which testimony was corroborated by the father of defendant, who testified that defendant never owned a cap or a brown suit of clothing; nor did he ever own a "gun." In addition to his denial of guilt, defendant also corroborated all such testimony. Furthermore, he testified that with his shoes "off" he was "five foot eleven" tall, and that at the time when the robbery occurred he weighed "around 165 to 168 pounds."

[2] Taken at its face value, and solely from a legal standpoint, it is apparent that sufficient appears in the evidence to have authorized the jury to reach the conclusion that defendant was guilty of the offense; nor, again from a legal standpoint, would this court be justified in declaring that the testimony that was given by the victim of the robbery was inherently improbable,—from which, with relation to appellant's specifications of error, it follows (1) that by reason particularly of the sufficiency of the evidence the judgment was not against law; (2) that the trial court committed no reversible error in denying defendant's motion for a new trial; or (3) in refusing to "instruct" the jury to acquit defendant. People v. Green, 93 Cal. App. 435, 269 P. 687, and cases there cited; People v. Oakleaf, 66 Cal.App. 314, 226 P. 24; People v. Miller, 139 Cal.App. 644, 34 P.(2d) 788; People v. Dunlap, 12 Cal.App.(2d) 333, 55 P.(2d) 522.

Appellant also asserts that "the court erred in refusing to give the defendant time in which to secure and present affidavits containing newly discovered evidence in support of the motion for a new trial where the said affidavit in support of the evidence was only obtainable out of the State of California and it was impossible to produce same at the time of the motion for a new trial."

Defendant's notice of intention to move for a new trial included the ground of "newly discovered evidence;" but neither accompanying such notice, nor at all, did he file any affidavit which purported to contain a statement of what the "newly discovered evidence" would consist. With reference thereto, when the motion came on for hearing, among other things, the attorney who represented defendant stated:

"I have set up as one of those grounds in there, that it is our intention to file newly discovered evidence, providing we can find it. The situation is that I am not ready to present this newly discovered evidence this morning, in that I have received information that there was a chap in Pasadena, at the time of this alleged robbery which was on February 2nd, 1934, who was known to look a great deal like Charles Miller (defendant) and who was in possession and wore a brown striped suit and a tweed cap at various and odd times while living in Pasadena. I understand that the lad is now incarcerated in a penitentiary in the East and is doing time. I had tried to get from the Bureau of Identification a picture of this one person, Mr. Lyle (?), so that I could take it over and present it to Mr. Wes Kelly, the complaining witness in this matter, and see if, in looking at this picture, he would realize that he had made a mistake in naming this defendant as the one that was in his door."

[3, 4] One of the rules which is applicable to a motion for a new trial on the ground of "newly discovered evidence" is that before such motion may prevail, the defendant must establish not only the exercise of due diligence by him in endeavoring to discover such evidence before the trial of the action and to produce the same thereat, but as well, that at the time when the motion comes on for hearing he must present affidavits of witnesses by whom the newly discovered evidence is expected to be given;—the exception thereto being that "if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all the circumstances of the case, may seem reasonable." Section 1181, subd. 7, Pen. Code. See, also, 8 Cal.Jur. 427, 431. Apparently no showing was made by defendant in regard to any endeavor on his part to comply with the terms of the statute. The probabilities are that, if on the date when the robbery occurred "there was a chap in Pasadena who was known to look a great deal like Charles Miller (defendant) and who was in possession (of) and wore a brown striped suit and a tweed cap," such facts would have to be established by witnesses who were available as such both at the respective times when the trial was had and the motion was heard. It may be that if an affidavit could have been procured from the described person, it, also, would have been useful; but nothing in the record herein even indicates the possibility that that person would give such an affidavit; moreover, neither from the same, nor from any other source, is it disclosed that defendant made any effort either to make an early discovery of such alleged evidence, or to produce it at any time; nor does it show on what date the attorneys for defendant "received information" regarding the "newly discovered evidence." The fact that at some indefinite time the attorney who represented defendant "had tried to get from the Bureau of Investigation a picture of this one person, Mr. Lyle (?), so that I (she) could take it over and present to to Mr. Wes Kelly the complaining witness in this matter, and see if, in looking at this picture, he would realize that he had made a mistake in naming this defendant as the one that was in his door," was wholly immaterial. Considering all such facts in connection with the motion for a new trial, it may not properly be asserted that the trial court abused its discretion in denying it.

No error appearing in the record herein, the judgment and the order by which defendant's motion for a new trial was denied are affirmed.

We concur: YORK, J.; DORAN, J.

20 Cal.App.2d 18

PEOPLE v. MURPHY.

Cr. 345.

District Court of Appeal, Fourth District, California.

March 25, 1937.

1. Criminal law 🔑1068½, 1069(1)

Compliance with rule of Supreme Court and District Courts of Appeal as to time for and manner of perfecting appeal is mandatory (Rules of Supreme Court and District Courts of Appeal, rule 2, § 7).

2. Criminal law 🔑1104(6)

Appeal from judgment of conviction must be dismissed on people's motion for failure to perfect it within time and in manner required by court rule, where no excuse for delay is offered and application for transcript fails to state grounds of appeal in general terms and points on which appellant relies.

◆

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

W. K. Murphy was convicted of grand theft, and he appeals. On motion to dismiss the appeal.

Motion granted, and appeal dismissed.

J. Q. Gilchrist, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The appellant was convicted of the offense of grand theft and judgment was pronounced on January 8, 1937. Oral notice of appeal was given on that date. A written notice of appeal and a request for the preparation of a transcript were filed on January 15, 1937. The respondent has moved to dismiss the appeal on the ground that the same was not perfected within the time and in the manner required by rule 2, section 7, of the Rules of the Supreme Court and District Courts of Appeal.

[1] Compliance with the rule in question is mandatory and it has frequently been held that an appeal must be dismissed when the rule has not been complied with. People v. Lewis, 219 Cal. 410, 27 P.(2d) 73, and cases there cited.

[2] The appellant concedes that this court has the power to dismiss this appeal, but argues that the granting or denial of the motion is entirely within the discretion of the court. It is argued that this discretion should be exercised in favor of this appellant because no injury could thereby be inflicted upon any of the parties and because the delay in filing the application for a transcript in this case was so slight as to be negligible. Assuming, but by no means holding, that this court has any discretion in the matter, no reasonable excuse for the delay is offered and, so far as shown by the record, the requirements of the rule in question have not yet been complied with. While an application for a transcript was filed on January 15, 1937, this instrument fails to state in general terms the grounds of the appeal and is entirely silent as to the points upon which the appellant relies.

The motion to dismiss the appeal is granted, and the appeal is dismissed.

We concur: MARKS, J.; JENNINGS, J.

KEY NUMBER SYSTEM

---

20 Cal.App.2d 26

HILLSIDE PACKING ASS'N v. COWLES et al.

Civ. 5775.

District Court of Appeal, Third District, California.

March 26, 1937.

1. Agriculture 🔑6

Where fruit grower entered into marketing contract with co-operative fruit marketing association but retained right to withdraw on giving specified notice, agreement between grower and bank, to which association had agreed to make payment for fruit delivered, waiving right of withdrawal did not constitute binding contract between grower and association, since essential elements of meeting of minds and valid consideration was lacking, hence marketing association was not entitled to injunction preventing grower who had given proper notice of withdrawal from delivering fruit to another.

2. Agriculture 🔑6

Where marketing contract gave grower right to withdraw on giving specified notice, even if contract between grower and bank, to which marketing association had agreed to make payments on grower's fruit, whereby grower waived right to withdraw was for benefit of association, association was not entitled to injunction restraining grower from delivering fruit to another, where grower had given proper notice of withdrawal and grower and bank had expressly rescinded waiver before attempt had been made to enforce it (Civ.Code, § 1559).

3. Evidence 🔑318(2)

In marketing association's suit to enjoin fruit grower from delivering fruit to another on ground that grower's agreement with bank, to which marketing association agreed to make payments on grower's fruit, waiving right to withdraw from marketing contract, precluded grower from terminating marketing contract, bank manager's letter, suggesting terms on which bank would consent to grower's withdrawal from marketing contract, offered to explain circumstances surrounding making of waiver *held* incompetent as hearsay.

4. Appeal and error 🔑750(3)

Assignment that any erroneous ruling by virtue of which party is precluded from introducing evidence in support of his cause of action is an error of law even though evidence offered is of an inconclusive nature *held* insufficient to raise question of error in exclusion of evidence.

◆

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Suit by the Hillside Packing Association against C. O. Cowles and another. From an adverse judgment, plaintiff appeals.

Affirmed.

James R. McBride, of Lindsay, for appellant.

John Preston King, of Lindsay, and Farnsworth, Burke & Maddox and James K. Abercrombie, all of Visalia, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff, which is a co-operative fruit marketing association, has appealed from a judgment refusing to grant an injunction prohibiting the defendant, C. O. Cowles, from delivering his crop of oranges for the year 1934 to the Native Son Orchards Company, contrary to his written agreement with the association. The marketing contract which Cowles signed contained a clause permitting him to withdraw therefrom upon giving a specified notice. Cowles owed the Bank of America a sum of money. By the terms of his contract with the plaintiff he agreed to authorize it to pay the bank from his account with the association the sum of 10 cents per box for all fruit so marketed. Two months after signing the marketing agreement, the bank for its own benefit procured Cowles to sign a written waiver of the withdrawal clause of his contract. The association was not a party to that waiver. In June, 1934, Cowles notified the plaintiff of his withdrawal from the contract pursuant to the terms thereof, and subsequently contracted with the defendant MacDonald for the Native Son Orchards Company to market his oranges. The bank was not a party to the original marketing agreement, and it consented to his withdrawal from that contract.

The appellant contends that Cowles' waiver of the withdrawal clause of his marketing agreement precludes him from terminating the contract and that the injunction against delivering his crop of oranges to the Native Son Orchards Company should therefore issue.

The plaintiff is a nonprofit co-operative fruit-marketing association, duly organized, with its principal place of business at Lindsay in Tulare county. The defendant, Cowles, owns 207 acres of citrus fruit land in Tulare county. September 25, 1933, he signed a marketing contract with the plaintiff, agreeing to deliver to the association his entire crop of oranges produced on a specified 166-acre tract of his land for a term of fifteen years. Section 6 of that contract authorizes the producer to withdraw therefrom upon written notice served during the first fifteen days of June of any year within the term of the agreement. That paragraph reads in part: "Any party of the second part may be released from the terms of this agreement and end the same as to him, by filing with the secretary of the said party of the first part a written notice of his desire to be so released during the first fifteen (15) days of June of any year during the term of this agreement. Said release and termination shall thereupon become effective at the close of the then crop year. * * *"

At the time of executing the above crop-marketing agreement, Cowles owed the

Bank of America at Exeter the sum of $6,506.57. On the last-mentioned date Cowles authorized the association in writing to pay the bank from the proceeds of his account the sum of 10 cents per box on all of his fruit so packed and marketed. This request was accepted by the association in writing. The authorization reads in part: "You are hereby authorized to pay to the Bank of America at Exeter, California, and charge to my account, ten cents per packed box as part of the packing charges on the navel and valencia crops of oranges grown on my orange acreage in Tulare County, California, and which oranges are being shipped through your association."

About two months later, on November 18, 1933, independently of the plaintiff, and for the sole protection of the bank, it prepared and procured Cowles to sign a letter addressed to the Hillside Packing Association, notifying it of his waiver of the privilege of withdrawing from the marketing agreement as provided by section 6 thereof. This notice of waiver was executed without the knowledge of the plaintiff and without consideration therefor as between Cowles and the association. It was left with the bank and forwarded to the association by it. That notice contained the following paragraph: "* * * In consideration of your Association making this payment of ten cents per box as aforesaid to the Bank of America, Exeter Branch, until all the indebtedness owed to the Bank, together with interest, is paid in full, I hereby waive the privilege of withdrawing from your Association as provided in paragraph 6 of the contract which I signed with other members with your Association, until such time that the Bank of America, Exeter Branch, has been paid in full, together with all interest, by the payment of the ten cents per box as aforesaid by your Association to the said Bank of America."

June 13, 1934, with the knowledge and consent of the Bank of America, with which he had made other arrangements for payments to be made on his indebtedness, Mr. Cowles notified the plaintiff in writing pursuant to the terms of paragraph 6 of his marketing agreement of his withdrawal from the contract. On the last-mentioned date Cowles signed a marketing agreement to deliver all of his citrus fruit from the 166-acre tract of Tulare county land for the year 1934 and thereafter to the Native Son Orchards Company, of which R. O. MacDonald was president. As a part of the last-mentioned agreement, provision was made for the payment to the Bank of America on Cowles' indebtedness of 10 cents per box for all of his fruit packed and marketed thereunder.

The plaintiff refused to accept the withdrawal of the defendant Cowles from its agreement, contending that his previous notice of waiver of that privilege precluded him from doing so. In November, 1934, this suit was commenced to enjoin Cowles from delivering fruit from his Tulare orchards to the Native Son Orchards Company, or to any other party contrary to his contract with plaintiff. A temporary restraining order was issued. The cause was tried by the court. Findings were adopted favorable to the defendants. A judgment was accordingly rendered vacating the restraining order and denying the injunction. From that judgment the plaintiff has appealed.

[1] The injunction was properly denied. The waiver of paragraph 6 was not a part of the contract with plaintiff. It was an independent contract between Cowles and the bank. That waiver was procured two months later by the Bank of America solely for its benefit and without the knowledge of the association. It was executed without consideration as between Cowles and the plaintiff.

The waiver added a new provision and an additional burden upon Cowles from those which were previously included in his marketing agreement with the plaintiff. The waiver constituted a separate contract with the bank. Anderson v. Adler, 42 Cal.App. 776, 184 P. 42. But it was not a part of the contract with the association. It constituted a vital change in his contract with the association. Main St., etc., Co. v. Los Angeles Traction Co., 129 Cal. 301, 61 P. 937. To render the waiver a contract with the association it would necessarily have to include all the elements of a binding agreement with it, including the meeting of the minds of the respective parties and a valid consideration therefor as between Cowles and the association in order to bind them. State Loan & Trust Co. v. Cochran, 130 Cal. 245, 62 P. 466, 600; Alden v. Mayfield, 164 Cal. 6, 127 P. 45; Myers v. Herskowitz, 33 Cal.App. 581, 165 P. 1031. As between Cowles and the plaintiff, the waiver lacked these essential elements to render it binding.

Wilson v. Shea, 29 Cal.App. 788, 157 P. 543.

[2] The waiver was signed for the sole benefit of the bank and not expressly for the benefit of the association. On the contrary, it was not made for the benefit of the association at all. Moreover, it was expressly rescinded before any attempt was made to enforce it. Section 1559 of the Civil Code provides that: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

The testimony of Tom B. Coughran, the manager of the Exeter branch of the Bank of America, is conclusive of the fact that the waiver was procured by the bank for its exclusive benefit.

[3] It was not prejudicial error for the court to exclude from the evidence a certain letter from Mr. Coughran, the manager of the bank, to Cowles, dated October 31, 1933, suggesting the terms upon which the bank would consent to Cowles withdrawing from his contract with the plaintiff. The letter merely stated that the bank would not consent to a rescission of that contract unless Cowles first obtained a release of his contract from the American Fruit Growers, Inc., a guaranty that any other marketing agency with which he might subsequently contract would pay to the bank 10 cents per box for all his fruit delivered to it, and an agreement that the Security First National Bank of Los Angeles would not interfere with such payment to the Bank of America of 10 cents per box. An objection to the introduction of this letter was sustained on the ground that it is incompetent, but it was marked for identification. The authenticity of the letter was not established. It was not referred to while the author, Mr. Coughran, was on the witness stand. It would be competent only as tending to contradict the evidence of the bank manager regarding the terms upon which he said the bank did consent to Cowles rescinding his agreement with the plaintiff. If the letter was intended to impeach him, the witness was entitled to have the letter called to his attention, so that he might explain the inconsistency, if any such variance existed. The only reason for the offer of this letter suggested by counsel for the plaintiff was "to explain the circumstances surrounding the making of that waiver." We are not informed of any manner in which it is contended the letter throws any light whatever on the execution of the waiver. It was clearly hearsay evidence, and it was incompetent.

[4] Moreover, the appellant assigns no reason in his briefs why he deems the exclusion of that evidence to have been erroneous. He does not even point out that particular ruling of the court as erroneous. All that he says regarding the effect of that ruling is the following indefinite and general statement, to wit: "Any erroneous ruling, by virtue of which a party is precluded from introducing evidence in support of his cause of action is an error of law even though the evidence offered is of an inconclusive nature."

This is an insufficient assignment of error.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

---

19 Cal.App.2d 683

DEMING et al. v. SMITH et al.

Civ. S. C. 38.

District Court of Appeal, Second District, Division 1, California.

March 23, 1937.

1. Deeds 🔑56(2, 3)

True test of delivery of a deed is whether in parting with possession of the conveyance grantor intended thereby to divest himself of title, and, if in parting with possession grantor gave up all power of control and dominion over the conveyance, there is a "delivery."

[Ed. Note.—For other definitions of "Deliver; Delivery," see Words & Phrases.]

2. Escrows 🔑8(1)

If, in delivering a deed to an escrow holder, grantor reserved right to recall the deed upon the happening of certain event, there is no delivery sufficient to vest immediate title in grantee.

3. Escrows 🔑13

Where deed is held in escrow subject to condition subsequent, there is no vesting of title in grantee until deed is delivered to grantee out of escrow, when title passes as of effective date of agreement under which deed was delivered into escrow.

4. Escrows 🔑9

Where mortgagors executed deed conveying mortgaged premises to mortgagee, after default in payment of mortgage, and placed it in escrow to be delivered to mortgagee if mortgage debt was not paid by a certain time, and to be returned to mortgagor if debt was paid by that time, or if mortgagee should institute foreclosure or fail to receive rentals to be applied on the debt, delivery to mortgagee at expiration of extended time for payment *held* valid, since conditions on which deed was to be returned to mortgagors were not optional with mortgagors, and all control of situation lay with mortgagees.

5. Escrows 🔑12

Putting deed to mortgaged premises from mortgagors to mortgagee in escrow, to be delivered to mortgagee if mortgage debt was not paid within a certain time and to be returned to mortgagors if debt was paid, *held* not to discharge mortgage debt until deed was delivered out of escrow.

6. Mortgages 🔑32(6)

Where deed to mortgaged premises from mortgagors to mortgagee was put in escrow, to be delivered to mortgagee if mortgage debt was not paid within a certain time and to be returned to mortgagors if debt was paid, deed *held* not a "mortgage," since, on delivery out of escrow, legal title would pass to mortgagee and parties would be presumed, in absence of intermediate estate or other equitable considerations, to have intended that debt be discharged as consideration for deed and mortgage merged in deed.

[Ed. Note.—For other definitions of "Mortgage," see Words & Phrases.]

7. Mortgages 🔑617

Burden is on mortgagee, who relied on conveyance of mortgaged premises, to show that right of redemption was given up deliberately and for adequate consideration.

8. Escrows 🔑1

That mortgagors were hurried, under threat of foreclosure after default on the mortgage, into entering an agreement whereby deed to mortgaged premises was put in escrow to be delivered to mortgagee if mortgage debt was not paid within a year and seven months, *held* not such unfair or oppressive dealing as to invalidate the agreement, since mortgagors had sufficient time in which to redeem and agreement benefited them.

9. Escrows 🔑1

Extension of time in which to pay mortgage *held* sufficient consideration to support agreement whereby deed conveying mortgaged premises to mortgagee was placed in escrow to be delivered to mortgagee if mortgage debt was not paid within time as extended.

10. Escrows 🔑10

Mortgagors who, in consideration of extension of mortgage, executed agreement whereby deed conveying mortgaged premises to mortgagee was placed in escrow to be delivered to mortgagee if mortgage debt was not paid within time as extended, *held* barred by laches from restraining delivery of the deed, where they took no steps to repudiate it until day before expiration of period of extension.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Suit for injunction by W. E. Deming and others against Catherine E. Dallett Smith and Title Insurance & Trust Company, wherein Catherine E. Dallett Smith filed cross-complaint to quiet title. From a judgment for defendants on both complaint and cross-complaint, plaintiffs appeal.

Affirmed.

Troy Pace and W. P. Smith, both of Los Angeles, for appellants.

O'Melveny, Tuller & Myers and Pierce Works, all of Los Angeles, for respondent Catherine E. Dallett Smith.

SHINN, Justice pro tem.

When the mortgage note of W. E. Deming and Ruth Deming in the sum of $125,000, given in 1926, and thereafter extended, fell due in February of 1933, negotiations were instituted for its further extension. On May 17, 1933, an agreement was reached for the extension until January 1, 1935, of the maturity of the debt, which amounted, with interest and taxes computed to May 15, 1933, to the sum of $135,747.54. This agreement, signed by W. E. Deming, owner of the property, his wife. Ruth Deming, and respondent Catherine E. Dallett Smith, in the form of written instructions to a title company as escrow holder, was accompanied by a grant deed of plaintiffs, appellants, to said respondent, holder of the note.

On December 31, 1934, this action was commenced to enjoin delivery of the deed by the escrow holder. A temporary restraining order which was granted upon the filing of the complaint was later dissolved, and the deed was delivered to the grantee out of the escrow.

Defendants answered, and Catherine E. Dallett Smith filed a cross-complaint to quiet title, which plaintiffs answered. Upon the trial, defendants' motion for judgment on the pleadings (the complaint and answers thereto) was granted. Trial proceeded upon the cross-complaint and answer thereto and judgment thereon was given in favor of cross-complainant, Catherine E. Dallett Smith, quieting her title to the land. Plaintiffs appeal.

The escrow instructions provided that the grant deed was to be delivered: (a) To the grantors or their order if the debt and advances should be paid on or before January 1, 1935; (b) to the grantors upon failure of the escrow holder for a period of three successive months to receive the rentals of the property to be applied on the debt, and in the further event that Catherine E. Dallett Smith, by reason of said default, should institute an action for the foreclosure of the mortgage; (c) to the grantee, Catherine E. Dallett Smith, if the debt should not be paid in full on or before January 1, 1935.

Appellants contend correctly that judgment on the pleadings should not have been given against them if their complaint stated sufficient facts to entitle them to all or any part of the relief which they sought. In their complaint they set out the escrow instructions to the title company. They make the contentions, among others, that the deed could not operate as a transfer of title because it was not delivered, and also that it was given as security only and therefore should be construed as a mortgage.

They base their first contention on the fact that the deed was delivered into escrow conditionally, in that, upon the happening of either of two events as stated, the deed was to be returned to the grantors. The right of the grantors to reclaim the deed upon payment of the debt or upon the institution of an action to foreclose the mortgage by the grantee had the effect, so appellants claim of retaining in the grantors a right of dominion and control over the escrow holder, with reference to the delivery of the deed, which robbed the transaction of an element essential to a valid delivery through escrow.

[1, 2] "The true test under which delivery is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor intended thereby to divest himself of title. If he did, there was an effective delivery of the deed. If not, there was no delivery." Williams v. Kidd, 170 Cal. 631, 638, 151 P. 1, 3, Ann. Cas.1916E, 703. If in delivering the deed to the escrow holder the grantors reserved the right to recall the deed upon the happening of certain events, there was no delivery. Kenney v. Parks, 125 Cal. 146, 57 P. 772. If in parting with possession of the deed they gave up all power of control and dominion over it, there was a delivery. Hudemann v. Dodson, 215 Cal. 3, 7 P.(2d) 997; Bury v. Young, 98 Cal. 446, 33 P. 338, 35 Am.St.Rep. 186; 9 Cal.Jur. 162.

[3, 4] Under the instructions given to the title company, the grantors parted with all control over the deed as that expression is used in the cases. Control passed to the escrow holder, to be exercised in accordance with the instructions. Because of the conditions under which the deed was held in escrow, there was no immediate vesting of title in the grantee, but when the deed was delivered to the grantee out of escrow, title passed as of the effective date of the agreement under which the deed was delivered into escrow. Conneau v. Geis, 73 Cal. 176, 14 P. 580, 2 Am.St.Rep. 785; Newport Bay Dredging Co. v. Helm, 120 Cal.App. 127, 7 P.(2d) 1039. Appellants contend that they did not part with control over the deed because they had the right to withdraw it from the title company upon payment of the amount of the debt and advances on or before January 1, 1935. But this right was not one which affected the sufficiency of the delivery to the grantee upon the failure of the grantors to pay the debt within the stipulated time. When the deed was placed in escrow the grantors had made up their minds to part with title to the property in the event they failed to pay the debt within that time. They reserved the right to pay the debt, but they did not reserve the right to change their minds or their instructions with reference to the delivery of the deed through the escrow. In McDonald v. Huff, 77 Cal. 279, 19 P. 499, it was held that a deed of a mortgagor, placed in escrow for delivery to the mortgagee in the event the indebtedness of the grantor was not paid

within a given time, was effectively delivered where the debt was not paid and the deed was delivered to the grantee out of the escrow in accordance with the instructions. The authority of that case has not been questioned in later decisions and is decisive upon the point.

The second contingency in which the deed was to be returned to the grantors was one in which the grantee, after default in the payment of rentals for a period of three months, should institute an action to foreclose the mortgage. This provision of the instructions is relied upon by appellants as attaching to the deposit of the deed in escrow a condition which invalidated the act of delivery to the grantee through escrow. It is contended that because the deed in such event was to be returned to the grantors, they retained some measure of control over it, and that its delivery into escrow was therefore not absolute. This condition, however, did not detract from the finality of the act of the grantors in placing the deed in escrow. They had no right to recall it. It was alleged in the complaint that the rentals in question had been assigned and were payable to the title company. Their payment was not optional with the grantors. The right of election was with the grantee to foreclose the mortgage or not, in the event of default. The grantors had no choice in the matter. The situation was not different in principle from one in which a grantor, selling through an escrow, is entitled to the return of his deed upon failure of the buyer to pay the purchase price. The control of the situation is with the buyer.

We conclude, therefore, that so far as the element of conditional delivery is concerned, no facts were stated in the complaint which would have rendered invalid the delivery of the deed out of the escrow.

[5, 6] It is next urged that the deed was given only as a mortgage and as additional security for the debt. The complaint, however, did not allege that the parties had that intention, nor did it allege facts from which such intention can be inferred. It was alleged that "the execution and delivery of said grant deed, as aforesaid, was not intended to and it did not terminate and/or discharge the obligation owed by plaintiffs to defendant Catherine E. Dallett Smith." It is quite clear that the delivery into escrow did not discharge the debt and that the relation of debtor and creditor continued. It was not alleged whether it was intended that the delivery of the deed out of the escrow should satisfy the debt. The conveyance, however, would have placed the legal title in the mortgagee. Therefore, in the absence of an intermediate estate or of equitable considerations sufficient to make it appear that no merger was intended, the mortgage lien would have become merged in the legal title and the debt would thereby have been extinguished. Such must be presumed to have been the intention of the parties, in the absence of an allegation of a contrary intention. Anglo-Californian Bank v. Field, 154 Cal. 513, 98 P. 267; 10 Cal.Jur. 606; Jones on Mortgages (8th Ed.) vol. 2, p. 508. The facts alleged were therefore insufficient to show that the deed was intended to operate as a mortgage. They show rather that it was intended as a conveyance of the entire estate of the grantors in satisfaction of the debt for which the mortgage stood as security. No interest in the property passed to the grantee under any other conditions.

Appellants advance another theory. It was alleged in the complaint that the deed was executed in great haste, without the grantors having had sufficient time in which to read it because of the insistence of the attorney for the grantee that it must be executed and delivered to the title company within a stated time, and because of the statement of the attorney that if it was not so delivered the mortgage would be foreclosed and a deficiency judgment would be taken against plaintiffs, W. E. Deming and Ruth Deming, as makers of the note. It was also alleged that the value of the property exceeded the amount of the indebtedness by the amount of $281,850.

[7, 8] The circumstances under which it was alleged that the deed was executed were set forth at length, but reduced to substance, showed only that plaintiffs were hurried into the actual execution of the deed without sufficient time to consider the same and under the fear that the creditor would resort to legal proceedings for the collection of the debt if the deed were not given. As supporting their theory that the pressure thus exercised upon them, together with the great excess in the value of the property over the amount of the debt, would call for equitable relief for the rescission of the contract or by injunction to stay its enforcement, appellants cite Bradbury v. Davenport, 114 Cal. 593, 46 P. 1062, 55 Am. St.Rep. 92, which holds, in brief, that the transfer of a mortgagor's interest in land to the mortgagee in satisfaction of the mortgage debt will be held invalid if it appears

that the consideration for the transfer was unreasonably small or if any unfair advantage was taken of the mortgagor in the transaction. Under the rule as thus stated, the burden is upon the mortgagee to show that the right of redemption was given up deliberately and for an adequate consideration. These rules, which enjoin upon the mortgagee the strictest duties of fair dealing in such transactions cannot be applied to the facts alleged in the complaint before us. Giving full effect to the allegation of the great value of the property, we are unable to discern any inequity in the transaction. Plaintiffs were fully competent. Without any payment on account of the principal of the debt they were allowed more than one year and seven months within which to dispose of their property at its reasonable value. It was not alleged that they were unable to do so, nor does it appear that they were hindered in any way in such efforts as they may have made to dispose of it. The agreement was not unfair in this respect. It did not have the effect of depriving plaintiffs of their property at an unreasonable or unfair price. The extension of time was for their benefit and it would appear that they were better off with it than they would have been without it. The mortgagee did not have to grant any extension. Negotiations had been carried on from the 1st of January until the middle of May. The mortgagee was free to withdraw from them at any time. Her insistence that plaintiffs either execute the deed or refuse to execute it, for the consideration of an extension of time, was but the assertion of her legal rights in the premises.

[9] The complaint alleged that there was no consideration for the agreement under which the deed was placed in escrow. It may be conceded for our present purposes that the mere allegation that the agreement was wholly without consideration, standing alone, would be a sufficient allegation that no consideration was given for the agreement. But this allegation does not stand alone. It appears on the face of the complaint that from the 17th day of May, 1933, until the 31st day of December, 1934, plaintiffs had the benefit of the extension of the maturity of the debt. Having had the benefit of the forbearance of the creditor to enforce collection of the debt, how can they say that they have received no consideration? The facts alleged speak louder than the conclusions which plaintiffs draw from the facts. It is a familiar rule in the construction of pleadings that the conclusions of the pleader will be controlled by the particular facts alleged from which the conclusions are drawn. Little v. Union Oil Co., 73 Cal.App. 612, 238 P. 1066. It sufficiently appears from the complaint that plaintiffs' agreement was not without consideration.

[10] One of the defenses relied upon was laches, and this defense, in our opinion, was good. From May 17, 1933, to December 31, 1934, plaintiffs accepted the benefit of the transaction from which they seek to be relieved. They admit having received full knowledge of the terms of the agreement within a few days after it was signed. In fact, it was not alleged that they did not know of the contents of the instruments at the time that they were signed, but only that they did not have sufficient time to consider the same. They protested the terms of the agreement and sought a modification thereof, but their efforts were in vain. The mortgagee did not promise any new arrangement nor hold out any hope for one. No facts were alleged which could be deemed a legal excuse for the delay of one year and seven months in instituting action to avoid the agreement. Plaintiffs have had the full benefit in the form of an extension of time. This they cannot restore. It would be unjust to relieve them of the burdens of their obligations under these circumstances. The complaint in this respect failed to show sufficient grounds for equitable relief.

No error was committed in giving judgment on the pleadings in favor of defendants.

Judgment in favor of Catherine E. Dallett Smith upon her cross-complaint to quiet title was a necessary sequence to the failure of plaintiffs' attack upon the transaction. It may be added, however, that upon trial of the issue as to the value of the property, cross-complainant having assumed the burden of proof upon that issue, the finding of the court was that the property had a value of only $67,500 at all times between May 15, 1933, and January 18, 1935. It was further found that the deed was given and accepted in extinguishment of the mortgage debt and that plaintiffs were guilty of laches in delaying the institution of the present action. These findings are fully supported by the evidence.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

20 Cal.App.2d 108

PEOPLE v. HOPPER et al.

Cr. 1550.

District Court of Appeal, Third District, California.

April 1, 1937.

1. Criminal law 🔑1035(2)

Alleged error in setting on November 24th of grand theft prosecution for trial on November 30th on ground that accused were not given sufficient time to subpœna witnesses and prepare for trial *held* waived where accused failed to object or to request a continuance on November 30th when trial began (Pen.Code, § 1049).

2. Criminal law 🔑1172(6)

Judgment will not be reversed because instruction is given containing a mere abstract principle of law not applicable to case where it appears that no prejudice to defendant has resulted.

3. Criminal law 🔑1141(2)

Appellate court cannot presume error and burden is on appellant to show prejudice.

4. Criminal law 🔑814(19)

In grand theft prosecution, instructing on responsibility of defendant as an aider and abetter *held* not error on ground of absence of evidence that either defendant aided or abetted other in commission of offense, where instruction was not claimed to be incorrect, and jury were fully instructed on presumption of innocence, reasonable doubt, and burden of proof.

5. Criminal law 🔑1171(1)

In grand theft prosecution, uncalled for remark by assistant district attorney to effect that last five or six clients of attorney for defendants who had refused to talk had landed in San Quentin *held* not prejudicial.

6. Larceny 🔑65

Evidence sustained conviction of grand theft for stealing and carrying away a heifer.

7. Criminal law 🔑1001

Grant of probation to defendants convicted of crime rests largely in discretion of trial court.

8. Criminal law 🔑1147

Very strong showing of abuse of discretion on part of trial court is required to warrant interference in trial court's order denying an application for probation.

9. Criminal law 🔑1001

Denial of probation to defendants convicted of grand theft *held* not abuse of discretion where application was referred to probation officer who reported that defendants had on previous occasions been arrested on charges of disturbing the peace and assault and battery.

◆

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

John Hopper and another were convicted of grand theft, and they appeal.

Affirmed.

Chester Monette, of Eureka, for appellants.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Defendants are jointly accused of the crime of grand theft in the stealing and carrying away of one heifer. From the judgment of conviction and from the order denying a motion for a new trial, this appeal is taken.

As grounds for appeal, it is claimed the court erred in the setting of the cause for trial, in the instructions to the jury, insufficiency of the evidence to support the verdict, and misconduct of the district attorney.

[1] Appellants seem to place most emphasis for reversal upon their contention that the court erred in the setting of the case on November 24th for trial on November 30th, claiming they were not given sufficient time to subpœna witnesses and to prepare for trial. On November 20th the trial was set for January 11th; on November 24th, the defendants were again brought into court and were then represented by their counsel. At that time the court asked if they had any legal reason to show why the trial should not be had on November 30th instead of January 11th. Counsel objected, stating that November 30th followed so shortly after Thanksgiving day, that he doubted if their witnesses would be available. The court inquired as to the residence of the witnesses for the defendants and was informed by the attorney for the defendants that they resided in Fortuna in the county of

Mendocino. The court then directed that subpœnas be issued and placed in the hands of the sheriff for service. Objection was also made that the advancement of the date of trial would work a hardship on defendants in that it would not give them sufficient time to prepare their defense. This objection was overruled and the case was set for trial for November 30th. When the matter was called for trial on that day, no further objections of any kind were made by defendants, nor was a request for a continuance asked, but without objection the defendants proceeded to trial.

Section 1049 of the Penal Code provides, "after his plea, the defendant is entitled to at least five days to prepare for trial." There is no doubt that defendants had five days within which to prepare for their trial. Whether or not, however, this provision is modified by section 12a of the Code of Civil Procedure added in 1933 (St.1933, p. 304), which provides that when any act is required by law to be performed within a specified period of time, such period of time is extended "by such number of days as equals the number of holidays (other than special holidays) appointed by the President or by the Governor, and which occur within or during such period," need not be here determined, for in view of the failure to object or to request a continuance, at the time of trial this point has been tacitly waived.

In People v. Browning, 132 Cal.App. 136, 22 P.(2d) 784, 787, a reversal of the judgment was sought on the ground that a portion of the trial was conducted on a holiday. The trial began February 27, 1933, and proceeded until its close on March 2, 1933. In the meantime the Governor had proclaimed March 2d, 3d, and 4th, as public holidays. The fact did not become known to court or counsel until after the case had been submitted to the jury. Upon return of the jury, counsel objected to recording the verdict. The objection was overruled. Upon appeal, this court held, "There is no doubt that a judgment of conviction which is pronounced on a holiday over the express objection of an accused person is void. In re Smith, 152 Cal. 556, 93 P. 191; In re Dal Porte, 198 Cal. 216, 244 P. 355. But the irregularity of proceeding with judicial transactions on a holiday may be expressly waived, or tacitly waived by failure to object thereto." (Citing many cases.)

[2-4] As to the alleged errors in the instructions, it is claimed the court erred in giving to the jury an instruction upon the responsibility of a defendant as an aider and abetter. It is not contended by appellants that the instruction is an incorrect statement of the law in itself, but they contend there is no evidence that either defendant aided or abetted the other in the commission of the offense, and hence it was error to give an instruction upon that subject. However, a judgment will not be reversed because an instruction is given containing a mere abstract principle of law not applicable to the case, where it appears that no prejudice to the defendant has resulted. People v. Wolcott, 137 Cal.App. 355, 30 P.(2d) 601; People v. Robinson, 107 Cal.App. 211, 290 P. 470; People v. Tapia, 131 Cal. 647, 63 P. 1001. We cannot presume error, and the burden is upon the appellant to show prejudice, if any. It also appears the jury were fully instructed on the presumption of innocence, reasonable doubt, and the burden of proof.

[5] Appellant assigns as misconduct a remark by the assistant district attorney, to the effect that the last five or six clients of the attorney for defendants who had refused to talk had landed in San Quentin. It is here charged that this was an attempt to influence the jury against counsel by endeavoring to show to the jury that he represented guilty clients. This remark was uncalled for and should not have been made, but we do not see wherein the rights of defendants were jeopardized or that such remark resulted in a miscarriage of justice in this case.

[6] It is also urged that the evidence is insufficient to support the verdict of conviction against either or both of these defendants. We have read the entire record in which it appears that the calf which the defendants were charged with having stolen was taken from the field of the complaining witness some time between dusk on the evening of October 22, 1936, and 8 o'clock the following morning. Defendant Hopper was the owner of a Durant roadster, and on the evening of October 22d, Mr. and Mrs. Hopper called at the home of appellant Bacchetti and wife, and all had dinner together at the Bacchetti home. At about 11 o'clock that night Mr. and Mrs. Bacchetti took the Hopper car and drove from their home, passed the residence of the complaining witness and the field in which he pastured his stock.

Mrs. Bacchetti testified that the purpose of the trip was to obtain a couple of rabbits at the Hopper home which she wished to prepare for lunch which was to be taken by the four on a proposed trip the following day. Mr. and Mrs. Bacchetti both testified that they did not stop the car along the road, but a Mrs. Hyson testified that she heard a car stop on the road at about midnight on the night in question and heard a "thump" as though some object was being thrown into the car, and recognized the car as being the car of Hopper. A Mrs. Haight testified she was next door to the Hopper's home on the night in question, and at 1:30 o'clock in the morning of the 23d she heard an old car drive up to the Hopper premises, and there heard a "hacking" noise and men's voices.

An examination of the Hopper car the next morning showed fresh blood and cow hair upon the running board and in the back of the car. Buried beneath the corner of the Hopper house and on the premises were fresh lungs and meat, which was identified as coming from a calf. When officers came to investigate the conditions at the Hopper home the day following the loss of the calf, they found fresh blood in the back of the roadster and on the running board. When Hopper was asked about the blood on the car, he said, "You will have to ask Bacchetti." In the Bacchetti home the officers found in a wash tray a pair of overalls, a shirt, and towel. Blood was found on the side of the wash tray. On Hopper's shirt and overalls was found blood and hair. At the Hopper home under a box in the back yard was found a piece of beef lung, and buried beneath the ground near the corner of the house was found fresh beef lung, and in the yard a dog was eating a large piece of neck meat of a young animal. A neighbor testified she saw Mrs. Hopper burying something near the corner of the house about 8 o'clock on the morning of the 23d.

In the rear of the Bacchetti home some days later was found meat and ribs of beef. The officers found the imprint of an automobile tire near a break in the fence of the complaining witness, and where blood was found on the ground, and upon comparison of the imprint and the Hopper car, found they were similar.

A chemist testified the blood stains on the clothes and car were from a bovine animal. Another witness called as an expert testified the piece of lung and the pieces of meat submitted in evidence were from a calf.

We believe that this evidence, with other evidence of a similar nature found in the record, and certain evasions in the answer of the defendants, is sufficient to justify the verdict of the jury.

[7-9] Appellants also claim that the trial court abused its discretion in denying them probation. This is a matter, however, vesting largely in the discretion of the trial court. The record shows that the application for these defendants was referred to the probation officer, and he reported, showing that both of these men had, on previous occasions, been arrested on charges of disturbing the peace and assault and battery. It would require a very strong showing of abuse on the part of the trial court to warrant any interference in its order denying an application for probation, and no such abuse is here shown.

In view, therefore, of the entire record, we are of the opinion that the defendants were fairly tried and fairly convicted, and that no error of sufficient magnitude has been here shown to justify a reversal.

The judgment and order appealed from are therefore affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

* * *

20 Cal.App.2d 88

PEOPLE v. JAMES et al.

Cr. 2938.

District Court of Appeal, Second District, Division 2, California.

March 31, 1937.

1. Criminal law 🔑1144(13)

On appeal from conviction, evidence would be viewed most favorably to prosecution.

2. Robbery 🔑14

Voluntary return of personalty feloniously taken from another will not purge wrongful act of its criminality and prevent conviction of robbery.

3. Criminal law 🔑1175

Accused could not complain that verdict of jury finding him guilty of robbery in second degree was inconsistent with finding that he was armed at time of commission of offense, since alleged error resulted favorably to accused.

4. Criminal law ⚷1165(3)

Defendant cannot complain where determination of his case is more favorable to him than evidence warrants.

5. Assault and battery ⚷95

Guilt of accused charged with assault with a deadly weapon *held* for jury.

6. Criminal law ⚷878(4)

Verdicts finding accused guilty of robbery in second degree and of assault with a deadly weapon *held* not inconsistent, where police officers testified that after robbery was committed accused continually prodded officers with one of their guns and threatened to blow out their brains, and jury might have believed that accused was not armed at time of robbery, but that by act of robbery he armed himself and thereafter committed assault with a deadly weapon.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

A. H. James and others were convicted of robbery in the second degree and of assault with a deadly weapon, and A. H. James appeals.

Affirmed.

E. Neal Ames, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendant was convicted after trial by jury on (a) two counts of robbery in the second degree and (b) assault with a deadly weapon. The jury found that defendant was armed at the time of the commission of the robbery. The appeal is from the judgments and sentence pronounced thereon.

[1] Viewing the evidence most favorable to the prosecution (People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558), the facts in the instant case are:

April 29, 1936, defendant and two companions went to the home of Mr. Griffin and, after receiving no response to their summons, broke into his home and destroyed the furniture. While they were ransacking Mr. Griffin's home, two police officers entered the house, whereupon defendant and his two companions forced them to put their hands up and took the guns from each of the officers. They then compelled the two police officers to lie face down on the floor, tied their hands behind their backs, during which process defendant continually prodded them with a gun and threatened to blow out their brains. Thereafter defendant with his companions left the house and subsequently defendant returned to the police officer the gun which he had taken from him.

Defendant relies for reversal of the judgment upon the following propositions:

First: There is no substantial evidence to sustain the judgment of guilty of robbery in the second degree, because (a) the personal property taken from the police officer was returned to him by defendant, and (b) the verdict of the jury finding defendant guilty of robbery in the second degree is inconsistent with their finding that he was armed at the time of the commission of the offense.

Second: As to the judgment of guilty of assault with a deadly weapon, there is no substantial evidence to sustain the finding that defendant was armed with a deadly weapon.

[2] The first reason set forth in paragraph (a) of defendant's first proposition is untenable. The law is settled that the voluntary return of personal property feloniously taken from another will not purge the wrongful act of its criminality and prevent a conviction of robbery. People v. Anderson, 59 Cal.App. 408, 428, 211 P. 254; People v. Strauss, 75 Cal.App. 447, 456, 243 P. 67; People v. Beal, 3 Cal.App.(2d) 251, 253, 39 P.(2d) 504.

[3, 4] The reason set forth in paragraph (b) of defendant's first proposition is also invalid, since the alleged error, if any, resulted favorably to defendant. The rule is that defendant cannot complain where the determination of his case is more favorable to him than the evidence warrants. Pen. Code, § 1258; People v. Tugwell, 32 Cal.App. 520, 529, 163 P. 508; People v. O'Neal, 2 Cal.App.(2d) 551, 562, 38 P.(2d) 430.

[5, 6] The second proposition urged by defendant cannot be sustained. An examination of the record discloses there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the findings of fact upon which the verdict of guilty of assault with a deadly weapon was necessarily predicated. Thatch v. Livingston, 13 Cal.App.(2d) 202, 56 P.(2d) 549; Koeberle v. Hotchkiss, 8 Cal.

App.(2d) 634, 48 P.(2d) 104; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399. The point urged by defendant that, since the jury found defendant guilty of robbery in the second degree and therefore unarmed, he could not have been guilty of assault with a deadly weapon, is fully answered by the testimony of the police officers that after the robbery was committed defendant continually prodded them with one of their guns and threatened to blow out their brains. The two verdicts are therefore consistent, since the jury may have believed that defendant was not armed at the time of the robbery, but that by the very act of robbery he armed himself, and thereafter committed the assault with a deadly weapon.

For the foregoing reasons the judgments and sentences are and each is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

---

20 Cal.App.2d 113

COATES v. LAKE VIEW OIL & REFINING CO.

Civ. 1758.

District Court of Appeal, Fourth District, California.

April 1, 1937.

1. Sales ⇨418(4)

For breach of contract to deliver goods, buyer may recover difference between agreed price and market value of goods, unless buyer cannot supply himself, in which event measure of damages is actual loss sustained by reason of loss of advance or profit through agreements made in reliance upon fulfillment of seller's contract.

2. Sales ⇨418(7)

Where seller breaches contract to deliver article having no established market value, buyer may purchase similar article or reasonable substitute, and difference between contract price and reasonable market value of substitute purchased is of value in furnishing measure of damages; but, where buyer cannot obtain similar article or reasonable substitute, loss of profits is just element in admeasurement of damages.

3. Sales ⇨418(7)

In buyer's action for seller's failure to deliver gasoline, as respects amount of gasoline purchased as substitute, buyer *held* entitled to recover difference between contract price and price of substitute.

4. Sales ⇨418(7)

In buyer's action for seller's failure to deliver gasoline, where only small quantity of substitute was available, awarding damages for amount of undelivered gasoline on basis of difference between contract price and price of substitute *held* error, since proper measure of damages was loss of profits, if any.

5. Sales ⇨417

In buyer's action for seller's failure to deliver gasoline, where only small quantity of substitute was available, evidence tending to show only buyer's "gross profits" in selling gasoline *held* insufficient to authorize award of damages for amount of undelivered gasoline for which no substitute was purchased, since buyer could only recover for loss of "net profits."

> "Gross profits" are really not profits at all, for they generally refer to the excess in the selling price over the cost price without deducting the expenses of resale and other costs of doing business. "Net profits" are gains made from sales after deducting value of labor, materials, rents, and all expenses, together with interest or capital employed.
>
> [Ed. Note.—For other definitions of "Gross Profits" and "Net Profits," see Words & Phrases.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by J. L. Coates against the Lake View Oil & Refining Company, wherein defendant filed a counterclaim. From an adverse judgment, defendant appeals.

Reversed, with directions.

Lindsay & Gearhart, of Fresno, and Bradner & Weil, of Los Angeles, for appellant.

N. Lindsay South and G. L. Aynesworth, both of Fresno (John A. Hewicker, of San Diego, of counsel), for respondent.

MARKS, Justice.

Plaintiff recovered damages in the sum of $42,210.16 for the breach of a written contract whereby defendant agreed to furnish plaintiff motor fuel for one year commencing June 15, 1929. This appeal followed.

Defendant presents two grounds for reversal of the judgment: First, that the act of George E. Holmes, an employee of defendant, in signing the written contract which is the foundation of the action, was beyond the scope of his authority and not binding on defendant; and, second, that there is no evidence to support the findings of the amount of the damages awarded plaintiff.

After a study of the record we have reached the conclusion that the second specification of error is well taken and that the judgment must be reversed. We purposely refrain from a discussion of the first specification so that during a second trial the trial judge may be unhampered by anything we might say.

The complaint alleges the execution of a written contract dated July 3, 1929, signed by plaintiff and defendant acting through Holmes. The contract recites that defendant sold and plaintiff bought motor fuel in quantities not less than 720,000 nor more than 1,440,000 gallons to be delivered to plaintiff at defendant's refinery at Pentland, in Kern county, in monthly quantities, totaling not less than 60,000 nor more than 180,000 gallons for the year commencing June 15, 1929. The specifications of the motor fuel are set forth in the contract and the price agreed upon was the basic price of 10¼ cents per gallon, state tax paid, as long as the prevailing tank wagon price of gasoline sold by "the five major oil companies of California" in Fresno remained at 16½ cents per gallon. It provides that this basic price would vary in accordance with certain specified fluctuations in the tank wagon price of gasoline charged by these companies in Fresno. Other provisions of the contract are not material to the discussion of the question of damages.

The complaint has annexed to it a copy of the contract. It alleges that plaintiff performed all his obligations under the contract and that he demanded full performance by defendant; that defendant delivered only 130,000 gallons of the motor fuel and refused to deliver the balance of 1,310,000 gallons. The only allegation of damage is as follows: "That the plaintiff has thereby lost profits and has sustained damage to the amount of sixty-five thousand two hundred and eighty-two dollars ($65,282.00)."

The answer puts in issue all material allegations of the complaint, including the due execution of the contract.

The trial court found that the contract had been duly executed; that plaintiff required the maximum of 1,440,000 gallons of motor fuel and that on July 24, 1929, defendant breached the contract; that up to that date defendant had furnished plaintiff with only 172,472 gallons; "that by reason of defendant's failure, refusal and neglect to perform said agreement on its part, plaintiff was unable to purchase an adequate supply of motor fuel for his business and lost the profits therefrom; that plaintiff tried to purchase motor fuel and gasoline from every available source and was unable to purchase more than a small supply of motor fuel, the same being the only available substitute that he could obtain; that the lowest price at which he could obtain any such motor fuel was at a net loss to him of at least 3.37c per gallon, delivered at Fresno;" that there was an undelivered "balance of 1,267,528 gallons to which plaintiff was entitled, which defendant wholly failed, refused and neglected to deliver to plaintiff; that the difference between the contract price and the repurchase price of said motor fuel, at the rate of 3.37c per gallon, is the sum of $42,715.69; that from this amount there should be deducted the sum of $505.53, on account of defendant's counterclaim for motor fuel delivered to plaintiff, for which he has not paid, leaving a net loss to plaintiff of $42,210.16, the same being the difference between the amount which plaintiff agreed to pay for said motor fuel and what it would cost him to obtain the only available substitute therefor."

[1] The rules governing the measure of damages in cases of this kind are thus set forth in McKay v. Riley, 65 Cal. 623, 4 P. 667, 668: "Ordinarily, the rule of damages, in actions like the present, is the difference between the price agreed to be paid and the market value, because the vendee can obtain the article contracted for at the market price. When, however, the circumstances are such that the vendee cannot thus supply himself, the rule does not apply, for the reason of it ceases. Bank v. Reese, 2 Casey [26 Pa.] 143. In such case the true measure of damages is the actual loss sustained by the vendee by reason of his not receiving an advance or profit through agreements which he himself has made in reliance upon the fulfill-

ment of his vendor's contract. McHose v. Fulmer, 73 Pa. [365] 367."

Counsel are not in serious disagreement on the rules governing the measure of damages. They are in disagreement as to the application of these rules to the facts of this case.

[2] It is admitted that where a seller agrees to sell to a buyer an article which has no established market value and the seller breaches his contract to sell and deliver, the buyer may go into the open market and purchase a similar article of merchandise, or if a similar article is not available and purchasable the buyer may purchase a reasonable substitute. If he does so the difference between the contract price and the reasonable market value of the substitute purchased is of value in furnishing a measure of his damage. 55 C.J. 1160, 1174; Dwight v. Callaghan, 53 Cal.App. 132, 199 P. 838; LeMoyne Ranch v. Agajanian, 121 Cal.App. 423, 8 P. (2d) 1055. In case the vendee cannot obtain an article similar to the one the vendor agreed to sell him, or a reasonable substitute therefor, and the article has no established market value, his "loss of profits would be a just element in the admeasurement of damages." Roach Bros. & Co. v. Lactein Food Co., 57 Cal.App. 379, 207 P. 419, 424.

[3] There is evidence to support the finding that plaintiff could not purchase a motor fuel of specifications comparable to those described in the contract. It is in doubt whether his inability to purchase this motor fuel was due to the fact that none was manufactured, or to the fact that he operated "cut-rate" stations and sold to other "cut-rate" dealers. There is also evidence to support the finding that plaintiff did purchase a relatively small quantity of gasoline, the only available substitute for the motor fuel. This gasoline, while of low grade, was of much better quality than the motor fuel which was described by one witness as a mixture of distillate and stove oil. It is difficult to determine the exact quantity of the substitute purchased by plaintiff, but we believe we are safe in assuming that it did not exceed 50,000 gallons. The trial court found that the market price of the substitute was 3.37 cents more than the contract price of the motor fuel. This finding is challenged by defendant, but for the purpose of this opinion, we will assume, without holding, that it is supported by the evidence, and also, that the gasoline purchased by plaintiff was in fact a substitute for the motor fuel. This brings this portion of the case within the rule for the measure of damages where an article similar to the one sold cannot be purchased and the vendee purchases the nearest available substitute obtainable for it. It is at once obvious that under this phase of the case, and even with these assumptions in favor of the findings and judgment, that plaintiff would only be entitled to recover 3.37 cents a gallon on the not more than 50,000 gallons of the substitute purchased by him. It is also obvious that this rule for the measure of his damages should not be applied to the undelivered 1,217,528 gallons of motor fuel for which he purchased no substitute.

[4] It is evident that the court was in error in giving judgment for damages of 3.37 cents a gallon on approximately 1,217,528 gallons of motor fuel which defendant did not furnish plaintiff and for which plaintiff purchased no substitute, for the reason, as the trial court found, that no substitute could be purchased in the open market. Assuming that there was no established market value of the motor fuel, the proper measure of damage, on this phase of the case, would have been the loss of profits, if any, suffered by plaintiff by reason of the breach of contract by defendant in its failing to furnish him with approximately 1,217,528 gallons of motor fuel for which no substitute was available and none was purchased.

[5] We have searched the record in an effort to discover any evidence fairly establishing the loss of profits to plaintiff from defendant's breach of the contract, if any, and have found none.

On July 24, 1929, plaintiff was operating five gasoline stations in the city of Fresno and was supplying three others. He testified that after defendant cut off his supply of motor fuel he had to close some of his own stations and lost the patronage of customers because he could not supply a cheap motor fuel which could be resold at a cut-rate price. In answer to the question as to how he estimated his alleged damage of $65,000, he replied: "I demand every gallon covered by the maximum. I had the same sold and a two cent a gallon bonus if I could guarantee delivery on the same, without a penny overhead." He also testified that he netted approximately 2½ cents a gallon on gasoline supplied to his retail customers. He further testified to a profit of from four to five cents a gallon on motor fuel or gasoline sold in his own stations. After weighing all his evidence it would seem that this represented gross and not net profits. We can find no substantial evidence showing, with any degree of certainty, how much of the motor fuel would have been used in his own service stations and how much sold to retail dealers had the motor fuel been delivered by defendant.

In another place in his evidence plaintiff testified that the gross profits from his service stations "ran all the way from two to five thousand dollars a month." This included the gross profits on his oil sales, which ran about $600 each month. There is no way of determining whether he made $5,000 gross profits for one month or for more than one month. Neither can we determine for how many months his gross profits were only $2,000, or for how many months they ran between these two figures. At still another place in his testimony he referred to his "overhead" as being $700 per month. There is no other evidence of his expense in selling this motor fuel.

Gross profits are really not profits at all, for they generally refer to the excess in the selling price over the cost price without deducting the expenses of resale and other costs of doing business. See Buie v. Kennedy, 164 N.C. 290, 80 S.E. 445.

To allow plaintiff to recover a judgment based in part on his gross profits would result in his unjust enrichment. If he is entitled to recover at all, because of his loss of profits, such recovery must be confined to his net profits. Net profits are the gains made from sales "after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed." Black's Law Dictionary, p. 1439.

We have thus far assumed that the increased cost of 3.37 cents a gallon for about 50,000 gallons of the substitute for the motor fuel purchased by plaintiff has evidentiary support. This estimate made by the trial court might have been inaccurate. The record shows that the trial court, in arriving at this figure, used the basic contract price of 10¼ cents per gallon as constant during the year, while the contract provided for fluctuations either upward or downward, depending on the "average prevailing tank wagon price of gasoline at Fresno charged by the five major oil companies of California." No evidence of such tank wagon price was introduced. This question should be met at another trial.

Paul J. Hisey, the last witness called for defendant, testified that he had been secretary of the defendant oil company and for several months had been its receiver. If there is a receivership of defendant, counsel should give that matter serious consideration. See 22 Cal.Jur. p. 523 et seq.

As the action is to be retried, plaintiff should be permitted to amend his complaint, should he be so advised. In this opinion our principal discussion has been of the evidence and not the pleadings under which it was received.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

---

20 Cal.App.2d 74

PEOPLE v. BUTCHER.

Cr. 1943.

District Court of Appeal, First District
Division 1, California.
March 31, 1937.

Criminal law 🔑1186(1)

Pendency of companion case, which defendant hoped would be tried before determination of his appeal from judgment on conviction of robbery, so that he might take witness stand and disprove confession, *held* not ground for reversal of such judgment.

◆

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Myron Butcher was convicted of robbery, and he appeals.

Affirmed.

Victor Wells, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

KNIGHT, Justice.

The defendant was charged with robbery and a prior conviction of felony. He admitted the latter and was found guilty by a jury of the former. Motions for new trial and probation were denied, and subsequently a second motion for new trial was made and denied; whereupon defendant was sentenced to imprisonment in the state prison. From the judgment of conviction he took this appeal.

It appears from the evidence that about 8 o'clock on the night of January 23, 1936, two men drove up in an automobile in front of a Safeway store on the corner of Fifth avenue and Fulton street in San Francisco, and one of the men alighted. After talking with the other man for a moment, he re-entered the automobile and they drove away. They were observed by the manager of the store and his assistant, who were working in the front of the store at the time. About ten minutes later the car returned and the men entered the store. At this time they were wearing masks partially covering their faces, and carrying pistols; and they compelled the store manager to turn over to them all of the cash in the store, which amounted to $135. Thereupon they ordered the employees into the back of the store, and fled. The following day one Jesse Lewis was arrested for the robbery of another Safeway store; and three days later defendant was taken into custody. He was found hiding in a closet in a hotel room. At first he denied having any connection with the robbery of the Fulton street store, but when confronted by Lewis, who was in the hospital, wounded, he admitted participating in the robbery, and later at police headquarters made a complete written confession as to the circumstances under which it was committed. Furthermore, at the trial the store manager positively identified both men as being the robbers. Defendant did not take the witness stand. His defense was an alibi, but the witness by whom he sought to establish the alibi was not certain of the date.

The sufficiency of the evidence to support the conviction is not questioned, nor has defendant assigned any errors of law. It appears, however, according to defendant's brief, that at the time the appeal was taken there was a companion case pending trial, which defendant states he had hoped would be brought to trial before the determination of this appeal so that he might take the stand in that case and disprove said confession. But manifestly the result of the companion case, whatever it might be, could have no effect on the judgment of conviction in the present case, against which defendant frankly concedes no valid grounds for reversal can be urged.

The judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

* * *

20 Cal.App.2d 131

WYNNE v. WYNNE.

Civ. S. C. 3.

District Court of Appeal, Second District, Division 1, California.

April 2, 1937.

1. Divorce 🔑327

Evidence that husband, who admitted that he went to another state to obtain divorce, rented room at $5 per month and slept therein one night, did not vote or register in state or remain therein after obtaining divorce, and only visited state occasionally, *held* insufficient to authorize dismissal of wife's suit for separate maintenance on ground that spouses were divorced, as failing to establish jurisdiction of court granting divorce.

2. Divorce 🔑327

Divorce decree rendered in another state may be impeached collaterally by extrinsic evidence showing that court pronouncing decree did not have jurisdiction either of parties or subject matter.

3. Appeal and error 🔑1010(2)

District Court of Appeal will not hesitate to reverse judgment unsupported by evidence.

4. Husband and wife 🔑289

Nonresident wife *held* entitled to maintain suit for separate maintenance.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Suit by Elizabeth Lee Wynne against Walter M. Wynne. From a judgment for defendant, plaintiff appeals.

Reversed.

Swaffield & Swaffield, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for appellant.

W. C. Shelton and George W. Burch, Jr., both of Los Angeles, for respondent.

DESMOND, Justice pro tem.

The plaintiff, in a suit for separate maintenance, appeals from a judgment which holds that the defendant, a naval officer, is not her husband and that she has no right of support or maintenance from him. While the ground of appeal is not expressly stated, it is clear that appellant's contention is that the findings upon which the judgment rests are not supported by the evidence; therefore that the judgment cannot stand.

The suit was filed on March 9, 1933, in the county of Los Angeles. The complaint alleged, as one of the specifications of cruel treatment causing plaintiff grievous mental suffering "That on or about the 20th day of February, 1933, in the First Judicial District Court of the State of Nevada, in and for the County of Douglas, a complaint was filed by defendant upon a simulated residence of said defendant, Walter M. Wynne, in said State of Nevada. That said alleged cause of action for divorce is based upon the grounds of extreme cruelty; whereas, in truth and in fact, defendant established a residence in Nevada only for the express purpose of filing said cause of action for divorce; that the matrimonial domicile of the parties hereto has never been the State of Nevada."

The answer of defendant, filed March 25, 1933, admitted that he did file the Nevada divorce action mentioned in plaintiff's complaint, but denied that he established a residence in Nevada solely for the express purpose of filing said suit, alleging that he "is a resident of the county of Washoe, State of Nevada, in which state he has established his permanent residence." After the lapse of several months, and on August 8, 1933, the court granted a motion to file an amended answer, in which, by way of affirmative defense it is alleged:

"That the plaintiff in this action was served with a copy of the complaint and summons in the said Nevada divorce action on February 23, 1933. That the plaintiff in the present action failed to appear or plead to the said Nevada divorce action, and, her default having been entered therein, the First Judicial District Court of the State of Nevada, in and for the County of Douglas, on May 11, 1933, granted to the defendant in this action a final decree of divorce from the above named defendant.

"That the defendant alleges the fact to be that the Superior Court of Los Angeles County, California, has no jurisdiction over either the person of the defendant, or the purported first cause of action of the plaintiff, for the reason that the relationship of husband and wife does not exist between the parties to this action."

The trial court found that at the time defendant filed his divorce action in Nevada, he was a resident of that state and had been such continuously from November 15, 1923 (meaning undoubtedly 1932), and further: "That the said residence was established in good faith, and with the purpose of making the county of Washoe, State of Nevada, his permanent residence, and that it is not true that said residence of the defendant was not in good faith, or was simulated, or fraudulent or solely and only for the purpose of obtaining a divorce from the plaintiff."

Another finding was as follows: "The court finds that said plaintiff failed to appear or plead in said Nevada divorce action, and upon the expiration of the time required by law to appear, her default was duly entered and thereafter, on the 11th day of May, 1933, a decree of divorce was granted the defendant by the First Judicial District Court of the State of Nevada, in and for the County of Douglas, divorcing him from the plaintiff, and that said decree of divorce is final."

Upon the trial of the cause one witness only was examined, the respondent, called under section 2055 of the Code of Civil Procedure. When he had finished his testimony, counsel for appellant stated to the court: "I further offer to prove that Mrs. Wynne was the innocent party and ask leave of court to proceed with the evidence on the ground that the defendant has not shown he established a bona fide residence in Nevada." The court sustained an objection to the offered evidence, "on the ground that the evidence now shows that Mr. Wynne did establish a residence within the State of Nevada." Appellant's counsel then inquired: "Then, according to the limitations placed upon me the case is closed?" To which the trial court responded, "Yes." Just a few moments previously, the trial judge had commented as follows:

"The Court: I would have been a little bit afraid of Mr. Wynne if he had said anything contrary. *But he said he went down there for the purpose of getting a divorce; very frankly he tells us that.* But he also said that he went down there for the purpose of establishing a residence. Mr. Wynne comes into court and by a very frank statement puts himself in the position where the court can rely on what his intentions were more than otherwise. He should not be penalized for telling the truth." (Italics ours.)

But the transcript shows respondent had not frankly told the court that he went to Nevada for the purpose of getting a divorce. Quite the contrary, as witness this excerpt from the testimony:

"Q. By Mr. Madden: Your purpose in going to Nevada was to secure a divorce, isn't that correct? A. It was not."

[1] We have read the testimony and examined the documents admitted as exhibits in this case, and can find no evidence to support the finding of the trial court that respondent had established a bona fide residence in the State of Nevada. From his own testimony, and from the letters and other documents presented by the record, it appears that he failed to rid himself of his wife in Pennsylvania, where he found it wise to dismiss a libel for divorce which he had filed against her in 1931; that a year later, while assigned to duty in California waters, he availed himself of the proximity of Reno to accomplish his purpose, employing an attorney there, who, in order that respondent might establish bona fides in his claimed residence, rented him, at $5 per month, a room adjoining his office, in which a bed was placed and where respondent kept his overcoat, heavy socks, and some other articles. Respondent slept there one night, at the time his decree was granted; but whether any one else also rented the same room, he was unable to say. Instead of serving as a demonstration of good faith in the matter of establishing a permanent residence in the state of Nevada, these facts, as well as those which follow, taint the whole proceeding with mala fides.

It appeared that respondent crossed the State of Nevada several times by train, was "more or less familiar with the country," and being asked what his intention was in coming to Nevada, answered: "It was a place from which I could vote. I liked the country and I could stay there." But he did not vote there, nor did he register, nor did he stay there. Immediately after his divorce decree was granted he left Nevada and has never returned there, except to be married at Las Vegas on June 22, 1933, to a woman other than appellant, the bride and groom departing from Nevada immediately after that ceremony and residing in California at the time this action was tried. As to his claimed residence before his Nevada action was filed, it appeared that he first went to that state on November 16, 1932; that he consulted his attorney at Reno concerning his proposed divorce that day; that he stayed in Nevada two days, returning about a week or five days later, and again in December spending a week on each of two trips there. He testified that he returned in January, on that occasion spending more than three weeks in Nevada; that his suit was filed on February 20th; and that he next returned on May 10th, his decree being granted on the following day.

[2] The Supreme Court of California has said, in the case of Delanoy v. Delanoy, 216 Cal. 27, at page 34, 13 P.(2d) 719, 721, 86 A.L.R. 1321, that: "It is always competent to collaterally impeach a decree of divorce rendered in another state by extrinsic evidence showing that the court pronouncing it did not have jurisdiction either of the parties or the subject matter. Thus the decree may always be attacked on the ground that the foreign court had no jurisdiction because the petitioning party was not a bona fide resident, or that the law of the sister state was not complied with."

[3, 4] Since this court does not hesitate to reverse a judgment when there is no evidence to support it [Driscoll v. Market St. Cable Ry. Co., 97 Cal. 553, 32 P. 591, 33 Am.St.Rep. 203; see, also, other California cases collected in the opinion in Chase v. Jonkey, 12 Cal.App.(2d) 365, 369, 55 P.(2d) 1229], and since this appeal presents just such a situation, it is apparent that an order of reversal should be made on the points heretofore discussed. That being so, it becomes unnecessary to consider the further point raised by appellant, relying again upon Delanoy v. Delanoy, supra, that she was unjustifiably denied the right to proceed with her suit upon the court's determining the initial question of the validity of the Nevada decree adversely to her contention. Respondent argues that appellant, not having established a domicile in California, has

no standing in the courts of this state in a case of this character. This is a suit for separate maintenance, not for divorce, and our Supreme Court has held (Hiner v. Hiner, 153 Cal. 254, 94 P. 1044) that even a nonresident wife may maintain such an action.

The judgment is reversed.

We concur: HOUSER, P. J.; YORK, J.

20 Cal.App.2d 32

BROWN MATERIALS CO., Limited, et al. v. ANGUS et al.

Civ. 5788.

District Court of Appeal, Third District, California.

March 26, 1937.

Venue 🔑46

Where employer instituted action against former employees seeking assignment of lease covering realty containing mud deposits and also setting up purported cause of action seeking to restrain former employees from selling mud products to employer's customers, and where action was commenced in county other than residence of defendants or location of realty, defendants *held* entitled to have venue transferred to county in which realty was located (Code Civ.Proc. §§ 392, 395, as amended by St. 1933, pp. 1837, 1840; § 398, as amended by St.1933, p. 1843).

◆

Appeal from Superior Court, Fresno County; E. N. Rector, Judge.

Action by the Brown Materials Company, Limited, and others, against W. G. Angus and others. From an order granting defendants' motion for change of venue, plaintiffs appeal.

Affirmed.

G. L. Aynesworth and Jas. W. Campbell, both of Fresno, for appellants.

W. H. Stammer and Galen McKnight, both of Fresno, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This is an appeal by the plaintiffs from an order of the superior court of Fresno county transferring the trial of said action to the county of San Luis Obispo.

The appellants' statement of the proposition involved upon this appeal is worded as follows: "Where both a local and a transitory action are joined and suit is commenced in a county other than the residence of defendant or the location of the real property involved, has the defendant an optional right to have the venue of the action changed either to the county of the situs of the real property or to the county of defendant's residence?"

An examination of the record leads us to the conclusion that this statement is not strictly accurate, for the reason that the so-called "transitory action" mentioned is not shown by the record to be a statement of a cause of action in and of itself, but is really only a statement of an incidental relief sought, dependent wholly upon the plaintiffs' success, based upon the cause of action relating to the real estate.

The complaint sets forth that the Brown Materials Company, Ltd., is a corporation dealing specially in mud products, sold to and used by oil drilling concerns; that during the times mentioned in the complaint the defendants W. G. Angus and R. W. Potter were in the employ of the plaintiff corporation; that W. G. Angus was secretary-treasurer and general sales manager for the plaintiffs; that it was the duty of Angus to locate and procure leases on lands containing mud suitable for purposes of oil drilling operations; that plaintiffs were engaged in the procuring and selling of mud for such purposes. The complaint then sets forth that the R. E. Jack Company is the owner of certain mud producing properties situate in the county of San Luis Obispo, and that the said company has its principal place of business in said county. It appears that none of the defendants were residents of the county of Fresno, where the action was commenced.

The complaint further sets forth that the defendants Angus and Potter obtained a lease from the R. E. Jack Company upon properties in San Luis Obispo county, containing mud products suitable for use by oil drilling companies. There is also an allegation in the so-called second cause of action that the defendants Angus and Potter intended to engage in selling other products which the plaintiff was likewise selling, and would endeavor to sell the same to the plaintiffs' clients. It is also alleged in the complaint that the profits to be had from the lease obtained by Angus and Potter exceeded the sum of $3,000 a month, and the lease is estimated to be of the value of about $200,000.

After summons had been served upon all of the defendants, the defendants named in the action, and also the R. E. Jack Company, filed notice of motion for change of venue from Fresno county to San Luis Obispo county, the situs of the real estate involved in the action. On the day preceding the time set for the hearing of the respective motions for transfer of the place of trial, the plaintiffs had the action against the R. E. Jack Company dismissed, and the motions for change of place of trial were had upon the papers filed by the defendants Angus and Potter, and granted by the court.

It is likewise alleged in the complaint that the Antelope Mud Company, a copartnership, is interested in the lease, etc. It appears, however, from the record that the Antelope Mud Company was simply a fictitious name under which the defendant W. G. Angus was doing business.

At the time the notice of motions was given praying for a change of place of trial, there is no question but that a proper showing was made for the transfer of the action from Fresno to San Luis Obispo county. However, it is now argued that the action having been dismissed as to R. E. Jack Company (which company had its place of business in San Luis Obispo county, as well as the owner of the real estate situate in said county), the defendants Angus and Potter have no right to have the action transferred to San Luis Obispo county upon the fact that the real estate is situate in said county, they being residents of the county of Kern, and that their only right to a change of venue would be from Fresno county to Kern county, the place of their residence, and that, having failed to ask for such change, they waived their right with respect to a change of venue, and that the court was without authority to order the change of the place of trial of said action from Fresno to San Luis Obispo county.

It is conceded that Fresno county was not, at the time of the institution of the action, a proper county for the trial thereof, either as to the first or alleged second cause of action set forth in the complaint.

The first cause of action sets forth that the defendants W. G. Angus and R. W. Potter caused to be created a copartnership for the purpose of developing mud, and the selling of the same; that said defendants obtained a lease upon the property situate in San Luis Obispo county. The complaint then goes on to allege that said defendants caused the equipment of the plaintiffs to be used for the purpose of opening up and developing mud deposits upon the leased premises. It is further alleged that upon the development of said mud deposits the defendants began to, and did, sell the same in competition with the plaintiff corporation; that all of the advertising of the products of said mud from said premises was done at the expense of the plaintiff corporation; and that the equipment belonging to the plaintiff corporation was used for such purpose; further, that purchasers of said mud obtained from premises so leased were sought of former clients of the plaintiff corporation. It is further alleged that said defendants are selling said mud products and enjoying and receiving large and profitable returns. These allegations in the complaint all follow the allegations relating to the employment of the defendants Angus and Potter by the plaintiff corporation, and, also, the duty of said persons as such employees, to look for and obtain leases of premises containing suitable mud for use of the plaintiff corporation in its business; and that instead of taking leases in the name of the corporation, it was taken in the name of the defendant, Angus.

After detailing and setting forth at length all of the reasons why the defendants should be required to assign and set over to the plaintiff corporation the lease referred to, and all their rights and privileges thereunder, the complaint proceeds to set forth what is called a second cause of action, in the following language:

"Reference is hereby made to the first cause of action herein set forth and by such reference the same is incorporated herein the same as if set out in full.

"That at all times herein mentioned the plaintiff-corporation has had and enjoyed a large business from the sale of mud, sand, gravel, rock, cement, brick, lime, fire clay, and oil well supplies to numerous operators of oil well development plants in the territory above named, and that it does not maintain a list or record of its clients and customers; that at all the times herein mentioned and now, the said defendants, W. G. Angus and R. W. Potter, have known each and all of these customers, and in the sale and development of mud products from said lease have actively solicited plaintiff's clients and customers, and have continued to sell to them, and have obtained and taken from plaintiff-corporation a large number of its clients, and do now threaten to, and will, unless restrained by an order of this court, solicit each and all of the customers of plaintiff-corporation, and will take and deprive plaintiff of each and all of said customers and clients, to plaintiff's great and irreparable damage and injury."

This allegation is evidently not of itself the statement of a separate and distinct cause of action. It is simply incidental to, dependent upon, and if any part of a cause of action, is a part of the cause of action set forth in what is called the "first cause of action" in the complaint. It explicitly refers to, and is made dependent upon, what is stated in the first cause of action, and, likewise, explicitly states that whatever the defendants Potter and Angus have done or propose to do is in relation to the development "of mud products from said lease." Without the lease there is absolutely nothing left for the defendants. If the lease is ordered transferred to the plaintiff corporation, as prayed for, then and in that case the defendants are left without any mud products for sale. The language as to what said defendants intended to do is not supported by any listing of facts or acts on their part.

The appellants rely upon the case of Smith v. Smith, 88 Cal. 572, 26 P. 356, and Le Breton v. Superior Court, 66 Cal. 27, 4 P. 777; also upon the recent case of Howe v. Tucker, 219 Cal. 193, 25 P.(2d) 832, 833, and the different cases cited in the opinions in the cases just listed. An examination of several of the cases discloses that the question of venue is not an issue; it was a question of jurisdiction.

In Smith v. Smith, supra, it was held that under the provisions of section 382 of the Code of Civil Procedure, where a personal action was joined with an action relating to real estate, the defendant had a right, by reason of the joinder of the personal action, to have the cause tried in the county of his residence. It is not stated in the opinion in the Smith Case, however, that if the so-called personal action is merely incidental to, and dependent upon, the success of the plaintiff as to the first cause of action which relates to real estate, and is purely local, the defendant would not have a right to have the cause of action transferred to the county where the real estate involved has its situs.

In Howe v. Tucker, supra, the right to maintain an action to cancel a promissory note, and for determination of a trust in a note and a deed of trust securing the note, in which deed of trust the trustee therein named is a person other than a payee of the note, constituted a transitory action, so that venue of the trial thereof should be transferred to the county of the defendant's residence.

In the opinion in the Tucker Case we find language which is pertinent to the issues here involved, to wit: "It is only when real estate alone is the subject-matter of the action that the provisions of section 392 [supra] can be invoked against a defendant who resides in a county different from that in which the land is situated. If, in his complaint, the plaintiff join with such a cause of action another which is not embraced in its provisions, or if he also seeks a remedy against the defendant upon matters which are not embraced within the provisions of this section, his action becomes one of those 'other cases' provided for in section 395, which the defendant is entitled to have tried in the county of his residence." This language readily distinguishes the Tucker Case from the one we are considering. Here the appellants have not joined another action in the complaint which is not embraced within the provisions of the alleged first cause of action. The second alleged cause of action, if a cause of action at all, must embrace within its provisions everything contained in the first cause of action, and is entirely dependent thereupon.

In Cohen v. Hellman Commercial Trust & Savings Bank, 133 Cal.App. 758, 24 P.(2d) 960, cited as an authority by the appellants, it appears that the only question involved was one of jurisdiction, and not a question of venue. The same is true of the case of Le Breton, Administrator, v. Superior Court, supra; also, of Weygandt v. Larson, 130 Cal.App. 304, 19 P.(2d) 852. In the Larson Case the opinion shows that it was not really an action involving real estate, but an accounting for profits and to restrain certain actions.

In several of the cases the actions had for their purpose enforcing of a trust. As against these cases the respondents rely upon the following which we mention: In Hannah v. Canty, 1 Cal.App. 225, 81 P. 1035, it was held that where a separate, local, and transitory action was joined with one relating to real estate, the defendant was nevertheless entitled to have the cause transferred to a proper county for trial.

The principles involved in the cases cited herein are as follows: (1) The defendant is entitled to have a local action tried in the county where the real property is located (section 392, Code of Civ. Proc., as amended by St.1933, p. 1837); (2) the defendant is entitled to have a personal action tried in the county of his residence (section 395, as amended by St. 1933, p. 1840 supra); (3) the plaintiff may not deprive a defendant of either of these rights by joining a second cause of action in his complaint. If both types of action are so joined, the defendant may insist on trial in either court (section 398, as amended by St.1933, p. 1843 supra). The language of the court in deciding this question in the case of Ah Fong v. Sternes, 79 Cal. 30, 21 P. 381, 382, is as follows: "Even if the complaint be regarded as stating two separate causes of action, upon one of which the defendant would be entitled to a change of venue, but not upon the other, the result would be the same. It is the plaintiff's own doing if the complaint be so drawn. He cannot deprive the defendant of his right to a change of venue by the addition of something to the complaint. If this were not the rule, it would be very easy for a plaintiff to defeat the defendant's right in the matter. All that plaintiff would have to do would be to add another cause of action to his complaint. It need not be a genuine cause of action." The court then points out in what manner, if such were not the rule, the plaintiff might deprive defendants of their rights under the code provisions.

To the same effect is the case of Sanborn v. Pomona Pump Co., 131 Cal.App. 241, 21 P.(2d) 124. The right of the defendants to designate a proper county, or the proper county for the trial of the action, is specially given by section 398, supra. As said in the Sanborn Case, if a complaint has a double aspect, the pleader cannot thereby deprive the defendant of his right to a change of place of trial, relying upon the Sternes Case, supra.

Section 5 of article 6 of the Constitution, relating to jurisdiction, does not seem to us to call for any discussion, as the only question involved in this action is one of venue. Nor do we deem it necessary to enter into a discussion of the various code provisions relative to the procedure to secure a change of the place of trial, as what we have said, and the cases cited, seem to us decisive of this appeal.

The order is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

20 Cal.App.2d 65

NEBLETT et al. v. GETTY et al.

Civ. 11135.

District Court of Appeal, Second District, Division 2, California.

March 30, 1937.

Rehearing Denied April 22, 1937.

Hearing Denied by Supreme Court May 27, 1937.

1. Appeal and error 🔑927(7)

On appeal by plaintiffs from judgment entered after directed verdict, appellate court would view evidence in light most favorable to plaintiff, disregarding conflicting evidence, giving plaintiffs' evidence all value to which it was legally entitled and indulging every legitimate inference which might be drawn therefrom.

2. Divorce 🔑197

In action by attorneys against client in divorce action who allegedly breached contract by obtaining order of substitution from court, evidence *held* to sustain finding of agreement by client to employ attorneys, under terms of which attorneys were to receive for their services such sum as they could obtain through orders of court (Civ. Code, § 137).

3. Attorney and client 🔑63

Attorney who is retained generally to conduct legal proceeding is presumed, in absence of anything to contrary, to enter into an entire contract to conduct proceeding to its termination.

4. Divorce ⚷197

In action by attorneys against client in divorce action for breach of contract to employ attorneys by obtaining order of substitution from court, evidence *held* to sustain finding that contract was that attorneys should represent client in her marital difficulties to final judgment or to conclusion of the action.

5. Divorce ⚷197

Client who breached contract with attorneys to conduct her divorce action by obtaining order of substitution from court so as to prevent attorneys from completing their services *held* liable to attorneys for reasonable value of services rendered by attorneys down to date of their discharge.

6. Divorce ⚷197

Reasonable value of services of attorneys rendered to wife in divorce action, if any, was question of fact which should have been submitted to jury in customary manner on all facts and circumstances in evidence bearing on question.

7. Master and servant ⚷41(1)

Innocent party, in case of discharge and breach of contract for services, is not required to rely on terms of original contract, since one who is wrongfully discharged may elect to treat contract as rescinded, may sue on quantum meruit as if contract had never been made, and may recover reasonable value of services, though in excess of contract price.

8. Divorce ⚷197

In action by attorneys for services rendered to wife in divorce action, court properly excluded testimony that alter ego of corporate defendants, which had been defendants in divorce action, was the husband of attorneys' client.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by William H. Neblett and others against Helen Ann Rork Getty and others. From a judgment in favor of the defendants, the plaintiffs appeal.

Judgment for named defendant reversed, and judgment for other defendants affirmed.

Wm. H. Neblett, R. Dean Warner, John G. Sobieski, and Harry W. Dudley, all of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles (W. I. Gilbert, Jr., of Los Angeles, of counsel), for respondent Helen Ann Rork Getty.

Dockweiler & Dockweiler, of Los Angeles, for respondent corporations.

CRAIL, Presiding Justice.

[1] This is an appeal by the plaintiffs from a judgment entered after a directed verdict. Viewing the evidence in the light most favorable to the plaintiffs, disregarding conflicting evidence, giving plaintiffs' evidence all the value to which it is legally entitled, and indulging every legitimate inference which may be drawn therefrom (Mairo v. Yellow Cab Co., 208 Cal. 350, 281 P. 66), the following is a statement of the case:

On April 1, 1935, Helen Ann Rork Getty, one of the defendants, hereinafter called the wife, called on plaintiffs and asked them to represent her as her attorneys in the marital difficulties between herself and her husband, Jean Paul Getty. Plaintiffs represented her from that date to September 17, 1935, and during that period devoted themselves to conferences, the gathering of evidence, the preparation of pleadings and to court appearances for the protection of the rights of the wife and her two children. Conferences were held by plaintiffs with the attorneys for the husband, both in Los Angeles and in New York. Finally, Mrs. Getty instructed plaintiffs to file in California a complaint for divorce, which was done on May 27, 1935. The husband was not within the jurisdiction of the state, but the wife alleged in her complaint that certain corporations were the alter egos of the husband and joined them as defendants, and alleged that they were the mere instrumentalities or conduits through which the husband held the property belonging to the community and conducted the husband's business, and that said corporations were therefore obligated for support and maintenance and attorneys' fees and costs pending the determination of the divorce action. All of the corporate defendants answered to the complaint for divorce.

From time to time orders to show cause were issued by the trial court against the defendant corporations with regard to maintenance. Hearings were had and orders made requiring the corporations to pay certain sums for the support and maintenance of the wife and children. A total of $13,000 attorneys' fees and $4,500 costs was so ordered to be paid under section 137 of the Civil Code and was paid by one of the alleged alter egos to the wife. Just before the time set for the hearing of another application by the wife for $200,000 attorneys' fees and costs, the defendant corporations obtained a continuance of the hearing, and before the adjourned hearing the wife insisted that the plaintiffs voluntarily sign a substitution of attorneys in the divorce action substituting themselves out of the case. The plaintiffs refused to sign such substitution and the wife discharged the plaintiffs and obtained an order of substitution from the court.

Thereupon plaintiffs instituted the instant suit against the wife, the husband and the same alter ego corporations for the reasonable value of plaintiffs' services rendered to the wife in the divorce litigation, alleging them to be worth $100,000, of which $13,000 had been paid. The amended complaint upon which the action went to trial set out a cause of action against all defendants for breach of contract for attorneys' fees, an action in tort for having induced the wife to discharge plaintiffs for the purpose of depriving them of their fees, and also common counts for money had and received and for services rendered. All of the defendants, except the husband, were served and filed answers. The suit was brought to trial before a jury upon the amended complaint minus certain allegations which were stricken and which will hereafter be referred to more particularly. After a protracted hearing the trial court directed a verdict in favor of all defendants and entered judgment thereon.

[2] The principal contention between the parties is whether there was a contract of employment between the plaintiffs and the wife. At the time the wife took up with the plaintiffs the matter of their employment, the following conversation relative to their fees was had: "She said she had definitely made up her mind to sue Paul for divorce—she called Mr. Getty 'Paul.' She said, 'What will I do about financial arrangements? I have no money. I can't promise to pay you anything for your work, because I haven't anything except what I have with my husband or what my husband has, and therefore what you get out of this case you will have to get the court to allow you. I have nothing to pay you.'" Pursuant to this conversation, plaintiffs proceeded with their duties as her attorneys in the divorce action and also obtained orders for the sums, heretofore referred to, which she turned over to the plaintiffs. In our view there was substantial evidence of an agreement upon the part of the wife to employ the plaintiffs as her attorneys, a contract under the terms of which plaintiffs were to receive for their services such sums as they could obtain through orders of the court under section 137 of the Civil Code.

[3-5] In the case of Boardman v. Christin, 65 Cal.App. 413, 418, 224 P. 97, 99, the court adopts with approval the following language from section 2253 of Mechem on Agency (vol. 2, 2d Ed.): "An attorney who is retained generally to conduct a legal proceeding is presumed, in the absence of anything to indicate a contrary intent, to enter into an entire contract to conduct the proceeding to its termination." There was nothing in the contract between plaintiffs and the wife tending to show that the parties intended any departure from this general presumption. There is substantial evidence then to sustain the contention that the contract was that the plaintiffs should represent the wife in her marital difficulties to final judgment or to the conclusion of the action, whatever it might be. Her act in discharging them had the effect of depriving them of their opportunity to fulfill their part of the contract. The complete performance of the services by the plaintiffs was prevented. So far as the divorce action was concerned, "the attorneys had but to gather up their briefs and retire." Reynolds v. Reynolds, 67 Cal. 176, 7 P. 480, 481. The wife had the power to discharge the plaintiffs as her attorneys under section 2356 of the Civil Code, but this power thus to terminate the relationship must not be confused with the right to do so. She had accepted the benefit of their services. If the wife without justifiable grounds prevented the completion of the plaintiffs' services by discharging them, she would be liable to the plaintiffs for the reasonable value of the services rendered by them down to the date of their discharge. Ayres v. Lipschutz, 68 Cal.App. 134, 228 P. 720; Pierce v. Rilovich, 136 Cal.App. 611, 29 P.(2d) 228; Stuart v. Preston, 2 Cal.App.(2d) 310, 38 P.(2d) 155.

[6] It was intended by both parties to the contract that plaintiffs would be paid for their services. True it was agreed that this compensation should come from the husband in the divorce action through orders of the court, but the wife by discharging her attorneys just before her application for fees came on for hearing deprived the plaintiffs of the opportunity to receive their compensation in the manner contemplated in the contract. What was the reasonable value of their services, if any, was a question of fact which should have been submitted to the jury in the customary manner upon all the facts and circumstances in evidence bearing upon the question.

[7] The defendants argue that the evidence absolutely negatives any idea of a contract and on the same page contend that "there is a clear understanding and meeting of the minds that this respondent was to pay nothing." It is not a sufficient answer to say that under the terms of the original contract the wife was not to pay the attorneys out of her own funds. In case of discharge and breach of contract, the innocent party is not required to rely upon the terms of the original contract. "It is well settled that one who is wrongfully discharged and prevented from further performance of his contract may elect as a general rule to treat the contract as rescinded, may sue upon a quantum meruit as if the special contract of employment had never been made and may recover the reasonable value of the services performed even though such reasonable value exceeds the contract price. [Citing cases.]" Lessing v. Gibbons, 6 Cal.App.(2d) 598, 607, 45 P.(2d) 258, 262. Obviously, therefore, the jury should not have been instructed to return a verdict against the plaintiffs; and the judgment as to defendant Helen Ann Rork Getty must be reversed.

[8] The plaintiffs make contentions for a reversal of the judgment as to the corporate defendants upon the ground that the court struck certain allegations from the amended complaint, and upon the ground that it excluded testimony of the alter ego character of the corporate defendants. We find no merit in these contentions. Plaintiffs also contend that there is evidence of a contract between the husband and wife whereby the husband agreed to pay attorneys' fees to plaintiffs. But the husband was not served with summons and did not appear in the action.

The judgment as to Helen Ann Rork Getty is reversed and the judgment as to the corporate defendants is affirmed.

We concur: WOOD, J.; McCOMB, J.

20 Cal.App.2d 10

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. SPARR REALTY CORPORATION et al.

Civ. 5779.

District Court of Appeal, Third District, California.

March 25, 1937.

1. Trusts 🔑112

In seeking true construction of declaration of trust, guiding principle must be the intention of the settlor, that is, his intention as expressed, not what he intended to say.

2. Trusts 🔑195

Where declaration of trust required trustee to sell property, pay all expenses, discharge liens, and render to beneficial owners, the profits, if any, remaining as their beneficial interest, such beneficial interest, assigned as collateral, constituted "personal property," and was properly sold in accordance with terms of assignment, and was not required to be sold in accordance with Code provisions relating to sale of interest in realty (Civ.Code, § 863).

[Ed. Note.—For other definitions of "Personal Property," see Words & Phrases.]

3. Trusts 🔑262

In action to recover unpaid balance on note remaining after proceeds of collateral, including beneficial interest in trust agreement covering realty, had been applied to indebtedness, exclusion of testimony as to value of corpus of trust *held* not error, where there was no allegation in any wise attacking regularity and legality of sale of beneficial interest except as to whether such beneficial interest constituted personalty or interest in realty, and there was nothing in pleadings on which charge of undue influence or fraudulent conduct on part of trustees could be based (Civ.Code, § 2235).

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by the Bank of America National Trust & Savings Association against Sparr Realty Corporation and another. From an adverse judgment, defendants appeal.

Affirmed.

Freston & Files (by Ralph E. Lewis) and Howard Waterman, all of Los Angeles (Louis Ferrari, of San Francisco, and Edmund Nelson, of Los Angeles, of counsel), for appellants.

W. U. Handy and Clay & Handy, all of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was begun to recover an alleged unpaid balance upon two promissory notes, one in the amount of $291,801.13, and the other of the value of $27,924.44. Upon the larger note there had been credits which left the amount due the sum of $253,301.24. As to the smaller note, nothing appears to have been paid. The notes in question were executed by the defendant Sparr Realty Corporation, a corporation, and guaranteed as to payment by W. S. Sparr individually. Judgment went in favor of the plaintiff for the amounts unpaid, with interest from March 8, 1934. From this judgment defendants have appealed.

While other questions are presented for consideration, the case really presents a problem as to the security originally held as collateral for the two notes. The original security of the notes consisted of two elements: (1) A pledge of a number of separate notes and trust deeds; and (2) collateral assignments of beneficial interests in four trusts. The notes and trust deeds pledged were, upon default, sold at a pledgee's sale, the proceeds of the sale being credited against the larger note. It does not appear that the appellants are complaining of any feature of the sale, save and except as to the sale of the assignment of the beneficial interest of the appellants in and to the proceeds of certain trusts. On the part of the plaintiff it is contended that the assignment of the beneficial interest in the trusts hereinafter mentioned were personal property, and had become such by what is termed an "equitable conversion."

The plaintiff proceeded to sell the beneficial interests assigned as collateral in accordance with the terms of the assignment, and not in accordance with the Code provisions relating to the sale of an interest in real property or the sale of real property.

If the beneficial interests mentioned in the assignment were in fact personal property, and had become such under the terms of the assignment, and may be considered, and were intended by the parties to be considered as an equitable conversion, if conversion were necessary, then and in that case there appears to be no substantial merit in the appeal. On the other hand, if the beneficial interests assigned to the plaintiff constituted only the conveyance of an interest in real property, then the judgment should be reversed.

The appellants, among other grounds of defense, pleaded the statute of limitations, which, of course, would bar the action if this cause is one dealing with realty and not personalty.

The basis of this action dates back to the 16th day of May, 1922, when the appellant W. S. Sparr theretofore had been operating as a subdivider of real estate, executed and delivered to the Hellman Commercial Trust & Savings Bank, of Los Angeles, a deed to certain real estate situate in the county of Los Angeles. Thereupon the Hellman Commercial Trust & Savings Bank executed and delivered a certain declaration of trust designated as "No. 164-N.S.," in which W. S. Sparr was named as beneficiary. Thereafter, two certain other declarations of trust were executed and delivered to W. S. Sparr by the Hellman Commercial Trust & Savings Bank, designated and known as "No. 265 and No. 265-b, N.S." Thereafter, the Hellman Bank was taken over and all its interests absorbed by the plaintiff in this action, and on the 30th day of July, 1927, the appellant W. S. Sparr deeded to the Merchants National Trust & Savings Bank of Los Angeles, which then was the successor of the Hellman Commercial Trust & Savings Bank, additional property, and a certain other declaration of trust was executed known as "Trust No. 760, N.S." The plaintiff in this action has succeeded to the interests on behalf of said banks in and to the real property deeded as aforesaid, and also has become obligated to carry out the terms of the declarations of trust. These declarations of trust provided for the sale of the property conveyed by the deeds referred to, which conveyances purported to have been made without any money consideration, the purpose of the transaction being to subdivide the properties mentioned, sell the same in lots, and apply the proceeds to the expenses thereof, the liens upon the property, and after all the expenses have been paid and the liens discharged, and the compensation made as provided in the declarations of trust, the surplus was to be paid to the appellants in this action.

It appears that the interest of W. S. Sparr was by him assigned to the appellant Sparr Realty Corporation.

Prior to the time when the interests of the various banks in the proceedings hereinbefore enumerated had become vested in the plaintiff, the Sparr Realty Corporation, on the 15th day of May, 1930, executed and delivered to the Merchants Trust & Savings Bank, of Los Angeles, a certain promissory note evidencing the fact that the Sparr Realty Corporation had borrowed from said bank $291,801.13, with interest thereon to be paid at the rate of 7 per cent. per annum. The assignment in connection with this note reads as follows: "And the said Corporation hereby pledges to, and deposits with Merchants National Trust and Savings Bank of Los Angeles, as collateral security for the payment of this note, or any other liability or liabilities to said Corporation, to Merchants Trust and Savings Bank of Los Angeles, when due or to become due, or which may hereafter be contracted, the following property, to-wit: Collateral assignment of beneficial interest in and to Trust Nos. 164, 164-b, 265, 265-b and 760, N.S. The assignment in relation to this note of the beneficial interest in and to the trusts referred to, provides, upon default, that sales thereof be made as follows: 'Said trustee shall publish notice of the time and place of such sale, with a description of the interest in said trust to be sold, at least once a week for three successive weeks in some newspaper published in the City of Los Angeles, California, and may from time to time postpone such sale by publication of a notice of postponement in the same newspaper in one issue only prior to the date of the sale fixed by said notice of postponement, or at its option, by public announcement thereof at the time and place of sale so advertised; and on the day of sale so fixed said trustee may sell said interest or any portion thereof at public auction, to the highest bidder for cash in gold coin, and after such sale and after due payment made, said trustee shall execute and deliver to the purchaser or purchasers an assignment or assignments of the interest or interests in said trust so sold to such purchaser or purchasers, subject to all of the terms and conditions thereof.'"

The assignment then provides for the payment of expenses, payment of the notes, and any surplus to be paid to the assignors. A similar assignment covers and secures the smaller note heretofore mentioned. The declarations of trust provide only for the sale of the property mentioned in lots, as the same might be subdivided, for such prices as the trustor might designate; it being specified in the declarations of trust that certain lots were not to be sold for less than a certain sum. There is nothing in any of the declarations indicating that the parties intended that any of the real property should ever be transferred to, or vested in the trustor. The sole purpose and intent, as we gather it from the declarations of trust, was for the subdivision and sale of the real property theretofore conveyed by deed, and a division of the surplus for paying over the surplus, if any, to the trustor after deducting all the expenses thereof. All of the declarations of trust are similar in language, save as to trust No. 760, which contains a declaration that the beneficial interest assigned is considered as personal property.

The language of the assignments of the beneficial interest owned by the appellants, or, rather, by the appellant Sparr Realty Corporation, is in the form of an assignment of personal property. The language is not in the form of a grant but in the form of a pledge, and if the intention of the parties was to treat the beneficial interests as a pledge in the nature of personal property, then and in that event the intention then and there expressed prevails throughout the entire transaction.

[1, 2] In behalf of their contention that the sale of the beneficial interest assigned to the plaintiff was not in accordance with the sale of real property, and therefore void, the appellants rely specially upon two California cases: First, the case of Title Insurance & Trust Co., a Corporation, v. Duffill, 191 Cal. 629, 218 P. 14, 18. The language of the trust in the Duffill Case, how-

ever, clearly distinguishes the trust there being considered from the trusts presented to us upon this appeal. After certain contingencies, the property in question, to wit, the corpus, was to be conveyed to Harry Duffill. The trustees there took the property for the purpose of management, paying expenses, collecting revenues, paying over the income as directed, and at the expiration of a number of years, to convey the corpus as we have stated. In the Duffill Case the trustees took the property for a specific purpose, to wit, eventually to convey. This left in Harry Duffill, or rather, vested in Harry Duffill, a right, according to the trust declaration or agreement, to have the corpus of the trust conveyed to him according to the terms thereof. In the decision in that case the court says: "In seeking the true construction of a declaration of trust, the guiding principle must be the intention of the settlor—his intention as expressed. Not, What did he intend to say? but, What did he intend by what he did say? must be the test." That is the test to be applied upon this appeal—what was intended by the declarations of trust? The answer is—to sell the property, pay all the expenses, discharge the liens, and render to the appellants the profits, if any, remaining as their beneficial interests.

The second case relied upon by the appellants is that of Lynch v. Cunningham, 131 Cal.App. 164, 21 P.(2d) 154, 973. The opinion in the Cunningham Case follows the rules laid down in the Duffill Case, and being similar as to its facts, the same conclusion was reached. It may be stated, however, that in both the Cunningham and the Duffill Cases the rights of third parties were being considered, and not alone, the intention of the parties involved in the assignments and declarations of trust. In both the Cunningham and the Duffill Cases the reconveyance of the corpus appeared to be within the contemplation of the parties involved in the transaction. In the case at bar that intention appears to us to be entirely absent. Not a single one of the trusts indicates any contemplation that the real property should ever be returned or reconveyed to the beneficiary; that the interests of the beneficiary consisted solely in whatever the surplus might be. This, we think, brings the case squarely within the provisions of section 863 of the Civil Code which reads as follows: "Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust." Paraphrasing the language somewhat, after the execution of the instruments referred to herein, there remained in the beneficiary no interest in the real estate, but only the interest in the surplus or profits, if any, attendant upon the execution of the trust.

Almost identical questions presented for our consideration have received elaborate expositions and answers in three appellate court decisions, to wit: First is that of Craven v. Dominguez Estate Co., 72 Cal. App. 713, 237 P. 821, 824. In that case the declaration of trust is very similar to the declarations here involved. The property was to be sold; the interests, if any, were the profits of the beneficiary. In the Craven Case it was held to be an express trust to sell the real property and dispose of the proceeds according to the instruments of trust; that the trust declaration brought the case within the terms of section 863 of the Civil Code. The remedies of the beneficiary were held to be the enforcement of the trust. Citing in support thereof, Ward v. Waterman, 85 Cal. 488, 24 P. 930. In the Craven Case we also find the following language: "Thus where a trust deed creates a valid trust and gives a power of sale to the trustee at the request, and for the benefit of, the beneficiary under the deed, no power of revocation being reserved, no estate in the premises is left in the grantor, which is capable of being transferred." Citing, 39 Cyc. 245; Marvin v. Smith, 46 N.Y. 571; Kopp v. Gunther, 95 Cal. 63, 30 P. 301; Wilhoit v. Cunningham, 87 Cal. 453, 454, 25 P. 675.

The second case is that of Finnie v. Smith, 83 Cal.App. 707, 257 P. 866, involving a trust where the owner had conveyed the trustees, by means of declaration of an express trust for the purpose of selling and distributing the proceeds in a specified manner, and where the trust instrument contained no reservation of title or right of revocation, section 863 of the Civil Code applied, and there remained in the trustor no legal or equitable interest in the real property; that the right of the trustor related only to the profits or the beneficial interests as the same might appear to be on the execution of the trust. The opinion in the Smith Case takes up and reviews the different decisions having to do with like questions as those presented here, and reaches the conclusion as urged by the respondent, that the transaction amounts to an equitable conversion, and the beneficial interest is to be treated as personal property.

The third case is that of Houghton v. Pacific Southwest T. & S. Bank, 111 Cal. App. 509, 295 P. 1079, 1080. The trust there involved was to sell property, no provision being made for the return of the corpus. What that case holds is best illustrated by the following excerpt taken from the opinion listing the authorities upon which the court relied, to wit: "Under the law of this state the interest of Raymond as beneficiary of the trust in question was not an interest in the real property, but was personal property. The creation of the trust vested in the trustee the whole estate in the real property, subject only to the execution of the trust (Civ.Code, § 863), and Raymond as beneficiary retained no interest in the land which was subject to attachment by levy upon the real property. Ward v. Waterman, 85 Cal. 488, 508, 24 P. 930. It has been said that the interest of the beneficiary consists of 'merely a chose in action, an interest in a fund of money to be realized in the future by the sale of real property. By the making of the trust agreement he had converted any * * * interest in the real property which he possessed into a right only to receive money in lieu thereof, and this right was undoubtedly personal property.' Marble Co. v. Merchants' Nat. Bank, 15 Cal.App. 347, 351, 115 P. 59, 61. See, also, Craven v. Dominguez Estate Co., 72 Cal.App. 713, 237 P. 821; Ward v. Waterman, supra; Civ.Code, § 663; Code Civ.Proc. § 17, subd. 3."

[3] The appellants further complain that the court excluded testimony as to the value of the corpus of the trust. An examination of the pleadings reveals that there are no allegations in any wise attacking the regularity and legality of the sale of the beneficial interests in the trusts theretofore belonging to the appellants, save and except as to whether such beneficial interests constituted personal property, or an interest in real estate.

There is nothing in the pleadings upon which a charge of undue influence or fraudulent conduct on the part of the plaintiff could be based. Nor is there anything in the pleadings upon which it may be reasonably asserted that the provisions of section 2235 of the Civil Code can be applied. There is nothing in the record, so far as we have been able to ascertain, or which has been called to our attention, indicating that the trustee has obtained any advantage or exercised any undue influence over the beneficiary. The record shows that the appellants have been loaned exceedingly large sums of money, and that to secure the payment of the same, assignments were made of beneficial interests, pledging the same as security for repayment.

The proceedings referred to herein were instituted just preceding the prolonged national depression. The property proposed to be subdivided and sold in lots during the depression years found no market, with the result that the whole enterprise appears to have been more or less of a financial failure.

We gather from the record that the corpus of the trust still held by the plaintiff is encumbered by large sums of money so that the allegations contained in appellants' brief as to the value thereof must be read in the light of such outstanding liens and obligations.

We have not attempted to analyze all the authorities cited by respective counsel, but only those which we think decisive of the questions involved in this action.

The judgment of the trial court is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

PEOPLE v. PERKINS.

Cr. 4063.

Supreme Court of California.

March 26, 1937.

Rehearing Denied April 22, 1937.

1. Homicide ⚷253(1)

Evidence *held* to support conviction for first degree murder (Pen.Code, § 189).

2. Criminal law ⚷728(5), 730(1)

In murder prosecution, asking of rhetorical question by district attorney during closing argument to jury, and remarks of trial court and counsel relative to defense counsel's suggestion that he be permitted to answer question, *held* not error, especially where trial court was not requested to instruct jury to disregard such question and remarks.

3. Homicide ⚷174(5)

In prosecution for murder allegedly committed while deceased was being robbed, evidence respecting finding of money in tree near scene of crime some 18 days after crime *held* admissible in view of evidence of opportunity of defendant to have placed money in tree.

4. Criminal law ⚷1169(1)

Admitting photographs, taken about 6 weeks after crime was committed, of premises where murder occurred, *held* not prejudicial on ground that building and surrounding grounds had been changed, where other photographs of same premises taken day after murder were also in evidence and changes were not only obvious, but demonstrable.

5. Homicide ⚷166(10)

Where only motive involved in murder prosecution is robbery of deceased, anything bearing upon robbery as motive is admissible, but evidence of other motives is not admissible.

6. Homicide ⚷166(10)

Where only motive involved in murder was robbery of deceased, refusal to admit evidence that deceased had other money not in his possession *held* not error.

7. Homicide ⚷169(8)

Where only motive involved in murder was robbery of deceased, refusal to admit evidence that deceased had referred to defendant as "his boy," which statement had never been communicated to defendant, *held* not error.

8. Homicide ⚷166(10)

Where only motive involved in murder was robbery of deceased, excluding evidence that defendant had been promised job for day following crime *held* not reversible error.

9. Criminal law ⚷363

Declarations wherein event speaks through person, and not wherein person tells of event, are part of res gestæ and admissible in evidence.

10. Criminal law ⚷364(6)

Refusal to admit as part of res gestæ testimony as to what defendant said to witness, when he came to her house on morning of murder about one-half hour after deceased died, *held* not error.

11. Homicide ⚷167(7)

Refusal to admit evidence of threats made on life of deceased by persons other than defendant shortly before murder *held* not error.

12. Homicide ⚷260

Permitting jury, over defendant's objection that building had been changed, to view scene of murder and pointing out, by consent of counsel, different objects and describing them to jury, *held* not abuse of discretion, where changes in building were not material to defendant's contentions.

13. Homicide ⚷308(3)

Where evidence tended to show that deceased had been murdered while being robbed, instruction that jury could return either verdict of guilty of first-degree murder or verdict of not guilty *held* not error.

14. Criminal law ⚷829(1)

Refusal of instructions containing matters fully covered by other instructions was not error.

15. Criminal law ⚷363, 413(1)

Self-serving declarations are not admissible, and to entitle any such statement made by defendant to admission it must be shown that it is within rule denominated "res gestæ," which means that the declaration must be the natural and spontaneous outgrowth of the act or assault and not a mere narration of a past transaction.

[Ed. Note.—For other definitions of "Res Gestæ," see Words & Phrases.]

16. Criminal law ⚷363

"Res gestæ" are events themselves speaking through instinctive words and acts of participants the circumstances, facts, and declarations which grow out of main fact, are contemporaneous with it, and serve to illustrate its character, and include words and acts which are so closely connected with main fact as to constitute a part of transaction and without a knowledge of which main fact might not be understood.

17. Criminal law 🔑363

Self-serving declarations and hearsay evidence cannot be invoked to displace or destroy efficacious and proper application of res gestæ doctrine.

18. Criminal law 🔑1159(1)

Where incriminatory circumstances relied upon are equally compatible with innocence, reviewing court will reverse judgment of conviction, but, where jury rejects hypothesis pointing to innocence by its verdict, and there is evidence to support implied finding of guilt as the more reasonable of the two hypotheses, reviewing court is bound by jury's finding.

19. Homicide 🔑167(7)

Evidence offered tending to establish that other persons had threatened deceased with violence is not ordinarily admissible in murder prosecution as tending to show that defendant did not commit crime.

20. Criminal law 🔑562

Evidence of itself must be inherently sufficient to prove that person accused committed crime, and, if that is established beyond a reasonable doubt and to a moral certainty, it excludes all others from participation in crime except coconspirators.

THOMPSON and LANGDON, JJ., dissenting.

◆

In Bank.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

William Perkins was convicted of murder in the first degree, and he appeals.

Affirmed.

Prior opinion, 60 P.(2d) 567.

Rehearing denied; THOMPSON, J., dissenting.

Donald P. Nichols and Allan J. Carter, both of Pomona, and W. I. Gilbert, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., and Stanley Mussell, Dist. Atty., of San Bernardino, for the People.

SEAWELL, Justice.

Since granting the petition for a hearing herein we have made a re-examination of the points therein urged as grounds for a hearing by this court, as well as all questions raised on the appeal, and we are of the vew that the opinion and decision of the District Court of Appeal, Fourth Appellate District, 60 P.(2d) 567, prepared by Turrentine, J., pro tempore, fully and correctly disposed of all the questions raised by the appeal. It is hereby adopted by this court as a correct statement of the facts and the law applicable to the case, as amended and corrected in minor respects by said District Court of Appeal upon rehearing granted, and, as so corrected, adopted by said court as a per curiam decision. We have added to said opinion our own observations which we deem pertinent to the issues in view of certain points stressed in the petition for a hearing by this court.

The opinion follows:

"The defendant, William Perkins, stands convicted of murder in the first degree, upon which conviction a judgment of life imprisonment has been entered. He prosecutes this appeal both from the judgment and from the order denying a new trial.

"That the deceased, David Philip Kirk, known as 'Skippy,' was murdered in the city of Ontario on the morning of December 31, 1935, is admitted. The evidence connecting the defendant with the murder is purely circumstantial. The record discloses that Kirk had been living in a small two-room house and that the defendant had been living with him for about ten or twelve days before the murder. Kirk was about sixty years of age and defendant about twenty-three. Kirk operated a penny ante poker game in partnership with one Clark. A poker game broke up at about 1:30 o'clock on the morning of December 31, 1935. The defendant and Kirk had been in the building substantially all evening and were in the house together when the game broke up. Thereupon the players left and Kirk and defendant remained in the house and went to bed. Kirk slept in the east room and the defendant in the west room. Kirk died at about 5:45 o'clock that same morning. He had been strangled and his skull was fractured. Defendant testified that he saw Kirk have $7 and other bills on his person the night prior to the murder. Thus far the evidence is without conflict and is conceded by both sides to be substantially correct and to establish beyond a reasonable doubt that Kirk was murdered.

"The evidence connecting defendant with the murder of Kirk may be fairly stated as follows: Several witnesses testified that between 12, midnight, and 1:20 on the morning in question they saw Kirk have in his possession paper money which they estimated to aggregate about $20 to $25. Other witnesses testified that Kirk had a new dollar bill of the 1935 series on the evening prior to his murder and that he had called their particular attention to this bill and at the same time showed them several of the new issue of 25-cent pieces which he also had in his possession at that time.

"After Kirk's death some of the coins were found on the floor near his body and others were found on his person but the bills were missing and were never found either on his person or in the house. The testimony showed that Kirk ordinarily, and on the night prior to his death, carried his money in one of the pockets of a khaki shirt which he had worn that night and which he wore to bed that night.

"Defendant testified that he and Skippy retired to their respective beds about 1:30 o'clock on the morning of December 31, 1935, and that defendant went to sleep almost immediately; that he was sleeping between two mattresses; that he was awakened shortly before dawn by 'someone hollering'; that he thought the person from whom the sound issued was Skippy; that the sound was muffled; that shortly after he heard the above-mentioned sound some unknown person jumped on the bed which he was occupying and on top of the upper mattress and held him on the bed in such manner that he could not escape; that as he continued his struggle to get away and was about to succeed in his effort the intruder left off and ran into the other room and then out of the house; that he began to arise and just as he did so he slipped and fell but recovered himself and jumped up and followed the intruder.

"Defendant further testified that he ran out of the house on the porch and to its east end and about 15 steps therefrom and then saw two men running up the alley; that he thought he shouted at the men to stop; that he discontinued his pursuit of the men and returned to the house where he discovered Skippy lying on the floor; that he spoke to Skippy but received no answer; that he procured a cup of water and sprinkled some of the water over Skippy's face; that he then left the house and went to another dwelling next door for the purpose of securing assistance. One witness, Elsie Dickey, testified that, a few minutes after 6:15 o'clock of the specified date, and while it was yet dark, the defendant came to her door and said that he wanted help, that she told the defendant that there was no man in her house who could assist him and the defendant then went away. Mr. Ireton, who lived next door to the house occupied by Skippy, testified that the defendant came to his house about daybreak of December 31, 1935, and requested help and that the defendant then stated that two men had entered Skippy's house and had beaten 'Hell out of both of us.' The witness Ireton also testified that he directed the defendant to go to a house on the corner and that shortly thereafter the defendant returned to the Ireton dwelling and again requested assistance, that he (Ireton) promised to come but later called across the fence and suggested that the defendant call the police. Ireton further testified that shortly after defendant left his house he looked over at Skippy's house and saw some one walking in the house and then walk over to the window in the west room, and he then saw some one's hand moving the bottom of the screen on the window back and forth. This was the window, according to defendant's testimony, through which the two men had entered his room.

"Approximately at 6:30 a. m. defendant went to the ice plant and telephoned the police, asking them to come to his assistance, but gave them a wrong address for Skippy's house. Defendant testified that while waiting for the police to come he succeeded in getting Skippy up onto the bed; that he heated some water and took a towel and washed some of the blood off Skippy's face; that he then put cold water on his forehead in endeavoring to restore him to consciousness.

"Some time later defendant's attention was called to the fact that he had given a wrong address to the police and he then called the department, giving a more correct address.

"Several witnesses testified that shortly after they arrived at the scene of the murder they discovered defendant had blood on his clothes and that they also saw certain scratches and cuts on his face, neck and body. Defendant said that he had not been in a fight the day or evening befo the murder, but stated he got the scratches from the mattress while he was being held down and that his assailant did not touch him. The police doctor testified that he found human skin and blood in the debris which he removed from under the fingernails of Kirk.

"The chief of police testified that he arrived at the house and saw defendant for the first time at approximately 7 o'clock on the morning the murder was committed; that he talked to defendant and that during the conversation defendant pointed out the window in his room where he claimed the two men had entered; that he examined the window and windowsill; that there was dust and dirt on the windowsill and that it had not been disturbed recently. The window was approximately 30½ inches high and about 14 inches wide and was about 3 feet above the porch outside. The window had been covered by a screen which was partly loosened from the bottom and left side.

"Certain witnesses testified that there was dew on the ground in the early morning of December 31, 1935, and that they examined the ground for footprints. One witness, Dr. Abbott, who was the police surgeon, testified that he looked for footprints on the ground and found none, but that when he arrived at the alley he found tracks going up and down the alley.

"Mrs. Murphy testified that on January 18, 1936, she and her 7 year old son found three $5 bills, and four $1 bills, in a hole in a pepper tree across the street from a Mrs. Dickey's house. This was the green house on the corner where defendant admitted he had gone for help on the morning in question. She further testified that there was a growth of brush around the foot of the tree partially concealing the hole where she found the money. This hole was about a foot and a half above ground. The pepper tree was some 200 or 300 feet from the Kirk premises. The money was immediately turned over to the police and was subsequently introduced in evidence at the trial. One of the dollar bills was of the new 1935 series similar to the one which Kirk had displayed the night prior to the murder.

"The witness, Dr. Abbott, testified that during the morning of December 31, 1935, he saw the piece of wood which was then in the hands of a police officer and that he saw a gray hair on it. This witness also testified that Kirk had not only been strangled to death but that he had been struck over the head with a blunt instrument with sufficient force to fracture his skull; that defendant told the officers on the morning of his arrest that it was from forty-five minutes to an hour between the time he was able to get out of bed and the time the police arrived in answer to his call. The first officer arrived approximately fifteen minutes after the first call by defendant to police.

"On this state of the evidence the defendant challenges its sufficiency to sustain a conviction. His contention is that the Supreme Court in the case of People v. Lamson, 1 Cal.(2d) 648, 36 P.(2d) 361, 363, laid down the following rule: 'Resting its case upon circumstantial evidence, the prosecution must not only show a set of circumstances consistent with guilt, but must show a set of circumstances inconsistent with any reasonable theory of innocence.' It is also urged that the decision in People v. Staples, 149 Cal. 405, 86 P. 886, 894, is controlling in this case and requires a reversal of the judgment. The following language is declared to be peculiarly pertinent to the situation here presented: 'It will be perceived that the evidence in the case relied on to establish the guilt of the defendant is practically circumstantial, and it is elementary law that where the evidence is of such a character it must be not only consistent with the hypothesis of guilt, but inconsistent with any other rational hypothesis. The deduction to be drawn from these circumstances is, ordinarily, one for the jury, but where, in a case such as this, every circumstance relied on as incriminating is equally compatible with innocence, there is a failure of proof necessary to sustain a conviction, and the question presented is one of law for the court. The prosecution has the burden of proof. The defendant is presumed innocent until the proof satisfies the jury beyond a reasonable doubt of his guilt. The right of a jury to return a verdict of guilty is not an arbitrary right. The sufficiency of their verdict must be tested by determining whether the evidence upon which that verdict is framed was of such a character that they could say from it that in their judgment no reasonable doubt of the defendant's guilt existed.'

"In each of the above-cited cases the question as to whether or not a murder had in fact been committed was one of the matters which the prosecution attempted to establish by circumstantial evidence. In the case before us the fact that a murder had been committed is conceded and we are only considering whether or not the circumstantial evidence is sufficient to connect the defendant with, and to convict him of, the murder. Where the commission of the offense charged is conceded and it is left to be determined only who was the perpetrator of the crime, we think the proper rule is laid down in the case of People v. Tom Woo, 181 Cal. 315, 184 P. 389, 393, where it is said: 'In passing upon this question [the sufficiency of the evidence] we will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground we are discussing, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed; and, second, that it was perpetrated by the person or persons accused thereof. In this case there can be no doubt of the first proposition, * * * Did these defendants commit or participate in the commission of the murder? What facts can we say the jury could have resolved from the evidence in order to justify the inference of guilt? We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.'

"In People v. Latona, 2 Cal.(2d) 714, 43 P.(2d) 260, 263, the Supreme Court said: 'However, as was said in People v. Martinez, 20 Cal.App. 343, 345, 128 P. 952, 953, if "the circumstances established reasonably justified the conclusion of the jury as expressed in their verdict, and, even though this court were of the opinion that such circumstances might be reasonably reconciled with the innocence of defendant, such fact does not warrant interference with the determination of the jury." [Citing cases.] * * * The circumstantial evidence produced convinced the jury beyond a reasonable doubt under the instructions of the court of the guilt of the appellant, and it is not the province of an appellate court to overturn such a conclusion, except it be determined that there was no evidence to sustain it. People v. Tom Woo, 181 Cal. 315, 184 P. 389. * * * The right to draw proper inferences from the evidence is a function of the jury; and as long as its conclusions do not do violence to reason, an appellate court is not permitted to substitute its finding of the ultimate fact for that reached by the constitutional as well as the statutory arbiter thereof. Circumstantial evidence may be as convincing in its force and as conclusive as the testimony of witnesses to an overt act. People v. Kneiling [127 Cal.App. 151, 15 P.(2d) 561].'

"We thus observe that the decision in People v. Tom Woo, supra, has been cited with approval since the decision of the case of People v. Lamson, supra.

[1] "The jury was entitled to believe that Kirk had from twenty to twenty-five dollars on his person the night prior to the murder; that he took the money to bed with him and that the next morning most of this money was missing from his person. It was therefore justified in concluding that he had been murdered in the course of being robbed. This, of course, would be murder in the first degree. Pen. Code, § 189. The physical evidence demonstrates that the money was not taken either with his consent or without force.

"In view of all the evidence, including the evidence of fresh scratches and cuts on the face, neck, and upper body of the defendant, his denial that he had been in a fight the evening or day before the murder, and particularly the evidence that the murdered man had human skin and blood beneath his fingernails immediately after the murder, the circumstances strongly connect the defendant with the crime. Applying the rules above stated to the evidence, we think there was clearly sufficient evidence upon which the jury was entitled to find, and did find, the defendant guilty of murder in the first degree.

[2] "During the closing argument of the district attorney a certain portion thereof was stated in the form of a question

and counsel for the defense interrupted and the following colloquy took place:

"'Mr. Carter: If you are asking me a question I would like the opportunity of answering you.

"'Mr. Kavanaugh: I will have to ask you not to interrupt me.

"'Mr. Carter: Then don't ask me any questions.

"'Mr. Kavanaugh: I will ask you all the questions I want to.

"'Mr. Carter: If you do I will answer them.

"'The Court: No, you won't.

"'Mr. Kavanaugh: I am addressing myself to the jury and Mr. Carter knows it well.

"'The Court: There is no necessity for this discussion between counsel. Proceed with the argument.

"'Mr. Carter: I except to counsel's remarks and to the remarks of the Court.'

"It seems obvious to us that this was a rhetorical question and that the district attorney made this clear in his reply to the defense counsel inquiries. In any event the court was not requested to instruct the jury to disregard the same and no error could be predicated thereon under the circumstances.

[3] "We think the evidence respecting the finding of the money in the pepper tree, although it was found some eighteen days after the murder, was admissible in view of all the other evidence and evidence of the opportunity available to the defendant to have placed it there. The weight of the evidence and the inferences to be drawn therefrom were peculiarly for the jury to pass upon. This entire matter was a circumstance which the jury had a right to consider along with other circumstances and evidence in arriving at their verdict.

[4] "Photographs of the premises where the offense was committed, taken February 17, 1936, were admitted in evidence and it is claimed that this was error because the building and the grounds around it had been changed. However, this could not possibly have prejudiced the defendant as other photographs of the same premises taken the day after the alleged murder were also in evidence, and any changes which had been made were clearly demonstrable.

"The defendant was not permitted to testify that he had been promised a job to go to work on the morning of December 31, 1935. Defendant also attempted to prove by a Mr. Flynn that for several weeks prior to the murder Flynn had been acting as a banker and had a considerable cash deposit of deceased's money in his possession at the time of the alleged murder and that Kirk had referred to defendant as 'his boy.' Defendant contends that all of these matters were admissible in evidence as bearing on the question of motive, and the refusal of the trial court to admit them constitutes reversible error. Appellant relies upon the case of People v. Kelley, 208 Cal. 387, 281 P. 609, as an authority justifying the admission of this evidence. In that case the sole question was the motive, as the commission of the crime had been brought home to the defendant.

[5-8] "In the instant case the only motive involved was robbery of the murdered man. Anything that had a bearing on robbery as a motive was, of course, admissible, but evidence regarding other motives was not admissible. This, we think, is the true rule and is not in conflict, but in accord with the rule laid down in People v. Kelley, supra. If this be the correct rule, then it is difficult to see how evidence that the deceased had other money, not in his possession, could bear on robbery as a motive for the commission of the crime. The same can be said of the evidence of Mr. Flynn that the deceased referred to the defendant as 'his boy,' which, so far as the evidence shows, had never been communicated to the defendant. It is not so clear that the evidence that the defendant was promised a job for the next day was inadmissible as bearing on motive for robbery, but its exclusion was not, in our opinion, prejudicial or reversible error.

[9, 10] "Defendant called Mrs. Ireton to the stand and asked her what the defendant had said to her when he came to her house at about 6:15 on the morning of the murder, which was at least a half hour after Kirk had died. On objection being made, she was not allowed to answer the question. Defendant contends that the evidence was admissible under the res gestæ rule. 'The rule [res gestæ] is familiar and permits the declarations of the defendant to be shown where they are so closely connected with the main event as to appear wholly unpremeditated and spontaneous.' (People v. Dad, 51 Cal.App. 182, 196 P. 506, 509.) It may be stated that where it is the event speaking through

the person and not the person telling about the event, that such declarations are part of the res gestæ and admissible in evidence. There had been sufficient elapsed time to allow the defendant to think over the event and, in fact, he had left the immediate scene of the crime and had sought some person to tell of the event. Under these circumstances, the trial court was correct in ruling that the conversation was not a part of the res gestæ and that the same was inadmissible as self-serving declarations.

[11] "The trial court did not err in refusing to admit evidence of threat made on the life of Kirk by persons other than defendant shortly before the murder. The rule is clearly laid down in People v. Mendez, 193 Cal. 39, 223 P. 65, 70, where the Supreme Court said: 'The trial court expressed the view that evidence tending merely to show that persons other than the defendants may have had a motive for the commission of the crime was inadmissible unless coupled with other evidence having an inherent tendency to connect such other persons with the actual commission of the crime. * * * We are inclined to agree with these conclusions of the trial judge. We do not find any California case directly in point upon the question whether evidence of motive upon the part of some one other than the defendant for the commission of the crime charged is admissible, in the absence of other evidence tending to connect such other persons with the commission thereof. "It is always proper to show that some other person, and not the defendant, committed the crime with which he is charged." People v. Mitchell, 100 Cal. 328, 333, 34 P. 698, 700. The question herein is what kind and quality of evidence is essential to that end. * * * It seems clear that a defendant, in order to exculpate himself, should not be required to establish the guilt of a third person with that degree of certainty requisite to sustain a conviction of the latter. On the other hand, it seems equally clear that evidence which simply affords a possible ground of possible suspicion against another person should be inadmissible. The decisions in other states are not completely harmonious upon this question. But they are substantially unanimous in holding that mere evidence of motive in another person, or of motive coupled with threats of such other person, is inadmissible unless coupled with other evidence tending to directly connect such other person with the actual commission of the crime charged. See notes to 1 Wigmore on Ev.(2d Ed.) §§ 139–142. The learned author criticizes the rationale of these decisions somewhat severely, but concedes that they are substantially unanimous upon this point. It seems to us that there is a sound basis for this rule and that it rests fundamentally upon the same consideration which led to the early adoption of the elementary rules that evidence to be admissible must be both relevant and material. It rests upon the necessity that trials of cases must be both orderly and expeditious, that they must come to an end, and that it should be a logical end. To this end it is necessary that the scope of inquiry into collateral and unimportant issues must be strictly limited. It is quite apparent that if evidence of motive alone upon the part of other persons were admissible, that in a case involving the killing of a man who had led an active and aggressive life it might easily be possible for the defendant to produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased; that a great many trial days might be consumed in the pursuit of inquiries which could not be expected to lead to any satisfactory conclusion.'

[12] "The trial court did not abuse its discretion in permitting the jury, over the objection of defendant, to view the scene of the crime. Although there had been some changes in the building, the changes were not material to the contentions of the defendant. The trial court, by consent of counsel, pointed out different objects and described them. Certainly no abuse of discretion appears. In the case of People v. Pompa, 192 Cal. 412, 221 P. 198, 202, it is said: 'The fact that physical conditions upon or about the premises may have been to any degree altered is a fact to be considered by the trial court in exercising its discretion to permit or refuse to permit such view, and its conclusion in that regard will not be disturbed upon appeal, in the absence of a clear showing of an abuse of such discretion. No such abuse of discretion is disclosed by the record in this case.'

"An examination of all of the instructions and comments of the trial court on the evidence leads to the conclusion that these comments were all within the constitutional limitation and within the limitation approved by the Supreme Court in People v. De Moss, 4 Cal.(2d) 469, 50 P.(2d) 1031.

While the trial court commented somewhat on the weight of the evidence, it at all times impressed upon the jury that they were the sole judges of the facts and that they should accept defendant's story if they believed it. This admonition was given at the introduction of the instructions, at the time comments were made upon the evidence, and at the conclusion of such comments. The comments made seem to coincide with the purpose and spirit of the constitutional amendment permitting the same. An example of the caution exercised is contained in the following statement of the trial court: 'I wish to warn you again, ladies and gentlemen, that nothing I can say or should say indicates what I would believe or what I would do if I were on the jury. It is merely for the purpose of directing your attention, if I may, to what seems to me to be the crucial points in the testimony in this case.'

[13] "Appellant contends that the trial court erred in instructing the jury that they could either return a verdict of guilty of first degree murder, or a verdict of not guilty. In view of the evidence that Kirk was not only murdered but also robbed at the same time, if the jury believed defendant committed the crime, the only verdict they could possibly have returned was one of guilty of first degree murder. (People v. Petro, 13 Cal.App.(2d) 245, 56 P.(2d) 984. See, also, People v. Mott, 211 Cal. 744, 297 P. 23.)

[14] "While appellant complains of the trial court's refusal to give certain requested instructions, we find that the same matters were fully covered in other instructions. This was sufficient. People v. Garcia, 2 Cal.(2d) 673, 42 P.(2d) 1013.

"The other alleged errors complained of by appellant respecting the admission or failure to admit evidence do not seem substantial and in no way affect the merits of the same."

The law as to what constitutes res gestæ as applied to criminal cases is so firmly settled by the decisions of this state that a long list of cited cases would only mean a multiplicity of authorities in support of a fixed rule. It is admitted that the testimony of the witness Mrs. Ireton, whatever may have been its specific purport, related to declarations made by the defendant when he supposedly was in the room in which the deceased was killed not less than one-half hour after the homicide had been committed, and that possibly said declarations were made after a longer period had intervened. The defendant had left the premises after the homicide and gone to a neighboring residence in quest of assistance, and, after having had a short conversation with said neighbor, had returned to the room in which the body of the deceased lay. It was then upon his return that the declarations presumably were made by the defendant which he attempted to introduce in evidence through the testimony of Mrs. Ireton.

[15, 16] The admission of such evidence would have violated the cardinal rule that self-serving declarations are not admissible and, in order to entitle any statement made by the defendant to admission, it must be shown that it is within the rule denominated res gestæ, which means that the declaration must be the "natural and spontaneous outgrowth of the act or assault," and not a mere narration of a past transaction. The res gestæ include words and acts which are so closely connected with the main fact as to constitute a part of the transaction, and without a knowledge of which the main fact might not be understood. "They are the events themselves speaking through the instinctive words and acts of the participants the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it and serve to illustrate its character." Ballentine's Law Dictionary.

A number of cases may be cited in which the declarations or exclamations were made less than a half-hour after the homicide was executed or the assault was made and were held inadmissible on the ground that such evidence was no part of the res gestæ, but was self-serving and hearsay. In People v. Dad, 51 Cal.App. 182, 187, 196 P. 506, 509, the declarations were made by the defendant as he walked from the restaurant where the homicide occurred some little time thereafter, and while "the smoke of the battle was still in the restaurant." His statement "I protect myself" and a declaration justifying his assault were excluded on the theory that the defendant "had ample time to contemplate a possible defense."

[17] The declarations in the instant case do not purport to consist of an outcry, nor to have been made while engaged in the conflict, nor were they the natural and spontaneous outgrowth of any assault, but they were purely self-serving statements made long after the assault had been

committed and the defendant had left the scene and subsequently returned to it. The trial court did not commit error or abuse its judicial powers in excluding such testimony. People v. Hinshaw, 194 Cal. 1, 227 P. 156; People v. Anderson, 120 Cal.App. 5, 7 P.(2d) 202; People v. Westcott, 86 Cal.App. 298, 260 P. 901. No further citation of authorities is necessary for the support of the well-recognized principle of law that self-serving declarations and hearsay evidence cannot be invoked to displace or destroy the efficacious and proper application of the res gestæ doctrine.

We think there is no substantial merit in the complaint that the exclusion of evidence to the effect that the defendant was promised a job of work in the immediate future was improper. Said evidence in no way tended materially to affect or change the situation as it existed at the time of or immediately before the homicide. The district attorney proved and commented on the situation of the defendant as it existed at the time the homicide was committed. Defendant had been living at the home of the deceased about ten days, was without money, and was running a charge account at a nearby store. The exclusion of evidence tending to show that he had a promise of work, or an expectation, or possibility, or opportunity in common with all others, is not a matter of great importance. The jury could, and no doubt did, take notice of the fact that the usual opportunities to obtain employment were open to him, and that it by no means follows that a person without work will kill to obtain money, rather than earn it. The prosecution offered evidence tending to prove the condition of the defendant at the time of the homicide and drew such inferences from the situation as it existed as it believed to be justified by the case presented. If its inferences and deductions were unwarranted, the jury as reasonable men would not follow specious reasoning. There is so little evidentiary substance to the claim that the refusal to admit evidence that the defendant had the promise of a job constituted reversible error, as to reduce it to a minimum in importance.

[18] Appellant presses on our attention the rule which frequently finds expression in our decisions to the effect that the circumstances relied upon to establish the guilt of one accused of crime must be consistent with that hypothesis and inconsistent with any other rational conclusion. In other words, where the incriminatory circumstances relied upon are equally compatible with innocence, a reviewing court will reverse a judgment of conviction, and a like application of that rule to this case, it is claimed, would impel a reversal of the judgment. The rule above announced does no more than to instruct the jury that, if a reasonable doubt is created in their minds for any reason, they must acquit the defendant. But, where the jury rejects the hypothesis pointing to innocence by its verdict, and there is evidence to support the implied finding of guilt as the more reasonable of the two hypotheses, this court is bound by the finding of the jury.

[19, 20] Evidence offered tending to establish that other persons had threatened the deceased with violence is not ordinarily admissible as tending to show the defendant did not commit the crime. The rule is that the evidence of itself must be inherently sufficient to prove that the person accused committed the crime, and, if that is established beyond a reasonable doubt and to a moral certainty, it excludes all others from participation in the crime except coconspirators.

We have considered the argument of appellant as to the insufficiency of the evidence to support the verdict. We are of the view that it is unquestionably sufficient. The attempt of the defendant to account for himself and explain the homicide is set out in a somewhat weird and unreasonable story which evidently did not impress the jury. It abounds in improbabilities, and the jury was the judge of its reasonableness. An instruction which is frequently given in criminal cases is to the effect that in judging the credibility and the weight to be given to the testimony of any witness consideration is to be given to the reasonableness of the witness' statements. The jury no doubt gave heed to the above-announced principle in considering the credence to be given to defendant's story.

The finding of the currency in the base of the pepper tree was also a strong link taken with all the other circumstances tending to connect the defendant with the commission of the crime. Of course, the defendant had to dispossess himself of the currency if he committed the crime. It was found concealed at a place where he was known to have passed shortly after the commission of the crime. It would be contrary to the rule of common sense to suppose that an outside person, who necessarily fled from the scene, would take time to conceal the money at a place within two or three hundred feet from the scene of the crime, with the intention of returning thereafter to repossess it when he already had it in his possession. The scratches upon defendant's face and human skin found under the fingernails of the deceased, evidencing a struggle, together with the other facts of the case, tend strongly to support the verdict.

The judgment and order denying a new trial are affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; EDMONDS, J.

THOMPSON, Justice (dissenting).

I dissent.

One of the prosecution witnesses testified on direct examination that on the morning of the homicide he had made a search of defendant's person and found nine cents in his pockets which the defendant said "was all he had." During the cross-examination of defendant, who had taken the stand in his own behalf, the prosecution established that defendant had not worked for a week prior to the homicide and had borrowed money from the deceased and that at the time defendant had only nine cents. In his argument to the jury, the district attorney emphasized the fact that defendant at the time of the homicide had but nine cents in his pocket. He then argued, in part, that defendant "had no employment, no contact, nothing except living there. There was a game there the night before, and it is uncontroverted—there is no dispute about it—that the defendant had no money of his own * * * he was, as we say, impecunious—busted flat; on the other hand, he admits seeing the deceased having money. * * * Now, let us presume * * * that this defendant actually conceived the idea in his strained financial condition, and it appeared there that he would get a little easy money. * * * Let us conceive that the defendant being hard up, and needing some money, and knowing that the old man had some money, that he would conceive the idea of getting it."

While a showing of motive is not indispensable to the establishment of an offense (People v. Kelley, 208 Cal. 387, 390, 391, 281 P. 609), it definitely appears from the record herein, and particularly from the foregoing, that the prosecution in its attempt to connect defendant with the homicide relied strongly on defendant's lack of employment and his apparent need of money. In view of the emphasis placed by the People on these features and in the circumstantial state of the evidence generally, I am of the opinion that the trial court grievously erred to the prejudice of the defendant when it sustained objections to questions intended to elicit that on the day preceding the homicide the defendant had a promise of employment. Such evidence was admissible as tending to overcome or minimize the motive or reasons advanced by the prosecution for defendant's asserted commission of the offense.

I am also of the view that the trial court erred in precluding the defendant from offering evidence, through a disinterested witness, to the effect that the deceased had been in the habit of depositing or "banking" money with the witness, a restaurant owner. This offer of evidence was explained by the defense as intended to show that deceased never retained or kept large sums of money with him, of which fact defendant was aware. Such evidence, if admitted, would have tended to overcome the likelihood of defendant perpetrating the heinous offense charged against him. In the face of such evidence it would not be unreasonable for the jury to assume that a person as financially distressed and as sorely in need of money as the prosecution had portrayed the defendant would not have murdered and robbed one with such a limited amount of money available. The evidence should have gone to the jury for whatever weight it desired to attach thereto.

Then, again, I am of the opinion that it was error to sustain objections to questions put to three defense witnesses, including the defendant, intended to disclose that the deceased on several occasions had referred to the defendant as "his boy." Evidence of this character would have a tendency to establish the amicable relations between deceased and defendant and tend to render improbable the latter's participation in his benefactor's untimely and violent death.

In view of the fact that all of the evidence tending to connect the defendant with the homicide and the robbery was meager and was circumstantial in character, any material evidence tending to prove lack of motive on the part of the defendant should have been admitted. In my opinion, the proferred evidence above discussed was material to this purpose, and the error involved in its rejection is accentuated by the circumstantial character of the prosecution's evidence tending to connect defendant with the homicide. The weight of credibility to be attached to such evidence, of course, would be for the determination of the jury.

I concur: LANGDON, J.

8 Cal.2d 492

SAWYER et al. v. SUNSET MUT. LIFE INS. CO.

L. A. 16020.

Supreme Court of California.

March 26, 1937.

Rehearing Denied April 22, 1937.

1. Insurance 🔑679

Under so-called reinsurance contract providing for assumption by reinsurer of outstanding policies of mutual association, reinsurer *held* liable jointly with mutual association on life policy to beneficiaries, since contract was more than mere contract of "reinsurance" under Code on which reinsurer would not be liable in that it was a contract for benefit of policyholders (Civ.Code, §§ 2646, 2649).

[Ed. Note.—For other definitions of "Reinsurance," see Words & Phrases.]

2. Insurance 🔑679

Where reinsurer agreed to pay all mutual association's outstanding policies, bringing of suit by beneficiaries of policyholder of mutual association against reinsurer was sufficient evidence of consent to agreement and law created privity necessary for maintenance of action.

3. Insurance 🔑681

Cancellation by mutual consent of respective insurers of so-called reinsurance contract by which reinsurer had agreed to pay all outstanding policies of mutual association, after death of insured, *held* not to preclude recovery by beneficiaries from reinsurer, since rights of beneficiaries became vested on death of insured.

To "cancel" a contract means to abrogate so much of it as remains unperformed. It differs from "rescission," which means to restore the parties to their former position. The one refers to the state of things at the time of the cancellation; the other to the state of things existing when the contract was made.

[Ed. Note.—For other definitions of "Cancel," "Rescission," see Words & Phrases.]

4. Insurance 🔑686

Reinsurer is bound by judgment against original insurer, even though reinsurer does not actively participate in defense of action against original insurer, provided reinsurer has notice of pendency of the action and is afforded an opportunity to defend and the defense is carried on without fraud or collusion by original insurer.

5. Insurance 🔑686

Reinsurer of mutual association which had notice of pendency of action by beneficiaries of insured against original insurer, but which refused to participate in defense, *held* bound by determination in action against original insurer as to amount of liability and hence could not raise defense in action against it, that there were less than 3,000 members at time of insurer's death, and that the amount payable would be $1 for each member in good standing.

6. Appeal and error 🔑110, 123

Appeals do not lie from verdict or from order denying motion for a new trial.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; H. D. Burroughs, Judge.

Action by Sally E. Sawyer and another against the Sunset Mutual Life Insurance Company, a corporation. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Prior opinion, 59 P.(2d) 208.

Sylvan Y. Allen and Allen & Hedberg, all of Los Angeles, for appellant.

De Forrest Home, Eugene Kelly, and Lon A. Brooks, all of Los Angeles, for respondents.

CURTIS, Justice.

A hearing was granted in this case after decision by the District Court of Appeal.

Second Appellate District, Division One [59 P.(2d) 208], to consider more fully the contention of the respondents that the modification by the District Court of Appeal of the judgment of the trial court in favor of respondents by reducing said judgment from $3,032 to $903 was erroneous. We are satisfied that the contention of the respondents is correct and the judgment as rendered by the trial court should be affirmed. We are, however, in accord with the statement of the case by Mr. Justice White, pro tempore, in the opinion prepared by him, and are satisfied with the conclusions reached therein that under the facts therein set forth the respondents were entitled to recover against the appellant, and we, therefore, adopt that portion of the opinion affirming said right of respondents, as part of the opinion of this court. It is as follows:

"Appeal by defendant, Sunset Mutual Life Insurance Company, from a judgment in favor of plaintiffs in the sum of $3,032 and costs.

"Briefly, the facts are that on July 24, 1929, the Roosevelt Mutual Life Insurance Association, a California corporation, insured the life of one Mack Lewis Sawyer for $3,000. Respondents herein were the beneficiaries under this policy. On June 9, 1930, while said policy was in force, the Roosevelt association and appellant, Sunset Mutual Life Insurance Company, entered into a certain agreement, under the terms of which appellant insurance company assumed, according to their terms and conditions, the policies and certificates of membership of the Roosevelt company then outstanding, it being further provided that the Roosevelt company would transfer to appellant all defenses contained in the said policies or certificates. This agreement was approved by the insurance commissioner of California on June 26, 1930. Under this agreement, the collection of assessments and payment of death losses were consolidated under one management. It was further provided in the contract that when death notices were received by the Roosevelt insurance company, the latter should forthwith submit them to the Sunset insurance company, and that proofs of loss were to be forwarded by the Roosevelt insurance company to the Sunset insurance company for the latter's approval and adjustment, and when the amount to be paid was approved by the Sunset company the latter was to forward its check to the Roosevelt company for settlement with the beneficiary. Final settlement papers, properly signed, and surrendered policies or membership certificates, properly released, were to be furnished by the Roosevelt company to the Sunset company. Following the execution of the agreement, the two insurance companies moved into the same suite of offices, and the medical examiner for the Sunset company acted in a like capacity for both companies. It also appears that the president of the Sunset company was vice president of the Roosevelt company. The Roosevelt company forwarded to all its agents and some of its policy holding members a mimeographed copy of a letter signed by the Sunset company, in which it was stated that on and after June 26, 1930, all risks carried by the Roosevelt company were fully covered by the Sunset company. Some $800 was paid by the Roosevelt company to the Sunset company pursuant to the contract.

"On September 29, 1930, and while this agreement between the two insurance companies was in effect, the insured, Mack Lewis Sawyer, died, and proofs of death were submitted to the Roosevelt company, with a claim for payment of the amount due under the policy. On January 7, 1931, the Roosevelt company disallowed the claim of respondents herein as beneficiaries under the policy for payment thereunder.

"On January 31, 1931, the so-called reinsurance agreement was canceled by mutual consent of the Roosevelt and Sunset insurance companies. Shortly thereafter, the respondents herein, as beneficiaries under the policy, brought an action against the Roosevelt company, and on September 23, 1932, secured judgment for $3,000 and costs. This judgment became final and remains wholly unsatisfied. On November 7, 1934, respondents secured an assignment from the Roosevelt insurance company of all the latter's rights to proceed against appellant under the reinsurance agreement; thereafter commencing the present action, which was tried before the court, sitting without a jury, resulting in a judgment in favor of respondents, from which this appeal is prosecuted by the Sunset company.

"Appellant's first attack upon the judgment is founded upon the claim that the so-called contract of reinsurance between appellant and the Roosevelt insurance company invested respondents with no right whatever to proceed against and compel payment by the appellant reinsurer; and in support of this contention we are cited to section 2646 of the Civil Code, reading, 'A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance,' and section 2649 of the Civil Code, which provides, 'The original insured has no interest in a contract of reinsurance.'

"The weight of authority in this state seems to be that if a reinsurer, by its contract of reinsurance, assumes all outstanding policies of the insured, it is liable directly to the beneficiaries. Grbavach v. Casualty Co. of America, 40 Cal.App. 376, 180 P. 835. It is argued, however, by appellant that the contract between the companies referred to and their subsequent action in carrying it out amount to nothing more than a naked contract of reinsurance under the Code; but we are of the opinion that the facts in this case show the contract in question to be much broader than a mere technical contract of reinsurance. In Arnold v. Lyman, 17 Mass. 400, 9 Am.Dec. 154, it is said:

" 'The promise being not to Hutchins expressly, but general in its form, the assent of the creditors made them parties to the promise; and this assent is sufficiently proved, as respects the plaintiffs, by their bringing an action upon the contract.'

"See, also, Morgan v. Overman S. M. Co., 37 Cal. 534; Flint v. Cadenasso, 64 Cal. 83, 28 P. 62; Lockwood v. Canfield, 20 Cal. 126.

"In the so-called contract of reinsurance before us we find the following covenant: 'The Company agrees that the membership of the Association so reinsured shall for the purpose of levying assessments be consolidated with its own assessment department and only such assessments levied as will enable the Company to pay all just claims in full according to the terms of the policies and/or certificates covered under the term of this contract.'

"Again, we find the appellant Sunset insurance company in its contract of reinsurance providing: 'The Company assumes the policies and/or certificates of membership of the Association now outstanding according to their terms and conditions including days of grace and reinstatement and the Association transfers to the Company all defenses contained in policies and the applications therefor.'

"In addition to the foregoing, we find in the contract the following covenant: 'It is agreed that an Assistant Secretary of the Company shall be elected as Assistant Secretary of the Association with authority to install systems and audit the accounts of the Association and make or supervise the making of all quarterly and annual statements to the Insurance Department and that the expense of such Assistant Secretary be paid by the Company.'

"Further in its agreement the Roosevelt Association agreed at its own expense to prepare and mail mortuary assessment calls, and collect and receipt for assessments collected under such notices, but to deposit all such collections in a depositary designated by appellant.

"The contract further provided that the Roosevelt insurance company must submit all notices of death of members forthwith on receipt of same to the appellant insurance company, and forward to beneficiaries blank proofs of loss on forms approved by the appellant; and, further, that when proofs of death were received, they were to be forwarded to the appellant company for its approval and adjustment.

[1, 2] "The finding of the court that under the terms of the contract between the respective insurance companies appellant assumed all the outstanding policies of the Roosevelt Mutual Life Association, and agreed to adjust, pay, and settle all claims arising under said policies, including the policy of insurance sued on herein, is amply supported by the evidence. The holders of policies issued by the Roosevelt Mutual Life Association in this state could avail themselves of said promise and undertaking made for their benefit by the appellant Sunset insurance company; and as was said in Whitney v. American Insurance Co., 127 Cal. 464, 470, 59 P. 897, the bringing of suit is sufficient evidence of assent on the part of respondents to said agreement and undertaking. Under the facts of this case, we are of the opinion that the law created the privity necessary for the maintenance of the action. The Sunset Mutual Life Insurance Company was jointly liable with the Roosevelt Mutual Life Association on the policy.

[3] "Appellant next urges that the cancellation of the so-called reinsurance agreement by mutual consent of the respective insurance companies on January 31, 1931, extinguished, canceled, settled, and disposed of all rights which had accrued under the policy of insurance herein by reason of the death of the insured, whose demise occurred prior to the cancellation agreement. With this contention of appellant we cannot agree. The document by the terms of which the contractual relations existing between the two insurance companies were terminat-

ed is denominated 'cancellation of contract,' and in part reads as follows:

"'* * * That a certain contract of reinsurance entered into between the two companies under date of June 9, 1930, be and hereby is cancelled by mutual agreement as of the date of January 31, 1931.'

"Appellant uses the words 'cancellation' and 'rescission' interchangeably and synonymously, and, we think, erroneously, because the word 'canceled,' applied to the agreement under the circumstances of the instant case, means no more than the doing away with an existing agreement; but this does not, in our opinion, extinguish any obligations that accrued prior to the date of cancellation. Winton v. Spring, 18 Cal. 451. In Young v. Flickinger, 75 Cal.App. 171, 242 P. 516, 517, we find the following:

"'To "cancel" a contract means to abrogate so much of it as remains unperformed. It differs from "rescission," which means to restore the parties to their former position. The one refers to the state of things at the time of the cancellation; the other to the state of things existing when the contract was made.'

"Upon the authority of this case, coupled with the statement contained in the cancellation agreement that the same became effective as of the date of January 31, 1931, we conclude that the cancellation served only to do away with the existing agreement as of the date mentioned; but such termination did not relieve appellant of obligations incurred to third parties, such as respondents herein, during the time the contract was in force. The contract in question being one between the two insurance companies for the benefit of third parties, viz., policyholders, the makers thereof cannot cancel the same so as to extinguish the accrued rights of third parties without the assent of the latter. Gifford v. Corrigan, 117 N.Y. 257, 22 N.E. 756, 6 L.R.A. 610, 15 Am. St.Rep. 508; Moore v. Baasch, 109 Wash. 568, 187 P. 388. When the insured Mack Lewis Sawyer died, September 29, 1930, respondents, as his beneficiaries, became thereby vested with a right to recover jointly from the insurance companies, and the lower court was correct in holding that the subsequent cancellation of the contract between the insurance companies did not obliterate or destroy the vested right and claim theretofore created in respondents.

"Concluding, as we do, that by reason of the so-called contract of reinsurance both the Roosevelt company and the Sunset company became jointly liable to respondents, we deem it unnecessary to discuss appellant's claim that the assignment by the Roosevelt company to respondents subsequent to the cancellation agreement of the company's rights under the reinsurance contract against the Sunset company, vested in respondents no right of action; for the reason that, in our opinion, respondents' claim and appellant's responsibility is not predicated upon the assignment, but springs from the contract entered into between the two insurance companies, which we hold to be a contract for the benefit of the policyholders of the Roosevelt Mutual Life Association."

[4, 5] With reference to the amount of liability to the beneficiaries under the policy of insurance, said policy provided: "If member is in good standing the Association hereby agrees to pay Sally E. Sawyer and George W. Sawyer (share and share alike) member's wife and son (the beneficiary hereunder) the sum of Three Thousand ($3,000) Dollars in cash immediately upon receipt of due proof of death of said member, * * * provided, however, that the said amount payable hereunder is conditioned that there be at least Three Thousand (3,000) members in good standing in the Association at the time of the death of said member, it being understood and agreed that should there be fewer than Three Thousand (3,000) members in the Association at the time of the death of said member, the amount payable hereunder shall be the sum of One ($1.00) Dollar for each member all in good standing."

The appellant in its fifth separate and distinct defense to the complaint alleged that on the date of the death of said Mack Lewis Sawyer, to wit, September 29, 1930, there were only 820 members of said Roosevelt Mutual Life Association in good standing, and that by the terms of said policy the total amount due thereunder to plaintiffs, if anything, was the sum of $820 and no more. The trial court found that it was not true that at the time of the death of said Mack Lewis Sawyer there were only 820 members of said Roosevelt Mutual Life Association in good standing, and further found that the evidence on said issue was insufficient for the court to make a finding as to the exact number of members in good standing at said time.

It is respondents' contention that this defense could not be properly interposed in this action against the Sunset company by reason of the fact that the validity of the policy of insurance, and the amount to be recovered thereon, were in issue in the suit by respondents as plaintiffs against the Roosevelt company, wherein respondents secured a judgment in their favor for $3,000 and costs, and this adjudication is binding upon the Sunset company, which had been advised of the pendency of said action and had been afforded an opportunity to defend said action or to participate in the settlement thereof. More generally stated, it is respondents' contention that where one person is responsible over to another to pay the latter's obligation, either by law or contract, and he is notified of the pendency of a suit on that obligation against the latter and afforded a full opportunity to defend, but fails to do so, the judgment, if obtained without fraud or collusion, will be conclusive against him. 15 Cal.Jur. p. 203, § 226.

We see no escape from the conclusion that the appellant herein is bound by the adjudication of the trial court in the suit against the Roosevelt Insurance Company as to the amount of liability under said policy of insurance. In Commercial Union Assurance Co. v. American Central Ins. Co., 68 Cal. 430, 9 P. 712, 713, the court said with reference to the liability of a reinsurer for a risk insured against by the original insurer: "Any judgment rendered against it [the original insurer] in the action would have conclusively established its [the original insurer's] liability, and also the liability of the reinsurer upon its policy; for it is a well-settled rule that where one is bound to protect another from liability he is bound by the result of a litigation to which such other was a party, provided he had notice of the litigation and opportunity to control and manage it, the rule being subject to the qualification that the litigation must have been carried on without fraud or collusion, and conducted in a reasonable manner." In the case of Merino v. Pacific Coast Borax Company, 124 Cal.App. 336, 12 P.(2d) 458, the court held in an action by an employer, who had been held liable in workmen's compensation proceedings for compensation to an injured employee, against the Borax company which was responsible for the accident resulting in the injury to the employee, that the award made by the Industrial Accident Commission against the employer was binding upon the Borax company as a measure of its liability for damages and as such was res adjudicata. It is not necessary for a reinsurer to actively participate in the defense of the action, provided it is proved that the reinsurer has notice of the pendency of the action and is afforded an opportunity to defend, and the defense is carried on without fraud or collusion by the original insurer. 15 Cal.Jur. p. 203, § 206. No suggestion has been made herein that the original insurer, the Roosevelt Mutual Life Insurance Company, did not defend said action to the best of its ability, and the trial court found upon ample evidence that the Sunset Mutual Life Insurance had notice of the pendency of the action but refused to participate. It follows that the issue with reference to the number of members in good standing in the Roosevelt company at the time of the death of said Mack Lewis Sawyer—whether it be 820 members as pleaded in the answer, or 903 members as subsequently determined by the District Court of Appeal upon the evidence presented in the record, was not available to the appellant as a defense in this action against the Sunset company, instituted to fix the fact of the liability of the Sunset company by virtue of its contract with the Roosevelt company, because the amount of said liability upon the policy herein involved, had already been conclusively determined in the suit against the Roosevelt company.

[6] The attempted appeals from the verdict and from the order denying the motion for a new trial are dismissed, as no appeals lie therefrom.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; EDMONDS, J.; SEAWELL, J.; THOMPSON, J.

8 Cal.2d 550

BLEE et al. v. LEAD MOUNTAIN MINES et al.

L. A. 15083.

Supreme Court of California.

March 30, 1937.

Rehearing Denied April 29, 1937.

1. Partnership ⚷217(3)

Evidence *held* to sustain finding that execution of note and chattel mortgage by trustee of properties of partnership was not unauthorized.

2. Partnership ⚷110

Where partner had made advance to partnership trustee secured by chattel mortgage, partner making advance could maintain separate action on such obligation where it was sufficiently segregated, as against contention that only action available to such partner was one for accounting and dissolution of partnership.

In Bank.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Harry B. Blee and others against the Lead Mountain Mines, a copartnership, and others. From an adverse judgment, defendants appeal.

Affirmed.

Forgy, Reinhaus & Forgy, R. M. Crookshank, and Fred Forgy, all of Santa Ana, for appellants.

Head, Wellington & Jacobs, of Santa Ana, for respondents.

LANGDON, Justice.

This is an appeal from a judgment for plaintiff foreclosing a chattel mortgage and entering a deficiency judgment in his favor.

Defendant Lead Mountain Mines was a partnership composed of a large number of persons, operating certain mining property. On May 27, 1926, the concern was in financial difficulties, and defendant H. J. Harkleroad was appointed trustee of its properties. He managed the business, handled the money, and paid current bills. About this time a judgment had been obtained against the partnership by the Simpson Engineering Company. Fearing disaster to the business, plaintiff, one of the partners, discussed the situation with Harkleroad and offered to get the necessary money to pay the judgment. He did so, and Harkleroad, on behalf of the partnership, executed the note and chattel mortgage as further security for the payment, which was in effect an advance of money to the partnership. There was no secrecy surrounding the transaction, the circumstances of which were generally known among the members of the partnership.

A number of the defendants named in the complaint defaulted, and others have appealed. The first ground of appeal is that by the terms of the instrument appointing him Harkleroad did not have authority to make such instruments without the written authorization of certain partners named as an advisory board. The trial court found that he was duly authorized, and in view of the evidence that he had been left in practical control of the business, this is not an unreasonable inference. Harkleroad testified that prior to May, 1926, "J. T. Anderson carried along for Lead Mountain Mines until he got in financial difficulty and from that time on I carried on"; that he paid certain bills, accepted checks, employed a watchman, and transacted a certain amount of business for the concern; that he met with the various parties from time to time; that "the gist of the meetings was a discussion of the financial affairs"; that they were always short of money; that they were "not in development," but were building a mill; that he, together with Anderson, had negotiated for the sale of machinery of Lead Mountain Mines to the Colosseum Mines, and that he executed the bill of sale. The following also appears: "Q. And you, at that time, were carrying on different transactions, weren't you, in regard to this matter, the Lead Mountain Mines? A. Well * * * as far as the Lead Mountain Mines were concerned, there was no activity. We were doing nothing. Principally all the transactions that were carried on where, as I said before, Mr. Brooks was endeavoring to put over a deal for a development of that barium. * * *"

[1] It clearly appears from this testimony that the parties acquiesced in the assumption of full powers of management by Harkleroad, and the execution of the note and mortgage, on behalf of the partnership and obviously for its protection and benefit, cannot be deemed unauthorized.

[2] Appellants also contend that the only action available to the plaintiff was one for an accounting and dissolution of the partnership; but the evidence shows and the court found that this advance of money

was a transaction sufficiently segregated to permit a separate action on the obligation.

The judgment is affirmed.

We concur: SHENK, J.; THOMPSON, J.; CURTIS, J.; SEAWELL, J.; EDMONDS, J.

---

8 Cal.2d 541

CITY OF LOS ANGELES v. ALDRICH, City Engineer.

S. F. 15747.

Supreme Court of California.

March 29, 1937.

As Modified April 22, 1937.

1. Municipal corporations 🔑907

Statute providing for refunding of bonded indebtedness of special improvement districts, requiring written consent of owners of majority of land area in district and of bondholders, and providing for retirement of bonds of nonconsenting bondholders, *held* not unconstitutional because not providing for vote of electors, though bonds to be refunded were issued under statute requiring consent of electors (St.1915, p. 99; St.1935, p. 2023).

2. Municipal corporations 🔑913

Under statute providing for refunding of bonded indebtedness of special improvement districts, period of redemption is merely one of incidents of contract and when contract is changed by consent of parties as provided by statute, the consent carries with it the change, if any, in the period of redemption and is applicable to all landowners affected thereby (St.1935, p. 2023).

3. Counties 🔑154(1)

Provision of statute relative to refunding of bonded indebtedness of special improvement districts that county shall be deemed purchaser of delinquent property lying within unincorporated area and levy limited tax to pay therefor, is not unconstitutional as gift of public money and pledge of county's credit to municipal corporation conducting original proceedings or to the holders of the refunding bonds (St.1935, pp. 2027, 2045, 2046, 2052, §§ 5, 24, 25, 31).

4. Statutes 🔑64(8)

Provision of refunding assessment bond act for levy of tax by county to pay for delinquent property lying within unincorporated area, if invalid, *held* not to render balance of act unconstitutional (St.1935, pp. 2027, 2045, 2046, 2052, §§ 5, 24, 25, 31).

5. Municipal corporations 🔑867(2), 907

Provisions of statute relative to refunding of bonded indebtedness of special improvement districts requiring city or county, pending redemption or resale of property purchased at tax delinquent sales, to transfer to bond redemption fund amount of future delinquent assessments and interest and to levy special tax to pay for lands purchased or pay installment of assessments and interest, is not invalid as creating additional liability of city not assumed in the first instance and pledging credit of municipality or as incurring indebtedness or liability exceeding in any year the income and revenue provided for such year without the consent of two-thirds of the qualified electors (St. 1935, pp. 2045, 2046, §§ 24, 25; Const. art. 4, § 31; art. 11, § 18).

6. Municipal corporations 🔑907

Statute providing for refunding of bonded indebtedness of special improvement districts is not invalid as discriminating against owners of improved land because not providing for credit against assessments of special taxes levied to amortize principal and interest of improvement bonds, against improvements and personal property, as well as land (St.1915, p. 99, § 9; St.1935, p. 2028, § 7).

◆

In Bank.

Original petition by the City of Los Angeles for a writ of mandate directed to Lloyd Aldrich, City Engineer of the City of Los Angeles.

Peremptory writ granted.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Robert J. Stahl, Deputy City Atty., all of Los Angeles, for petitioner.

Botsford & Hurtt, of Los Angeles, for respondent.

SHENK, Justice.

The City of Los Angeles filed in this court a petition for a writ of mandate to require the respondent city engineer to prepare an assessment diagram of the land within Municipal Improvement District No. 37 which would become subject to refunding assessment provided by resolution of the city council pursuant to the Refunding Assessment Bond Act of 1935 (Stats.1935, p. 2023).

Municipal Improvement District No. 37 was formed under the Municipal Improvement District Act of 1915 (Stats.1915, p. 99). On January 1, 1925, bonds of that district in the principal sum of $500,000 were issued and sold. The bonds were in even denominations of $1,000 and fifty thereof were payable each year commencing January 1, 1929, and ending January 1, 1938. The proceeds of the bonds were used to defray the cost of certain public improvements in said district. Special assessment taxes levied on the lands in the district were collected, but on March 19, 1936, delinquent assessments in the sum of $305,588.19 remained levied and uncollected. On that date the balance in the bond redemption fund was 16 cents. Of a total of $316,000 of bonds still outstanding and unpaid there was then matured and due on the principal of said bonds the sum of $216,000, and on the interest, $22,260. It is stated that during the five preceding years the tax delinquency in the district averaged about 80 per cent. It is thus seen, without further detailed statement, that a condition existed similar to that described in the case of County of Los Angeles v. Rockhold, 3 Cal.(2d) 192, 44 P.(2d) 340, 100 A.L.R. 149.

On March 19, 1936, the council initiated proceedings by resolution of intention to refund the district's bonded indebtedness pursuant to the Refunding Assessment Bond Act of 1935. The present petition was filed to test the constitutionality of that act. The act is entitled: "An act to provide for the refunding of the bonded indebtedness of special improvement districts, the bonds of which are payable from taxes or from special assessments levied wholly or partly in accordance with the assessed value of lands and for the issue and sale or exchange of refunding bonds and the retirement of unpaid bonds of such districts and the cancellation of unpaid taxes and assessments of such districts, and for the levy of assessments and reassessments to pay such refunding bonds and to enforce the liens of such assessments and reassessments, and to provide for contributions of public funds to assist in such refunding or the payment of refunding bonds, and for proceedings to test the validity of such refunding and assessment or reassessment proceedings and the use of the bankrupt laws of the United States of America in any refunding."

The act is similar in purpose to the Assessment Bond Refunding Act of 1933 (Stats.1933, p. 1915), as amended by statutes of 1935, p. 1999, with certain differences to be noted. In the case of County of Los Angeles v. Jones, 6 Cal.(2d) 695, 59 P.(2d) 489, we held that the 1933 act as so amended was constitutional and valid. The 1935 amendment of that act incorporated certain features, especially the requirement of the consent of a majority of the landowners in the district and adequate provision for retiring the bonds of nonconsenting bondholders, the omission of which from the 1933 act was held in the Rockhold Case to constitute an impairment of the contract rights of the landowners and the bondholders. The 1935 act here under consideration incorporates the features which were omitted from the 1933 act and by inclusion in the 1935 amendment were held to have overcome the objections to the 1933 act on constitutional grounds. We consider the foregoing cited cases, together with the later decision in City of Dunsmuir v. Porter (Cal.Sup.) 60 P.(2d) 836, a complete answer to the respondent's similar constitutional objections to the Refunding Assessment Bond Act of 1935.

It is not contended that the steps leading up to the request made on the respondent to prepare the assessment diagram have not been duly and regularly taken. It appears that owners of more than 50 per cent. of the land in the district have filed written consents to the proposed plan of refunding.

[1, 2] The present act (Stats.1935, p. 2023) does not provide for a vote of the electors of the district to effectuate the change in the contract of the landowners. It provides that the written consent of the owners of a majority of the land area in the district shall bind all the owners of land in the district. It also makes provision for the consent of the bondholders and the retirement of bonds of nonconsenting bondholders. Opportunity is given for a hearing of objections pursuant to notice. It is now contended that the consent of the electors of the district is necessary because the issuance of the ad valorem assessment bonds under the 1915 act required the consent of the electors and that the electors are therefore a necessary consenting party to the refunding proceeding. In the Rockhold Case it was held that the electors could not bind the landowners to a refunding contract except where the original bonds were issued in response to a provision of law call-

ing for a majority vote of the electors. The 1933 act there involved was thereupon changed by amendment to conform to the view there held that the appropriate consent to a change in the landowners' contract was the consent of the landowners, and that the consent of owners of a majority of the land in the assessment district was sufficient to bind the whole. The change in that law was effected accordingly and was upheld in the case of County of Los Angeles v. Jones, supra. We were not then of the opinion and do not now entertain the view that the vote of the electorate is necessary to lend support to the validity of the refunding proceeding, if the binding consent be obtained of those whose rights would be adversely affected. The landowners are the persons who might be so affected and are also those who might be benefited by the refunding proceeding because of the reduction in the burden of taxation brought about by a substantial discount in the principal and interest of the remaining unpaid assessment bonds and the restoration to the tax rolls of a large proportion of the lands in the district which had theretofore been removed therefrom upon sales for delinquencies and which thereafter will virtually be kept upon the tax rolls by the shortening to one year of the period of redemption after the sale of the property for delinquencies. This benefit, the resulting increase in public revenues, and the prevention of the pyramiding of excessive taxes on a small proportion of property, have been recognized in the decisions herein cited, and must be deemed to answer two objections made on this proceeding, viz., that the consent of the electors of the district to refunding the assessment bonds was not provided for, and that the majority consent of the landowners is insufficient to bind the minority. In the Rockhold Case it was declared that a provision calling for the consent of the owners of a majority of the land area in the district would be sufficient to bind the landowners to a shortening of the period of redemption after sale of the property for nonpayment of the refunding assessment. That statement was reiterated and the reduction of the period of redemption provided by the 1933 refunding act (Stats.1933, p. 1915), was upheld in the Jones Case after the amendment of 1935 (Stats.1935, p. 1999) providing for such majority consent. By supplemental brief the respondent urges that it has not been made clear by any of the prior decisions that such majority consent was sufficient to bind the minority landowner to the change in the period of redemption. The general language of the Rockhold Case and the more specific holding in the Jones Case would seem to be adequate to that purpose. But to remove all doubt on the subject we further state that the so-called vested right in the period of redemption under these refunding statutes may not properly be considered apart from the contract itself which is changed by the majority consent. The period of redemption is merely one of the incidents of the contract and when the contract is changed by consent of the parties as provided by the statute such consent carries with it the change, if any, in the period of redemption and is applicable to any and all landowners affected thereby.

[3-5] It is urged that the act is void because it provides for a refunding proceeding involving more than one jurisdiction. Where the ad valorem assessment district extends into both incorporated and unincorporated territory, section 5 of the act designates the legislative body which conducted the original proceedings as the body to conduct the refunding proceeding. By section 24, at any tax delinquent sale which is held pursuant to the act, the county is deemed the real purchaser of delinquent property lying within unincorporated area and, as provided by section 25, must levy a limited tax not to exceed ten cents on each one hundred dollars of assessable property, to pay for the lands purchased or to be purchased at such tax sales. It is contended that this contemplates a gift of public money and a pledge of the county's credit to a municipal corporation which has conducted the original proceedings in violation of section 31 of article 4 of the Constitution. The same general answer might be made to this contention as is given in the foregoing cited cases, viz., that such funds are used for a public purpose, for which the county might have used them in the first instance, and are therefore used for the benefit of the county and not of a city or any individual. However, in the present case the improvement district does not extend beyond the territorial limits of the city. Any different answer which might be made to the question in a proper case, pursuant to the provisions of section 31 of the Refunding Assessment Bond Act of 1935 would not render the balance of the act unconstitutional. Further, there is not involved herein a pledge of the credit of the city to the holders of the refunding bonds. This contention has been answered in the case of County of Los An-

geles v. Jones, supra. The principal difference between the refunding act there considered and the refunding act here involved is that the former provided for a plan to substitute, by the refunding proceeding, for the ad valorem assessment the old system of a specific assessment lien upon each parcel of land in the district evidenced by a bond issued against the particular parcel. The present refunding act adopts the alternative system by which the assessments are pooled and the bonds issued in even denominations, maturing serially, and are payable from a special fund fed by the collection of the taxes assessed against each parcel commensurate with the benefits received. The present refunding act, however, eliminates the infirmities of the 1915 act in so far as maintaining the solvency of the fund is concerned and which were pointed out in the cases of American Co. v. City of Lakeport, 220 Cal. 548, 32 P.(2d) 622; Hammond v. City of Burbank, 6 Cal.(2d) 646, 59 P.(2d) 495, and Kerr Glass Mfg. Corp. v. City of San Buenaventura (Cal.Sup.) 62 P.(2d) 583. By section 24 of the refunding act it is provided that the city or county, pending redemption or resale of the property purchased by it at tax delinquent sales, shall transfer to the bond redemption fund the amount of any future delinquent assessments and interest, which sums must be paid by the redemptioner or purchaser upon a redemption or resale of the property. Section 25 places the duty upon the legislative body, upon demand of the tax collector, when levying taxes for general municipal or county purposes, to levy a special tax, not exceeding 10 cents on each $100 of assessable property within the city or county, for the purpose of paying for the lands purchased, or for the purpose of paying installments of the assessments and interest which by section 24 the city or county is required to pay. It is contended that this added obligation of the city creates a liability not assumed in the first instance and renders the provision one in violation of section 31 of article 4 of the Constitution as a pledge of the credit of the municipality. Upon analysis the contention does not have merit. The additional provision in the 1935 act merely makes compulsory what the Legislature merely authorized by the similar provision in the 1915 act (Stats. 1915, p. 1441), viz., the continuing duty to levy and collect in each year the special ten-cent tax to provide advances to the bond redemption fund until amounts equal to the purchase price of lands sold to the city at tax delinquent sales and any future delinquent assessments and interest thereon have been transferred to the fund. Reimbursement to the city is realized upon redemption or resale of the property. Such advances have been approved in the cases last cited, and were held not to violate the specified inhibition in the Constitution. The advances provided by the present act partake of the same character. They do not increase the obligation of the city and therefore likewise should be held not an infringement of the constitutional provision. This also answers the contentions of the respondent that the duty to transfer funds for such purpose is contrary to the provisions of section 18 of article 11 prohibiting the incurring of any indebtedness or liability exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the qualified electors. American Co. v. Lakeport, supra. The respondent relies on City of Pasadena v. McAllaster, 204 Cal. 267, 267 P. 873. In that case municipally owned property was included in the assessment district, and the advances required to be made left the coffers of the city irrevocably. The decision in that case recognized that the inhibition did not apply where municipally owned property was not included in the assessment district. The same distinction was made in the case of American Co. v. City of Lakeport, supra.

[6] The only remaining question is whether the refunding act operates uniformly. The respondent contends that it does not. Section 7 provides the method of computing the proportion of the refunding assessment to be realized from each parcel of land in the improvement district. To the amount of the assessment to be levied under the act is added the sum of all amounts, including interest and penalties, paid into the interest and sinking fund of the district upon taxes or assessments levied upon the land in the district to raise funds to pay the principal or interest of the bonds being refunded. The resulting total is spread over the lands of the district in proportion to the benefits received from the improvement to pay the cost of which the refunded bonds were issued. The landowner is entitled to a credit or deduction of any sum, including any interest and penalties, theretofore paid into the interest and sinking fund of the district upon an assessment or special tax levied upon his land to pay the principal and interest of bonds of the district. The respondent contends that the owner of improved lands is discriminated against in favor of the owner of unimproved

lands because there is no provision to credit special taxes levied on such improvements and collected and transferred by the city to the bond fund. By the provisions of the Municipal Improvement District Act of 1915 (Stats. 1915, p. 99, § 9), all of the taxable property in the district was subject to the special tax levied to amortize the principal and interest of the improvement bonds. The act in this respect differs from the Municipal Improvement District Act of 1927 (Stats. 1927, p. 1351), pursuant to which the levy to defray the cost of the improvement is laid upon land only. It may not, however, be successfully contended that the refunding statute does not have a uniform operation as applied to the refunding of bonds of districts organized under the 1915 act. The basis of the refunding act, as also the act of 1927, is the recognition that land, being permanent, is the recipient of the benefit. Inasmuch, therefore, as the balance of the cost of the improvement is provided to be laid upon land only, the prior payments of taxes on such land become the natural subject of credit in arriving at a method of computing the proportion of the tax to be borne by each parcel of land. It is not apparent that, had the Legislature provided an alternative method of computation which would also take into account taxes levied on improvements and personal property to pay the principal and interest of the improvement bonds, and similarly provided a credit therefor, the proportion to be paid by owners of improved land would be any less than the resulting proportion under the present method of computation. In other words, it should be assumed that, had the Legislature included a method of computation based on a credit for taxes paid on improvements and personal property, as well as on land, it would also have included for the purpose of computing the percentage to be assessed against each parcel of land the amounts theretofore paid into the redemption fund from taxes on improvements and personal property. Under such a method the amount which would be assessed against the owner of improved land might conceivably even be higher. Furthermore, under the refunding act the landowners in the district are relieved from any future levies of taxes on improvements and personal property for the payment of principal and interest on the refunding bonds. We fail to perceive that there is any cause for complaint by reason of the method of computation of the assessment under the refunding act, or that the adoption of that method by the Legislature should prevent a district organized under the 1915 act from invoking its salutary provisions. It necessarily follows that there is no discrimination against the owner of improved lands in the refunding proceeding.

The foregoing answers all of the questions raised on this proceeding, and leads to the conclusion that the Refunding Assessment Bond Act of 1935 is not unconstitutional for any of the reasons herein advanced.

Let the peremptory writ issue as prayed.

We concur: WASTE, C. J.; THOMPSON, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; EDMONDS, J.

8 Cal.2d 532

PECCOLO v. CITY OF LOS ANGELES et al.

L. A. 16022.

Supreme Court of California.

March 29, 1937.

1. Automobiles 🔑187

City may be liable under statute for injury caused by automobile owned by it and ordinarily used in operation of city's light and power plant, since automobile is owned in a proprietary and not a governmental capacity (Civ.Code, § 1714¼).

2. Municipal corporations 🔑725

Where injury arises from exercise by a municipality of a mere proprietary right, or performance of a proprietary function, it is liable for negligence like individuals or private corporations.

3. Automobiles 🔑181(2)

Employee of light company, riding with employee of city department, engaged in supplying electric current, under arrangement whereby employees who regularly were engaged in joint inspection work alternated in weekly use of employers' automobile without charge to other party *held* "passenger" and not "guest" entitling such employee to recover from city department for negligence of its employee in operation of city's automobile.

[Ed. Note.—For other definitions of "Guest" and "Passenger," see Words & Phrases.]

4. Negligence ⚷22½

"Joint enterprise" which will impose liability on those engaged therein for negligence of others is one where there is not only common purpose but also common control, or right to control instrumentality of conveyance.

[Ed. Note.—For other definitions of "Joint Enterprise," see Words & Phrases.]

5. Automobiles ⚷181(2)

Employees of light company and city department regularly engaged in joint inspection work under arrangement whereby they alternated in weekly use of employers' automobiles which were operated solely by employee of employer furnishing automobile *held* not engaged in "joint enterprise" so as to render negligence of one imputable to the other.

6. Master and servant ⚷302(1)

Employee, while taking time away from his work for meals, is not in service of his employer, and hence employer is not responsible for employee's negligence during such periods of absence from work.

7. Automobiles ⚷249

Employee who drove several miles from place of work into city for lunch was not acting in "course and within scope of his employment" on return trip, and hence passenger injured through negligent operation of automobile on return trip was limited to recovery of $5,000 against employer under statute limiting owner's liability to such sum unless at time of accident employee was acting within scope of his employment (Civ. Code, §§ 1714¼, 1714½).

[Ed. Note.—For other definitions of "Course of Employment" and "Scope of Employment," see Words & Phrases.]

8. Appeal and error ⚷204(5)

Objections, urged for first time on appeal, that letter from compensation division of city department to assistant city attorney stating that driver of city's automobile in which plaintiff was injured was acting in course of employment, which was admitted in evidence, was privileged, came too late.

9. Appeal and error ⚷1050(1)

In suit for injuries to passenger in automobile driven by city employee who was not acting in course of his employment at time of accident, error, if any, in admitting letter from compensation division of city department to assistant city attorney stating that employee was acting in course of employment at time of accident *held* harmless in view of finding that employee was not acting in course of employment.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Suit by Leo D. Peccolo against the City of Los Angeles, Department of Water and Power of the City of Los Angeles, and others. From a judgment for plaintiff, both parties appeal.

Affirmed.

Prior opinion, 59 P.(2d) 149.

Ray L. Chesebro, City Atty., J. M. Stevens, Asst. City Atty., and Kenneth K. Scott, Deputy City Atty., all of Los Angeles, for appellant.

Edw. C. Purpus and E. W. Cunningham, both of Los Angeles, for respondent.

CURTIS, Justice.

After the decision of this cause by the District Court of Appeal, each of the parties thereto petitioned for a hearing in this court. The action is one to recover damages for injuries sustained in a collision between an automobile in which the respondent was riding and an auto truck driven by a third person. The automobile in which the respondent was riding at the time of his injury was owned by the Department of Water and Power of the City of Los Angeles, and was being driven by one of its employees. The trial court rendered judgment in favor of the respondent, the plaintiff in the action, in an amount exceeding the sum of $5,000. The District Court of Appeal reduced the judgment to $5,000. It held that while the driver of the automobile was negligent in the operation of the automobile, the Department of Water and Power was not liable for the injury due to his negligence, for the reason that the driver was not, at the time, in the service of his employer. It held that the collision in which respondent was injured occurred while the employee of the Department of Water and Power was taking time away from his work for the purpose of having his lunch and, therefore, his employer was not responsible for the employee's negligence during such period of absence from work. However, the appellate court held the Department of Water and Power, as the owner of said automobile, was liable under section 1714¼ of the Civil Code to the extent fixed by said section.

In his petition for hearing, the respondent contended that under the recent decision of this court in the case of Megowan v. City of Los Angeles, 59 P.(2d) 1012, the appellant, the Department of Water and Power, was liable under the facts of this case for the negligence of its employee at the time of the collision. The appellant in its petition for a hearing contended that under the recent case of Brindamour v. Murray (Cal.Sup.) 59 P.(2d) 1009, it was not liable in any amount for the injuries sustained by the respondent. The decision in each of these two last-named cases was rendered less than a month after the decision of the District Court of Appeal was filed in the present case, and, of course, the decision in neither of said cases was before the District Court of Appeal during the consideration of its appeal in this case. It was for the purpose of giving consideration to these two recent decisions as they applied to the facts in this case, that the petitions herein were granted.

In our opinion, the legal effect of neither of these two recent decisions changes the result of the decision rendered by the District Court of Appeal in the present action. In the Megowan Case, an automobile belonging to the city of Los Angeles, under the order of the captain of the fire department of said city, was being driven to the home of the president of the board of fire commissioners for the purpose of transporting him on a tour of inspection of the fire department equipment of said city. Before reaching the home of the president of the board of fire commissioners, a collision occurred between said automobile and another machine upon the streets of said city. It was held in the decison in that case that the use of said city-owned automobile for such purpose was lawful, and that, from the facts appearing therein, an inference was available to the plaintiff that the car was being operated for an authorized municipal purpose by an employee acting within the scope of his authority. Accordingly, the municipality was held responsible for the negligence of said employee, and liable in damages for the injuries sustained by the plaintiff as a result of said negligence. No such inference is available to the respondent in the present action. The undisputed evidence is that the employee of the appellant was at the time of the collision using appellant's automobile for his own private purpose in returning to the place of his employment, after having had lunch at San Fernando, and that the collision in which the respondent was injured occurred on the public highway before the employee had reached his place of employment. Under the authorities cited in the opinion of the District Court of Appeal, the employer was not liable for the employee's negligence during the time he was absent from his employment unless an obligation was imposed upon it by the provisions of section 1714¼ of the Civil Code.

[1, 2] The factual situation in the case of Brindamour v. Murray, supra, differs from that existing in the present action at least in one material respect. The instrumentality, the negligent use of which resulted in injury to the plaintiff in that action, was owned by the municipality and used by it exclusively in the maintenance of its police department. The maintenance of a police department is one of the governmental functions of a municipality. (See authorities cited in that case.) The automobile in which respondent in the present action was riding at the time he sustained his injury was owned by the Department of Water and Power, and used by it in the operation and maintenance of the city's light and power plant, a purely proprietary function of said city. When an injury arises from the exercise by a municipality of a mere proprietary right, or the performance of a proprietary function, it is liable for negligence like individuals or private corporations. Davoust v. City of Alameda, 149 Cal. 69, 84 P. 760, 5 L.R.A. (N.S.) 536, 9 Ann.Cas. 847; Chafor v. Long Beach, 174 Cal. 478, 163 P. 670, L.R.A.1917E, 685, Ann.Cas.1918D, 106; Morrison v. Smith Bros., 211 Cal. 36, 293 P. 53; Yolo v. Modesto Irr. Dist., 216 Cal. 274, 276, 13 P.(2d) 908. There is no question in this case but that the automobile of the Department of Water and Power was being used at the time of the accident with the express permission of said department. It was, therefore, liable under the provisions of section 1714¼ of the Civil Code (now section 402 of the Vehicle Code of this state, St.1935, p. 153) to the person injured to the extent of $5,000.

We therefore find ourselves in complete accord with the opinion of the District Court of Appeal, written by Mr. Justice pro tempore Shinn, and we adopt the same as the opinion of this court in conjunction with the preceding discussion of our own. The opinion is as follows:

"Plaintiff was injured when an automobile in which he was riding, owned by appellant, referred to herein as defendant, and driven by its employee, A. G. Johnson, collided with a truck on a public highway when the driver, Johnson, fell asleep.

[3] "The first contention of the defendant to be discussed is that plaintiff was a guest and not a passenger in the car and that defendant's liability, therefore, could exist only in case of intoxication or wilful misconduct of the driver. Peccolo and Johnson were employees, respectively, of Southern California Edison Company and defendant Department of Water and Power of the City of Los Angeles. They were regularly engaged in a joint inspection of districts fringing the limits of the city of Los Angeles preliminary to a segregation of business, by agreement between their respective employers, vendors of electric energy. For their transporation they used automobiles, alternating each week between a car of the department and one of the company. When a water department car was being used, Johnson drove it and Peccolo rode with him; such was their manner of use and operation of the car on the day and at the time of the accident. Nothing of value was exchanged between them or between their principals for the transportation except by way of alternate use of the cars. Each employee, in return for the use of his employer's car by both employees one week, rode free in the car driven by the other employee the following week. In this manner the expense of transportation was shared, perhaps not equally, but approximately so, and upon a basis satisfactory to the employers. Thus the passage of each employee was paid for not in money but in transportation, which was undoubtedly compensation, fully creating the relation of carrier and passenger and not that of host and guest. Parrett v. Carothers, 11 Cal.App.(2d) 222, 53 P.(2d) 1023; Jensen v. Hansen, 12 Cal.App.(2d) 678, 55 P.(2d) 1201.

[4, 5] "The second contention of appellant is that the employees were engaged in a joint enterprise, as that term is used in negligence law. This point is not well taken. A joint enterprise which will hold each of those engaged therein responsible for the negligence of the others is one where there is not only a common purpose but also a common control or right to control the instrumentality of conveyance. That the two employees had a common purpose cannot be questioned, but it is not true that they had joint control of the operation of the machine or the right to such joint control. The testimony was that each drove the car which belonged to his employer and that the one who rode as a passenger carried a map consisting of a long, narrow strip showing power lines in the vicinity of the city boundary line, and that this map was checked and corrected according to actual conditions as they were found to exist. The only fair inference from the testimony is that each employee was expected to drive the car of his employer, and there is no evidence that either ever deviated from that practice. In fact, then, there was no joint control. The principle is recognized that there may be an implied right of control, to be inferred from the legal relationship of the parties. In Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 P. 385, 387, in rejecting the contention that a common purpose in driving an automobile is sufficient as a basis for the imputation of negligence of the driver to those sharing the common purpose with the driver, the court said, 'In our opinion, the doctrine of imputable negligence should not be so loosely applied. To do so leaves the law in an uncertain state. The better view is expressed by Nonn v. Chicago City Ry. Co., 232 Ill. 378 (83 N.E. 924, 122 Am.St. Rep. 114): "There can be no such thing as imputable negligence, except in those cases where such a relation exists as that of master and servant or of principal and agent. In order that the negligence of one person may be properly imputed to another, they must stand in such relation of privity that the maxim qui facit per alium facit per se directly applies." Indeed, no other rule is consistent with section 1714 of the Civil Code, wherein it is declared that every one is responsible for an injury occasioned to another by his want of ordinary care "except so far as the latter has, willfully or by want of ordinary care, *brought the injury upon himself.*" (Italics ours.)' This doctrine was reaffirmed in Pope v. Halpern, 193 Cal. 168, 223 P. 470, and has been consistently followed. Since, therefore, it can be said neither as a matter of fact nor of law that Peccolo shared with Johnson the control or right of control of the operation of the car, there is no basis for the claim that

they were engaged in a joint enterprise so as to render the negligence of one imputable to the other.

"The liability of defendant as owner consenting to the use of its automobile by Johnson was limited to the sum of $5,000 under the provisions of sections 1714¼, 1714½, of the Civil Code (now sections 400, 402 of the Vehicle Code [St. 1935, c. 27, pp. 152, 153]) unless at the time of the accident Johnson was acting within the scope of his agency or employment. The verdict was for more than $5,000. It is claimed to be excessive because Johnson was not engaged in the service of his employer when the accident occurred. This contention must be upheld. The evidence shows that Johnson and Peccolo had discontinued work a little before noon and had driven some miles in to San Fernando where they had lunch; that after lunch the car was driven down a side street and parked while the men read until 1 o'clock, at which time they started to drive back to the point where their work would be resumed in the afternoon. They had a mile or more to go when the collision with the truck occurred. There was testimony from an employee of Southern California Edison Company that the men were allowed an hour for lunch and, in addition thereto, whatever time it took to drive to and return from the place where they ate. The trial court evidently was of the opinion that while the men were traveling to work they were acting in the service of their employers. In a general way this would be true. They drove as nearly as possible to the city boundary lines checking power lines and while so traveling they were, of course, in the service of their employers, but in driving in to San Fernando to lunch they were serving their own interests exclusively. The return trip after lunch to the point where they had left off work at noon was made necessary by their departure therefrom upon their personal mission. At the time of the accident they had not yet returned to the service of their employers. The fact that they were allowed, in addition to an hour at noon, the time required to drive to and from the place where they had lunch has no bearing upon the purpose of their trip in to San Fernando, nor does it tend at all to prove that they were in the service of their employers during that time. It proves only that they were allowed something more than an hour for lunch.

[6, 7] "It is well settled by the authorities that an employee, while taking time away from his work for meals, is not in the service of his employer and that the latter therefore is not responsible for negligence of the employee during such periods of absence from work. Adams v. Tuxedo Land Co., 92 Cal.App. 266, 267 P. 926; Helm v. Bagley, 113 Cal.App. 602, 298 P. 826; Martinelli v. Stabnau, 11 Cal.App.(2d) 38, 52 P.(2d) 956. The present case clearly falls within the foregoing rule. The evidence therefore fails to support the finding of the trial court that Johnson at the time of the accident was acting in the course and within the scope of his employment. The legal limit of defendant's liability to plaintiff was therefore $5,000.

[8, 9] "The further point is made that the court erred in admitting into evidence certain inter-office correspondence of the Department of Water and Power. Over the defendant's objection the court admitted a letter written by the compensation division of the department to an assistant city attorney, stating that Johnson was engaged in his regular duty of making an inspection of certain power lines at the time of the accident. Likewise, over defendant's objection, there was admitted a report of the accident to the compensation division by Johnson, in which he stated that the accident was caused by his falling asleep (to which he testified at the trial), and evidence was also admitted to the effect that Johnson had received compensation from the department. One of the objections now urged is that the letter of the compensation department to the city attorney's office was privileged, but as that objection was not made at the trial it may not be entertained here. Plaintiff's counsel stated, in reply to a question by the court, that the purpose of the evidence to which defendant objected was to show the employment of Johnson by the Department of Water and Power, a fact which was not disputed. If the evidence had a further tendency to show that Johnson was acting at the time of the accident in the course of his employment, any error which the court may have committed in receiving such evidence must be regarded as harmless in view of our conclusion

that Johnson was not acting in behalf of his employer but wholly in his own interests at the time of the accident."

The judgment is modified by reducing the amount thereof to the sum of $5,000, and, as modified, is affirmed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.; EDMONDS, J.; LANGDON, J.

---

19 Cal.App.2d 224

SECURITY-FIRST NAT. BANK OF LOS ANGELES et al. v. SAPKIN et al.

Civ. 11177.

Supreme Court of California.

April 12, 1937.

Mortgages 🔑375

Under statute, limitation period for commencement of action to recover deficiency after sale under trust deed is four years from date of maturity rather than four years from date of sale (Code Civ.Proc. § 337).

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the Security-First National Bank of Los Angeles and another against Ben Sapkin and another. After a decision by the District Court of Appeal of the Second Appellate District, Division 1 [64 P.(2d) 1097], affirming a judgment for the plaintiffs, the defendants filed a petition for hearing in the Supreme Court.

Petition denied.

Lawrence M. Cahill and L. A. Bloom, both of Los Angeles, for appellants.

Gene G. Curry, Thomas M. Parrington, both of Los Angeles, for respondents.

PER CURIAM.

In denying the petition for hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 1, we withhold our approval of that language which is apparently an inadvertence, to the effect that the statute of limitations on an action to recover a deficiency after sale under a deed of trust was four years from the date of the sale. Under section 337 of the Code of Civil Procedure prior to the amendment of 1933 (St.1933, p. 2116), the statute of limitations was four years from the date of maturity.

The petition for a hearing is denied.

---

19 Cal.App.2d 263

CARPENTER v. PACIFIC STATES SAVINGS & LOAN CO.

Civ. 11209.

Supreme Court of California.

April 15, 1937.

1. Courts 🔑486

Petition for hearing before Supreme Court after modification of judgment appealed from by District Court of Appeal must be denied, where reference in latter court's opinion to law of case, erroneously applied to facts in action, was unnecessary for decision.

2. Appeal and error 🔑1195(3)

Decision of District Court of Appeal, upholding order granting new trial to plaintiff in action for value of use and occupation of land until date of mortgage foreclosure sale, *held* not to bar his recovery of value thereof after such date under law of case doctrine.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by W. L. Carpenter against the Pacific States Savings & Loan Company. A judgment for plaintiff, on appeal by defendant, was modified with directions by the District Court of Appeal [64 P.(2d) 1102], and plaintiff petitioned for a hearing before the Supreme Court.

Petition denied.

John L. Mace, of Los Angeles, and Orrick, Palmer & Dahlquist, of San Francisco (Arch R. Tuthill, of Los Angeles, of counsel), for appellant.

Frank S. Hutton and C. P. Von Herzen, both of Los Angeles (E. H. Gaylord, of Los Angeles, of counsel), for respondent.

PER CURIAM.

[1, 2] The petition for hearing herein before this court is denied. The reference in the opinion to the law of the case as stated therein was not necessary for the decision and order modifying the judgment appealed from. We withhold our approval of that portion of said opinion in which the law of the case is discussed and applied to facts in the present action.

---

8 Cal.2d 553

PHILLIPS v. HUNTINGTON BEACH ELEMENTARY SCHOOL DIST. et al.

L. A. 16050.

Supreme Court of California.

March 30, 1937.

Schools and school districts ⇨115

Plaintiff *held* not entitled to set aside judgment dismissing his personal injury action against school district for failure to file claim with clerk of district, on ground that no clerk had been elected or appointed, where it was not shown that woman working in office in school building was not de facto clerk actually exercising duties of that office (Code Civ.Proc. § 473, as amended by St.1933, p. 1851, § 34; St.1931, p. 2475).

◆

In Bank.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Zinie Phillips against the Huntington Beach Elementary School District and others. From an order refusing to vacate a judgment of dismissal, plaintiff appeals.

Affirmed.

Prior opinion, 59 P.(2d) 601.

William J. M. Heinz and McFadden & Holden, all of Anaheim, for appellant.

W. F. Menton, Dist. Atty., and Preston Turner, Deputy Dist. Atty., both of Santa Ana, for respondent Huntington Beach Elementary School Dist.

S. B. Kaufman and W. F. Menton, both of Santa Ana, for other respondents.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Fourth Appellate District. Upon further consideration, we are satisfied with the conclusion reached therein and adopt the following opinion of Mr. Justice Pro Tempore Turrentine as the opinion of this court:

"Plaintiff filed an action against defendant Huntington Beach Elementary School District seeking to recover damages for personal injuries occasioned by a defective condition of the property of this defendant. When the case was called for trial, counsel for plaintiff stipulated that the verified claim for damages, which is required by Statutes 1931, page 2475, was prepared, and by the attorney for plaintiff taken to the school building and by him left in an office on the desk therein and a paper weight put thereon, no person being present in said office at the time. He was informed by a person assumed to be the janitor that this was the office of the school district and that Mrs. Lorraine Hancock was the secretary thereof. She was not present in the office at any time during the presence there of the attorney for plaintiff. It was further stipulated that Mrs. Lorraine Hancock would, if sworn as a witness, testify that she never saw the demand in her office, and that she had searched the records of the school board and had never found the demand and that she had never seen or filed the same at any time. On this statement the trial court ruled that no claim had been presented or filed with the clerk or secretary of the school district as required by Statutes 1931, page 2475, supra, and thereupon ordered the action dismissed, pursuant to which order judgment of dismissal was duly made and entered. Thereafter plaintiff, proceeding under section 473 of the Code of Civil Procedure (as amended by St.1933, p. 1851, § 34), moved to set aside the judgment of dismissal on the grounds of excusable neglect.

"What plaintiff maintained was excusable neglect is a prima facie showing that he checked the minutes of the Huntington Beach Elementary School District and that meetings held by the board of trustees were not held on the first Saturday of May of any of the years from 1930 to 1933, inclusive, and that no clerk of the board was ever elected on the first Saturday in May of any of said years; that the superintendent of schools had appointed no clerk in the year 1933; that a Mr. Baldwin was superintendent of schools; and that the school board passed a resolution to the effect that Mrs. Hancock be responsible solely to the superintendent for all duties performed in connection with the school work. The application coming on for hearing and the foregoing showing being made, the trial court denied plaintiff's motion to vacate and set aside the judgment theretofore entered. It is from this order refusing to vacate the judgment that plaintiff appeals.

"There was no showing that Mrs. Lorraine Hancock was not the de facto clerk of the school board and was not discharging the duties of that office. The motion under section 473 of the Code of Civil Procedure being addressed to the discretion of the trial court, we think that it was justified in requiring plaintiff to show at least, not only that the office of clerk or secretary of the district was vacant de jure, but also that there was no de facto clerk. The jurisdictional claim required by Statutes 1931, page 2475, must be presented and filed with the clerk or secretary of the school district and we think that a presentation and filing with a de facto clerk would be perfectly valid, and in order for a person to show inability to file a claim it at least must be affirmatively shown by such person that there is no duly elected or appointed clerk and no person exercising the duties of that office or, in other words, a de facto clerk."

The judgment and order appealed from are affirmed.

---

8 Cal.2d 563

LOS ANGELES COUNTY v. PAYNE et al.

S. F. 15830.

Supreme Court of California.

April 2, 1937.

1. Mandamus 🔑163

Demurrer to petition for peremptory writ of mandate admits truth of all allegations thereof.

2. Counties 🔑162

Fact, alleged in petition for writ of mandate commanding county auditor and treasurer to comply with county board's order for payment of claims and demands on emergency appropriation for poor relief, that there were over 75,000 destitute persons, requiring aid from public funds to preserve their health and prevent their starvation, in county, *held* to show "emergency" justifying appropriation in addition to amount provided in budget for current fiscal year under statute (Pol.Code, § 3714).

> "Emergency" has been defined as "an unforeseen occurrence or combination of circumstances which calls for an immediate action or remedy; pressing necessity; exigency," and "exigency" as "a case demanding immediate action or remedy."
>
> [Ed. Note.—For other definitions of "Emergency" and "Exigency," see Words & Phrases.]

3. Counties 🔑162

Expenditures provided for in county board's resolution, appropriating sum in addition to amount provided in current fiscal year's budget for direct relief of poor, *held* "mandatory expenditures required by law," and hence not within statutory inhibitions against expenditures exceeding appropriations (Pol.Code, § 3714; St.1933, p. 2005).

4. Statutes 🔑231

Codes of state are simply part of statutory law thereof and have no higher standing or sanctity than other statutes regularly passed by Legislature.

5. Statutes 🔑224

Section of Political Code, limiting county expenditures to amounts appropriated for current fiscal year by county board, except for certain purposes, and act for relief of poor and indigent persons, must be read together in determining validity of additional appropriation for poor relief; neither being supreme over the other, except that in case of conflict later enactment takes precedence (Pol.Code, § 3714; St.1933, p. 2005).

6. Counties 🔑150(1)

Validity of county liability subject to constitutional provision prohibiting indebtedness exceeding county's income and revenue for present fiscal year depends on whether there were unappropriated revenues when such liability was incurred, and such provision is not violated if revenues equivalent in amount to liability contracted have been provided (Const. art. 11, § 18).

7. Counties ⚷150(3)

All taxes, assessed for county purposes for current fiscal year, are available assets for purpose of determining total revenue and income of county for such year within constitutional provision prohibiting county from incurring indebtedness exceeding such income and revenue (Const. art. 11, § 18).

8. Counties ⚷150(3)

County board's resolution, appropriating sum in addition to budget appropriation for current fiscal year for relief of poor, did not result in expenditures exceeding revenue and income provided for such year in violation of Constitution, where anticipated tax delinquency exceeding additional sum appropriated was not included in tax levy or budget as revenue to be realized or produced during present fiscal year (Pol.Code, § 3714; Const. art. 11, § 18).

◆

In Bank.

Proceeding by Los Angeles County for a peremptory writ of mandate to H. A. Payne, as county auditor, and another. Writ granted.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for petitioner.

Franz R. Sachse and Russell K. Lambeau, both of Los Angeles, for respondents.

CURTIS, Justice.

The petition in this matter shows that the board of supervisors of the county of Los Angeles in its budget for the fiscal year 1936-37 made an appropriation of approximately $3,500,000 for the aid and relief of indigents within said county. Before the 12th day of March, 1937, the county had expended for the purpose for which it was appropriated all of said sum with the exception of approximately $250,000 and this unexpended balance, on the date last mentioned, had been encumbered by outstanding unpaid contracts and obligations to its full extent, leaving the said county wholly destitute of funds with which to carry on its work for the relief of the indigents within the county. On that date, by a vote of four of its five members, the fifth member being absent from the meeting, the board of supervisors passed and adopted the following resolution:

"That this Board of Supervisors, in the final budget of the County of Los Angeles for the fiscal year 1936-37, appropriated for the direct relief of indigent persons eligible to aid and relief by the County of Los Angeles under that certain act of the legislature entitled 'An act to provide for the aid and relief of indigents,' approved June 5, 1933, the sum of $3,430,000.00 to which sum an additional appropriation of $25,000.00 was added by transfer, making a total appropriation of $3,455,000.00 for said fund for the fiscal year 1936-37;

"That the total claims allowed and paid from said appropriation aggregate the sum of $3,203,849.08, leaving an unexpended balance of said appropriation of $251,152.92, all of which unappropriated balance is now encumbered by outstanding unpaid contracts, obligations and orders to the full extent of such balance, leaving no unencumbered and unappropriated balance in said appropriation;

"That the whole of the unappropriated reserve of the General Fund of the County of Los Angeles for the fiscal year 1936-37 has been fully appropriated and expended;

"That the full amount of all other appropriations contained in said budget will be required and necessary to be expended in conducting the functions of county government for the balance of the fiscal year 1936-37, leaving no funds available for transfer to cover deficiencies in the appropriations for indigent relief for the remainder of the fiscal year 1936-37;

"That approximately 53,600 families, or in excess of 75,000 persons in the County of Los Angeles are now and have for many months past been destitute and indigent, requiring the furnishing of aid with which to acquire food, shelter and supplies from public funds of the county to preserve their health and prevent their starvation;

"That the cost and expense of furnishing aid and relief to such indigent persons eligible to aid and relief under said act will approximate $1,000,000.00 for the balance of the fiscal year, over and above the appropriations heretofore made therefor;

"Now, therefore, the Board of Supervisors of the County of Los Angeles hereby finds and determines that a grave public emergency exists which, unless provided for, may seriously endanger the public health and the preservation of order within the County of Los Angeles; that it is a necessary and mandatory governmental function imposed by the law of this state to provide for the relief of such persons; and that such emergency requires the incurring of obligations and the expenditures of funds in excess of the budgeted appropriations therefor; and be it further resolved, that the sum of $1,000,000.00 in addition to the sums provided for in the budget for the fiscal year 1936-37, be and the same is hereby appropriated for the items included under maintenance and operation for the Department of Charities of the County of Los Angeles, which sum is to be used solely and exclusively for the purpose of furnishing direct relief to the poor, destitute, indigent and infirm persons of the County of Los Angeles for the purchase of food and the providing of shelter and supplies for such persons, and the Auditor of the County of Los Angeles shall draw warrants not exceeding said amount of $1,000,000.00 on the General Fund of the county, chargeable to the maintenance and operation of the Charities Department of the County of Los Angeles for the relief of indigent persons, payable to such persons as shall hereafter be designated in voucher or vouchers approved by the Board of Supervisors; and the Treasurer of the County of Los Angeles is hereby authorized and directed to pay such warrants out of any moneys in the treasury in such fund, and if there shall be insufficient moneys on hand in the treasury then such warrants shall be registered, bear interest and be called in the manner provided by law for the calling of other county warrants."

After the adoption of said resolution, the superintendent of charities drew his requisition upon the county auditor of said county for twenty-nine separate warrants upon the treasurer of said county in the sum of $1 each, payable respectively to twenty-nine poor and indigent persons, eligible by law and entitled to aid and relief from said county, in payment of demands upon the emergency appropriation for the direct relief of said twenty-nine persons. Said claims and demands of said poor and indigent persons were presented to the board of supervisors of said county on said 12th day of March, 1937, and were by said board of supervisors approved and ordered paid, and the auditor of said county was by said board of supervisors instructed and directed to approve and issue warrants for the same, and the treasurer of said county was by said board of supervisors ordered and directed to pay the same out of any funds available in the treasury of said county for payment of the same, and in the absence of such funds to register said warrants in the manner provided by law. The auditor of said county refused to approve said claims or demands, and refused to issue warrants, or any warrants, for any of said claims or demands, and the treasurer of said county declined and refused to either pay or register said warrants, or any of them. It is further alleged in said petition: "That approximately 53,000 families, or in excess of 75,000 persons in Los Angeles County are now and have for many months past been destitute and indigent, requiring the furnishing of aid from public funds of the county with which to acquire food, shelter and supplies to preserve their health and prevent their starvation; and that the cost and expense of furnishing aid and relief to such indigent persons eligible to aid and relief will approximate $1,000,000.00 for the balance of the fiscal year, over and above the appropriations heretofore made therefor."

Paragraph IX of said petition is as follows: "That in fixing and determining the tax levy of Los Angeles County for the fiscal year 1936-37, the Board of Supervisors of said county anticipated a current tax delinquency for said fiscal year in an amount equal to 7% of the revenue represented by taxes upon real and secured personal property; that in and by said tax levy said Board of Supervisors levied and imposed a tax rate upon real and secured personal property, which tax rate would mathematically produce, when applied to the total assessed valuation of such real and secured personal property, the sum of $1,638,550.05 in excess of the sum anticipated to be realized and actually raised during the fiscal year 1936-37; that said sum so included in said tax levy was not in said budget considered as revenue which would be realized or actually produced during said fiscal year, and that no part of said sum was included as an item of revenue against which any item of appropriation in said budget was charged or offset."

The prayer of the petition asks that a peremptory writ of mandate be issued directed to respondents commanding them to comply with the order of the board of supervisors approving and ordering paid said claims and demands.

To this petition, the respondents, the auditor and the treasurer of the county of Los Angeles, have filed a general demurrer. Upon the written stipulation of the parties, the matter has been submitted for decision upon the briefs on file.

The respondents herein, the auditor and the treasurer of said county, based their refusal to recognize said claims and demands and to comply with the directions contained in said resolution upon the following grounds which were set forth in writing and presented to said board of supervisors: (1) That the issue, approval, payment, and registration of said warrants would violate the provisions of section 3714 of the Political Code, in that (a) inadequacy of appropriated funds with which to furnish relief to indigent persons, otherwise entitled to relief, does not and cannot constitute an "emergency" under the terms of said section and (b) that the cost and expense of furnishing such relief to indigent persons, in excess of appropriations therefor, is not a "mandatory expenditure required by law," as that expression is used therein; and (2) that the issue, approval, and payment or registration of said warrants would constitute a violation of section 18 of article 11 of the Constitution in that such expenditure would exceed the income and revenue provided for the fiscal year 1936-37.

The respondents now rely upon these same grounds as a defense to this proceeding. We will consider these two grounds in the order just stated.

It will be noted that respondents contend in the first place that the issuance, approval, payment, and registration of said warrants would violate section 3714 of the Political Code, and in the second place that the payment of said warrants would constitute a violation of section 18, article 11, of the Constitution, in that such expenditures would exceed the income and revenue provided for the fiscal year 1936-37.

Section 3714 of the Political Code makes it the duty of the board of supervisors, before making the annual tax levy, to prepare and adopt a budget which shall contain among other things an estimate of the revenues and expenditures for the fiscal year classified as in said section provided. In the fifth subdivision of said section, it is provided that, "The estimates of expenditures, classified as required in subdivision two hereof, and as finally fixed and adopted by said county board of supervisors, shall constitute the appropriations for the county for the fiscal year to which the budget is intended to apply and the county board of supervisors and every other county official * * * shall be limited in the making of expenditures or the incurring of liabilities to the amount of such appropriations and classifications respectively."

It is further provided in said section that: "Upon the happening of any emergency caused by fire, flood, explosion, storm, earthquake, epidemic, riot, or insurrection, or for the immediate preservation of order or of public health, or for the restoration to a condition of usefulness of any public property, the usefulness of which has been destroyed by accident, or for the relief of a stricken community, overtaken by calamity, or the settlement of approved claims for personal injuries, or for property damages, exclusive of claims arising from the operation of any public utilities, owned by the county, or to meet mandatory expenditures required by law, the county board of supervisors may upon the adoption, by a four-fifths vote of the members present at any meeting, of the time and place of which all the members of such board shall have had reasonable notice, of a resolution stating the facts constituting the emergency and entering the same upon the minutes, make the expenditure necessary to meet such emergency.

"All emergency expenditures shall be paid by warrant from any moneys on hand in the county treasury, in any fund properly chargeable with such expenditure, and the county treasurer is hereby authorized and directed to pay such warrants out of any moneys in the treasury in such fund. If, at any time, there shall be insufficient moneys on hand in the treasury to pay any of such warrants, then such warrant shall be registered, bear interest, and be called in the manner provided by law for other county warrants."

By the provisions of said section, expenditures not included within the budget, but which result from the happening of an emergency, or which are necessary to meet mandatory expenditures required by law, are excepted from the operation of the limitation contained in subdivision 5 of said section quoted above. Respondents contend that the expenditure of the $1,000,000 proposed to be made by the board of supervisors of said county is neither an emergency matter, nor is it necessary to meet a mandatory duty required by law.

[1] The demurrer to the petition admits all the allegations thereof to be true. The statement in the petition that there now are and have been for many months in excess of 75,000 persons in said county, destitute and indigent, requiring the furnishing of aid with which to acquire food, shelter, and supplies from public funds of the county to preserve their health and prevent their starvation, must be accepted as an admitted fact in the determination of the questions involved in this proceeding. No showing is made in the petition that this same number of destitute and indigent persons were not residents of the county at the time of the adoption of the budget, or that there has been any change in the relief situation in said county from that existing at the time the board of supervisors adopted the budget for the present fiscal year. Upon this state of facts, the respondents claim that the showing made in the petition is insufficient to establish the existence of an emergency in said county respecting the relief situation. Reliance is placed by respondents in support of this contention upon the cases of San Christina Investment Company v. City and County of San Francisco, 167 Cal. 762, 141 P. 384, 385, 52 L.R.A.(N.S.) 676, and Burr v. San Francisco, 186 Cal. 508, 199 P. 1034, 17 A.L.R. 581. These cases involved ordinances of the board of supervisors of the City and County of San Francisco, fixing the tax rate for two separate years following the 1906 fire. The ordinance involved in the first of these two cases was passed in the year 1910, and the rate fixed therein exceeded the maximum rate permitted by the charter of said municipality, which was $1 upon each $100 valuation of property assessed. It was attempted to justify the excess assessment by a declaration that "a great necessity and emergency" existed in said city and county by reason of the destruction of a number of public buildings and their equipment and the necessity of replacing the same for municipal use. The charter expressly provided that the limitations placed upon the board of supervisors in fixing the tax rate at one dollar upon each $100 upon the assessed valuation of the taxable properties within said city and county "shall not apply in case of any great necessity or emergency." This court, in the decision in that case, accepted the definition of emergency given by Webster as, "An unforeseen occurrence or combination of circumstances which calls for an immediate action or remedy; pressing necessity; exigency." It also construed the word "great," preceding the words, "necessity or emergency," as used in the charter to mean, "a necessity or emergency of grave character and serious moment." It will be noted that the language used in section 3714 of the Political Code is materially different from that used in the charter of the City and County of San Francisco. The Code section simply provides that upon the happening of any emergency by fire, flood, etc., the board of supervisors may make an expenditure to meet such emergency. In the San Christina Investment Company Case, the court held that no great necessity or emergency, as those words were construed to mean, existed in said municipality by reason of the destruction some four years previously of certain buildings and equipment owned and used by said city and county in its government of said municipality. The court considered the hardship and inconvenience which the city and county would suffer by being deprived of the use of the buildings and other property destroyed by the fire, but held that an inconvenience to the city did not justify the setting at naught the written terms of the city's charter. It finally indicated that the course which the municipality should pursue in raising these large revenues was either by a bond issue, or an amendment to its charter permitting a tax levy exceeding that fixed by its present charter. The case of Burr v. San Francisco, supra, was almost the exact counterpart of the case of San Christina Investment Company v. City and County of San Francisco, supra, except that it involved a tax levy made some eight years after the fire of 1906. The levy exceeded the limit fixed by the charter. The excessive expenditures were claimed to be due to conditions resulting from the fire of 1906, and certain changes in the law which in certain instances increased the expenditures of the city and in other instances reduced the revenue of the municipality. This court simply followed its previous decision in the San Christina Investment Company Case, and applied the construction which it there gave to the provisions of the charter, and held that no great necessity or emergency existed in said municipality which would justify

expenditures in excess of the limit fixed by the charter.

[2] We think the situation which confronts the county of Los Angeles growing out of the relief problem is materially different from that considered in the two cases just mentioned. Among the definitions of emergency given and approved by the two decisions discussed above are, "pressing necessity," "exigency." "Exigency" in turn is defined by Webster as "a case demanding immediate action or remedy." While the destruction of necessary buildings and their equipment might result in a condition producing hardship and inconvenience to a municipality in its work of carrying on the business of a city, it can hardly be said that the want of such facilities would necessarily be held to be "a pressing necessity" or "a case demanding immediate action or remedy." A municipality could exist and perform the ordinary governmental functions without public buildings or equipment of its own. However, the situation in the county of Los Angeles which the increased expenditures are designed to remedy is of a most pressing character, and one from which immediate relief is required if human life is to be sustained and the health of a large number of persons is to be preserved. To relieve such a condition, we think comes within the enumerated purposes in the statute for which expenditures may be made beyond the limitations of the budget. To preserve the public health which necessarily includes the saving of people from starvation, is one of the expressed purposes for which expenditures may be made under the emergency provisions of said section. Such a condition as we have described herein, and which it is admitted exists in the county of Los Angeles as shown by the petition herein, was expressly held to be a "grave public emergency" by the Supreme Court of Washington in the case of Rummens v. Evans, 168 Wash. 527, 13 P.(2d) 26, 29. In its decision in that case, the court made the following pointed statement: "If husbands and fathers of 17,000 families are unable to find food to satisfy the hunger of their families and other bare necessities, although in the midst of plenty, many will be driven to get what they can where they may find it by any means available or driven to desperate self-destruction. They will not quietly and tamely submit to starvation. The burdens of the taxpayers of the state are grievous, as we well know, and have reached a point which is well-nigh unendurable, but not so grievous as to be hungry, cold, and naked, without fault, and seeing helpless women and children in the same state and unable to relieve them." The effect of the decision in that case was to sustain the validity of warrants issued under a resolution of the county commissioners of the county of Kings declaring an emergency existed in said county by reason of the condition described in the foregoing quotation from said decision. In our opinion, the conclusion reached by the court in that case is sound, and should be followed in determining the question now before us. We accordingly hold that the facts alleged in the petition herein are sufficient to show, and do show, that an emergency exists in said county respecting the relief situation therein, which justified the passage of the resolution appropriating the sum of $1,000,000 for the relief of the poor and indigent of said county over and above the amount provided for in the budget of the present fiscal year.

[3] We are further of the opinion that the expenditures provided in said resolution are mandatory expenditures required by law and are, therefore, not within the inhibitions of section 3714 of the Political Code. It is made the duty of every county in this state "to aid and relieve" all indigent residents of the county. St.1933, p. 2005; Deering's Gen.Laws.1933, Act 5815. The obligation imposed by this statute is a mandatory duty. San Francisco v. Collins, 216 Cal. 187, 190, 13 P.(2d) 912, and McBurney v. Industrial Accident Commission, 220 Cal. 124, 127, 30 P.(2d) 414.

[4, 5] There is nothing in conflict with this statement of the law in any of the following three cases relied upon by the respondents: Pacific Undertakers v. Widber, 113 Cal. 201, 45 P. 273, Goldsmith v. San Francisco, 115 Cal. 36, 46 P. 816, and Arthur v. City of Petaluma, 175 Cal. 216, 220, 165 P. 698. It was held in these three cases that the claims of the plaintiffs, although founded upon certain statutory provisions, were not valid claims for the reason that the payments thereof would be in violation of section 18, article 11, of the Constitution, which forbids the incurring of any indebtedness by a municipality exceeding the income and revenue provided for such year, except by a vote of the electors of such municipality. We

are not now considering the effect of such constitutional inhibition upon the indebtedness which is sought to be incurred by the adoption of the resolution of said board of supervisors. That question will be given attention later on in this opinion. The question which we are now considering is whether the incurring of said indebtedness is prohibited by section 3714 of the Political Code. The Codes of this state are simply a part of the statutory law of this state. They have no higher standing or sanctity than any other statute regularly passed by the Legislature. Section 3714 of the Political Code and the act for the relief of the poor and indigent persons must be read together. Neither has any supremacy over the other, except in the case of conflict, the later enactment would take precedence over the other. This, of course, is not the rule when a conflict exists between a provision of the Constitution and a statute, and the decisions in the three cases just referred to are based upon the well-established doctrine that the Constitution of the state is supreme, and any statute in conflict therewith is of no validity. The act of 1933, making it the mandatory duty of counties to aid and relieve its indigent persons residing therein, is not limited by any provisions of section 3714 of the Political Code for this section expressly provides that the limitation as to expenditures shall not apply to mandatory expenditures required by law. It may be questioned whether a county may be relieved of the mandatory duty imposed upon it by this statute by making an insufficient appropriation to meet the expenses necessary to properly care for its poor and indigent residents. It is not necessary for us to decide this question in this case for the reason that the county of Los Angeles has shown no disposition to shirk this duty but by the passage of the resolution herein involved is attempting in good faith to perform the obligation imposed upon it by the statute. In so doing, it has confined itself strictly within the requirements and limitations imposed by said section 3714 of the Political Code We are, therefore, of the opinion that the incurring of said additional indebtedness is a mandatory duty imposed by the statute, as well as that the purpose thereof is to meet an emergency within the meaning of that term as used in section 3714 of the Political Code.

[6-8] The only remaining question for decision is whether the incurring of said additional indebtedness exceeds the income and revenue of said county for the present fiscal year, and is, therefore, within the restrictive provisions of section 18, article 11, of the Constitution.

From the admitted allegations of the petition, it appears that the board of supervisors of the county of Los Angeles, in fixing and determining the tax levy for the present fiscal year, anticipated a tax delinquency of 7 per cent. of the revenue represented by taxes upon real and unsecured personal property. This anticipated tax delinquency amounts to the sum of $1,638,550.05. This sum was not included in the tax levy or in the budget as revenue to be realized or produced during the present fiscal year, and no part of said sum was included as an item of revenue against which any item of expense in said budget was charged or offset.

It is established in this state that the validity of a liability, subject to the provisions of this section of the Constitution last mentioned, depends upon whether or not there were unappropriated revenues when the liability was incurred. Buck v. City of Eureka, 124 Cal. 61, 68, 56 P. 612. If revenues have been provided equivalent in amount to the liability contracted, there is no violation of said section of the Constitution. State of California v. McCauley, 15 Cal. 429, 430, 447; Koppikus v. State Capitol Commissioners, 16 Cal. 248; People v. Pacheco, 27 Cal. 175, 176, 207, 208.

The question as to whether unencumbered uncollected taxes of the present or of prior years constitute income and revenue for the purpose of computing the constitutional limitation has not apparently ever been before the appellate courts of this state. In other jurisdictions, it has frequently been the subject of judicial discussion in which the courts have been in accord in holding that at least uncollected taxes for the current year to the entire amount thereof constitute income and revenue within the meaning of the constitutional prohibition.

In an early case the question was squarely before the Supreme Court of Washington. In that case the court discussed and decided the question in the following language: "The other question is one of more difficulty. Under constitutional provisions of substantially the same force as ours, the most of the states have adopted some rule under which the revenues to be collected for the current year could be made available prior to their collection. In California, where the constitution prohibits counties from incurring any indebtedness at all, and the state from incurring an indebtedness of more than $300,000, it has often been held that the counties could incur obligations and issue warrants therefor payable out of the revenues for the current year to be thereafter collected, and that the state could do likewise to an amount greatly in excess of the $300,000, if such excess did not exceed the amount to be derived from the revenues of the current year. See State v. McCauley, 15 Cal. [429] 430; Koppikus v. Commissioners, 16 Cal. [248] 249; People v. Pacheco, 27 Cal. [175] 207. In Iowa certain municipalities were prohibited from incurring indebtedness in excess of 5 per cent. of their assessed valuation, and the supreme court of that state has frequently held that municipalities in debt to that amount could incur further indebtedness to the amount of the revenue to be derived from taxes assessed for the current year. See Dively v. City of Cedar Falls, 27 Iowa, 227; Grant v. City of Davenport, 36 Iowa 396. In Louisiana the interpretation of a similar constitutional provision is the same. See Laycock v. City of Baton Rouge, 35 La.Ann. 475. Cases from other states to the same effect might be cited, and no case holding to the contrary has been called to our attention. We therefore feel compelled to agree with the contention that the amount of the taxes assessed for county purposes upon the tax roll for the current year must be deducted from the outstanding county indebtedness to determine its amount, within the meaning of the constitutional prohibition." State ex rel. Barton v. Hopkins, 14 Wash. 59, 44 P. 134, 135, 550.

Further on in the opinion the court says: "Those [taxes] of the current year have been by the courts treated as a part of the cash assets of the county for the reason that, in legal contemplation, their collection is certain. * * * The legal certainty grows out of the fact that the law presumes that the tax assessed upon property will be paid, for the reason that the property is liable for the tax, and can be sold if the tax is not paid. If this legal presumption is warranted as to taxes when they are assessed, there is no reason why such presumption should not continue until the property has been sold for the purpose of realizing the amount of the taxes assessed against it."

That case has been followed by the Supreme Court of Washington. Mullen v. Sackett, 14 Wash. 100, 44 P. 136; Graham v. Spokane, 19 Wash. 447, 53 P. 714; State v. Mutty, 39 Wash. 624, 82 P. 118; Seymour v. Ellensburg, 81 Wash. 365, 142 P. 875. These cases hold that even delinquent taxes of previous years may be treated as cash assets in computing the income and revenue of a subsequent year. To the same effect is the case of Overall v. City of Madisonville, 125 Ky. 684, 102 S.W. 278, 281, 12 L.R.A.(N.S.) 433. However, the Supreme Court of Iowa limits the income and revenue of the year to the taxes assessed and to become due during that year. French v. City of Burlington, 42 Iowa, 614, 620. In that case, the court stated the law as follows: "Up to the time of the annual tax sale, these taxes should be regarded as available assets. But after that period we are of opinion, and so hold, the burden is on the city to show that such taxes have any value before they should be counted or deemed available assets for the purpose of meeting a proposed indebtedness." It is not necessary for us to decide the question as it relates to delinquent taxes, for if the county may include the entire tax levy as income and revenue of the present year, the constitutional provision limiting the incurring of indebtedness to the revenue and income provided for such year has not been violated by the resolution increasing this appropriation for relief by the amount therein named.

Our attention has not been called to any contrary authorities. Those we have cited are in unison in holding, in effect, that the entire amount of taxes assessed for county purposes upon the tax rolls for the current year is available assets for the purpose of determining the total revenue and income for the year. Computing the revenue and income of the county of Los Angeles for the present year upon this basis, the additional expenditures incurred by the resolution of the board of supervisors of March 12, 1937, did not result in an excess of expenditures over the revenue and income of said county provided for the year. There was, therefore, no violation of the terms of section 18, article 11, of the Constitution by reason of the incurring of this additional liability.

There are other questions raised and additional grounds advanced by petitioner in support of its petition herein, but they are not of substantial importance in view of our decision of the questions considered in this opinion.

Let the writ issue as prayed for.

We concur: SEAWELL, J.; SHENK, J.; THOMPSON, J.; EDMONDS, J.; LANGDON, J.

---

20 Cal.App.2d 79

TAX FACTORS, Inc., v. MARIN COUNTY.

Civ. 10452.

District Court of Appeal, First District, Division 2, California.

March 31, 1937.

Rehearing Denied April 30, 1937.

Hearing Denied by Supreme Court May 27, 1937.

1. Reformation of Instruments 🔑20

County *held* entitled under statute to have written instrument providing for survey, classification, and valuation of assessable property in certain zones by corporation reformed so as to express true intent of parties as shown by resolution authorizing survey, where corporation knew such instrument departed from resolution and chairman of board of supervisors, in signing written instrument, did not (Civ.Code, § 3399).

2. Appeal and error 🔑1071(1)

In corporation's action against county for services rendered under alleged express contract to survey, classify, and value assessable property in certain zones, error in finding that written instrument signed by chairman of board of supervisors should be reformed *held* not prejudicial to corporation, where finding enforced contract expressed in resolution authorizing survey and resolution embodied terms of contract agreed upon (Civ.Code, § 3399).

3. Appeal and error 🔑1071(1)

In corporation's action against county for services rendered under alleged express contract with county to survey, classify, and value assessable property in certain zones which did not express true intent of parties as shown by resolution authorizing survey, finding that no oral orders were issued by officers of county to corporation *held* not prejudicial where work and manner in which it was to be done was specifically mentioned.

4. Counties 🔑126

That corporation which agreed with county to make survey, classification, and valuation of assessable property in certain zones failed to put up a surety bond as required in formal instrument signed by chairman of board of supervisors, *held* not determinative of liability of county on instrument, where such instrument did not conform to resolution authorizing survey and such provision was not found in resolution which expressed true intent of parties (Civ.Code, § 3399).

5. Counties 🔑122(1)

Purported contract between county and corporation by which corporation was to classify and value assessable property in zones would be invalid to extent that corporation undertook to value each piece of property in county, since assessor is legally bound to perform such duties (Pol.Code, § 3628).

6. Counties 🔑122(1)

Purported contract by which corporation undertook to classify and value assessable property in certain zones in county, which was invalid to extent that it attempted to perform duties of assessor, *held* invalid under statute in its entirety, where promises to classify and value property were made jointly as to each specific piece of property and classification and values appeared on same sheet (Civ.Code, § 1608).

7. Officers 🔑100(2)

County assessor is not entitled to financial aid through the board of supervisors.

8. Officers 🔑100(2)

County assessor may not be relieved of his duties by board of supervisors employing others to discharge the duties imposed by statute on him and attempted contract therefor is void (Pol.Code, §§ 4005, 4125).

9. Counties 🔑125

County *held* not liable as on implied contract to corporation which rendered services in classifying and valuing assessable property in certain zones in county under express contract therefor, where such contract was void because it attempted to have corporation perform those duties which assessor was bound to perform (Pol.Code, §§ 3628, 4005; Civ.Code, § 1608).

10. Counties ⇨122(1)

Particular room in which documents prepared by corporation under purported contract with county providing for classification and valuation of assessable property in certain zones were deposited *held* immaterial in determining whether contract was valid because intended to assist board of supervisors as a board of equalization and not to relieve assessor of his duties (Pol. Code, §§ 3628, 4005; Civ.Code, § 1608).

11. Taxation ⇨449(2)

County board of equalization may send for and examine such data as probate appraisements, lists of recent sales, and prices paid.

12. Officers ⇨100(2)

Purported contract with county by which corporation agreed to classify and value assessable property in certain zones *held* invalid as attempt by board of supervisors to relieve assessor of duty of valuing property, and not intended to furnish board of supervisors sitting as a board of equalization with material with which to cross-examine assessor (Pol.Code, §§ 3628, 4005; Civ.Code, § 1608).

13. Municipal corporations ⇨167

Generally, powers of a municipal board are those which are granted in express words; those necessarily implied in or incident to powers expressly granted; and those essential to declared objects and purposes of corporation, which are not simply convenient, but indispensable.

14. Counties ⇨21½

Power of duplicating assessment rolls of any county *held* not "indispensable" power of county so as to render contract therefor by county valid (Pol.Code, §§ 3628, 4005; Civ.Code, § 1608).

[Ed. Note.—For other definitions of "Indispensable," see Words & Phrases.]

15. Counties ⇨21½

Any fair reasonable doubt concerning existence of power in county is resolved by courts against it.

◆

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Tax Factors, Incorporated, against the County of Marin, State of California. From the judgment both parties appeal.

Reversed, with direction that judgment be entered in favor of defendant.

Charles A. Christin, of San Francisco (T. J. Keegan, of San Francisco, of counsel), for plaintiff.

George H. Harlan, of San Rafael (N. Charles Brusatori, of San Rafael, H. C. Symonds, of Mill Valley, and T. T. Daniels, of San Rafael, of counsel), for defendant.

STURTEVANT, Justice.

The plaintiff commenced an action on an alleged express contract to recover the balance claimed to be due for services rendered. The defendant answered and a trial was had before the trial court sitting without a jury. The court made findings of fact partly in favor of the defendant and partly in favor of the plaintiff, and from the judgment entered thereon both parties have appealed.

In the early part of the year 1928, the plaintiff applied to the defendant for a contract "* * * to make a survey, classification and valuation of the assessable property of the County of Marin * * *." Later the plaintiff was given a contract covering a limited portion of the county—city of San Anselmo, city of Ross, and certain election precincts in Fairfax. The consideration was $6,000. That contract was performed and the plaintiff applied for a contract to render similar services for the rest of the property in Marin county. After negotiations on the 1st day of October, 1928, the board of supervisors of Marin county adopted a resolution in words and figures as follows:

"Resolved, that Tax Factors Incorporated, a corporation, be and it is hereby authorized in accordance with and agreeably to the contract entered into the 1st day of October, 1928, between the County of Marin and said Tax Factors, Incorporated, to make a survey, classification and valuation of the assessable property of the County of Marin, situate in the following described territory, towit: Kentfield School District, Towns of Larkspur and Corte Madera, Larkspur School District, Town of Mill Valley and Mill Valley School District, Reed School District, Town of Sausalito and Sausalito School District, Town of Belvedere and Tiburon School District, Novato School District, Black Point School District, San Jose School District, Dixie School District, Burdell School District, Nicasio School District, San Rafael School District, San Pedro School District, and San Quentin School District.

"The same to be classified in the same manner as heretofore done by said Tax Factors, Incorporated, of the territory within the corporate limits of the City of San Anselmo, and the corporate limits of the City of Ross, together with that territory within the boundaries of those certain General Election Precincts established by the Board of Supervisors, and known as Fairfax Precinct No. 1, Fairfax Precinct No. 2, Fairfax Precinct No. 3, and Fairfax Precinct No. 4, and as authorized by a resolution of this Board passed and adopted on the 14th day of February, 1928;

"And be it further resolved, that this assignment of territory under the terms of said contract, is upon the condition that said work will be completed by said Tax Factors Incorporated, on or before the 1st day of June, 1929, and that said Corporation will make such survey, classification and valuation of the assessable property within the territory above mentioned in the manner specified in said contract and in this resolution for the sum of *not to exceed* $40,000.00."

The resolution had been prepared by the plaintiff and was by it presented to the board of supervisors. During the discussion an objection to the resolution was made because it did not limit the amount of the price to be charged. Thereupon the plaintiff's agent inserted the italicized words "not to exceed." The plaintiff undertook to prepare a formal written contract expressing the agreement of the parties. Later it tendered a written instrument dated October 1, 1928, which contains over forty folios but does not specifically refer to nor incorporate said resolution. No other resolution was passed by the board of supervisors and there is no evidence that the indenture just referred to was exhibited to any supervisors excepting Mr. Gardner, the chairman of the board. Nevertheless, the instrument was signed by the chairman, attested by the county clerk, and was also signed by the plaintiff, by Mr. Ramkin, the manager thereof. Said written instrument in no place directly or indirectly refers to the $40,000 limit in the resolution, but instead it contains under the heading "Estimate of Costs," the following: "For urban, suburban or subdivided lots eighty-five (85) cents per parcel, as in paragraph nineteen (19) of this agreement defined. For rural lands classified and mapped which are more valuable for agricultural or grazing than for subdivision purposes, the sum of ten (10) cents per acre. For buildings and structures as in paragraph nineteen (19) defined, the sum of $2.35 per structure." After said written instrument had been signed by the parties as above recited, the plaintiff commenced the performance of the duties it had undertaken to perform. From time to time it received payments on account. In preparing its complaint it specified its claims as provided in the above quoted "Estimate of Costs." It gave credit for $37,500 amounts received and asked judgment for $71,708.90 as the alleged balance due. The trial court ordered judgment in favor of the plaintiff for $2,500, the balance between $40,000, the amount specified in the resolution dated October 1, 1928, and $37,500, payments made. The plaintiff complains because the judgment was not enough and the defendant complains because the trial court awarded the plaintiff a judgment in the sum of $2,500, and earnestly contends that the contract was invalid and that the plaintiff should not have been given judgment in any sum whatever.

[1, 2] In its answer the defendant set forth certain allegations and asked that the formal written instrument prepared by the plaintiff should be reformed. The trial court made findings on those allegations in favor of the defendant. The plaintiff contends that in doing so the trial court erred. We think there is no merit in the contention. As to what should have been contained in the instrument as expressing the minds of the parties appears at once from an inspection of the resolution presented by the plaintiff to the board of supervisors and by that body adopted. That in preparing the formal instrument the plaintiff actually knew it made no reference to the resolution but, on the other hand, departed therefrom is at once clear. Mr. Gardner testified in effect that at the time he signed the formal written instrument he did not know it departed from the terms of the resolution and that it did not provide for carrying out the terms of that resolution. Section 3399 of the Civil Code provides: "When, through fraud * * * or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention." The facts of the instant case come clearly within the provisions of the rule just quoted. F. P. Cutting Co. v. Peterson, 164 Cal. 44, 49, 127 P. 163. Furthermore, even though there had been any error in the findings complained of such error could not have been prejudicial to

the plaintiff. The findings made enforce the contract expressed in the resolution. That resolution embodied the terms of the contract agreed upon by the plaintiff and by the board of supervisors.

[3] The plaintiff complains because the trial court made findings that no oral orders were issued by the officers of the defendant to the plaintiff. An examination of the resolution discloses that no orders, written or oral, are therein provided for. The work to be done is specifically mentioned. The manner in which the work was to be done was also specifically mentioned—"the same to be classified in the manner as heretofore done by said Tax Factors Inc. of the territory within the corporate limits of the City of San Anselmo * * *."

[4] The defendant complains because no surety bond was put up as provided in the formal written instrument. The furnishing of a bond was not mentioned in the resolution and is not to be found in any document except the formal written instrument. However, as we have shown above, that document was never shown to the board of supervisors and, so far as the record discloses, no member excepting Mr. Gardner ever heard of a covenant regarding a bond.

[5, 6] The defendant contends that the purported contract was void. Forward v. County of San Diego, 189 Cal. 704, 209 P. 993. The plaintiff contends that it was valid. H. D. Haley & Co. v. McVay, 70 Cal. App. 438, 233 P. 409. Both of the cases cited are helpful arguendo, but neither is determinative of the legal effect of the purported contract involved in this litigation. Under the clear terms of the resolution the plaintiff undertook "to make a survey, classification, and valuation of the assessable property" in the zones described in Marin county. In the record we find nothing claimed to be a survey, that is, in the sense of a measured plan and description of any portion of the county by a civil engineer. Two sheets of "classification" appear in the record. Each sheet purports to show (1) the net value of a specific lot; (2) the net value of the improvements thereon; (3) a diagram of the floor plan; (4) the nature of the building; whether commercial or otherwise, its size, and the kind of material used in its construction. No separate sheets appear as showing valuation. However, as just indicated, each classification sheet is not only descriptive of the building and lot but contains insertions regarding values. We think it follows that the plaintiff in fact undertook to make a "classification" and "valuation" of said assessable property. It is also clear that the two promises are made jointly as to each specific piece of property. In so far as the plaintiff undertook to value each piece of property in Marin county, it was merely attempting to do and perform those things that the assessor is legally bound to do and perform. Therefore, the contract was, to that extent, invalid. Forward v. County of San Diego, supra. But, as we have just shown, the work to be done by the plaintiff in making classifications and in expressing values appeared on one and the same sheet. Section 1608 of the Civil Code provides: "If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void." It therefore follows that the entire contract before us in the instant case was void. County of Humboldt v. Stern, 136 Cal. 63, 67, 68 P. 324.

[7-9] The statutes create the office of assessor, prescribe his duties, and fix his compensation. Among the duties imposed on the assessor the chief one is the duty of valuing all property in his county subject to local taxation. Pol. Code, § 3628. He is not entitled to financial aid through the board of supervisors (Dougherty v. Austin, 94 Cal. 601, 28 P. 834, 29 P. 1092, 16 L.R.A. 161), nor may the board of supervisors relieve him by employing others to discharge the duties imposed by statute (Pol. Code, § 4125) on him. Forward v. County of San Diego, supra. If a purported contract is attempted to be made in violation of the principle last mentioned it is absolutely void. Pol. Code, § 4005. Being void as to Marin county, no liability is created as on an implied contract. Zottman v. San Francisco, 20 Cal. 96, 105, 81 Am.Dec. 96.

[10-12] As we understand the position of the plaintiff, it is this: It maintains that it was undertaking to render assistance to the board of supervisors when sitting as a board of equalization and not to act as an adjunct of the assessor's office. Accordingly, some effort was made to show that the documents prepared by the plaintiff were delivered to and deposited in the offices of the board and not in the office of the assessor. No claim was made that said documents were to be taken out of the county nor, indeed, that they were to be taken out of the courthouse. As between the county officers, they were public property. The particular room in which they

were deposited is quite immaterial. No effort was made to show the documents prepared by the plaintiff were "maps, and platbooks." Pol.Code, §§ 3658, 3658a, 4218. Nor was the purported contract claimed to be founded on those sections. However, both in the trial court and in this court the plaintiff placed much reliance on the rule stated in H. D. Haley & Co. v. McVay, supra. In that case the court discussed a contract under the terms of which the plaintiff undertook to make a "cruise and estimate of all timber on such patented lands * * * as shall be hereafter designated" and a "classification, topographical survey, and report of such" lands. It will be noted at once that the work to be done by the Haley Company is a line of work, to do which, no office has been created, and the performance of which has not been imposed on any officer of the state or county. The value of standing timber depends on many factors. Among others are included the kind, species, amount, location, inside or outside of forest, the proportion of clear and rough stuff, and, above all, its accessibility; hence, the topography of the ground on which it stands. Being furnished with the data just mentioned, any officer seated at his desk can make accurate computations. Otherwise, his computations will be a bold guess. Comparing Haley's contract with the one in suit, it is clear there is no similarity whatever. Haley's reports were closely allied to the "maps and plats" authorized by section 3658 of the Political Code. The "classifications" of the plaintiff were but copy for an assessment roll, and, as we understand the record, they were so used. The Haley Case rests, at least in part, on Maurer v. Weatherby, 1 Cal.App. 243, 81 P. 1083. That case involved these facts. The property, real and personal, in the city of Eureka, was subject to local taxation by the city of Eureka and also by Humboldt county. The assessor of the county of Humboldt had made his assessment. The assessor of the city of Eureka had made his assessment. The council of the city of Eureka, sitting as a board of equalization, desired information to determine whether any of the property on the city assessment roll should be equalized. It employed the plaintiff to make sheets comparing the two assessment rolls. The court held the council had the right to make the contract for its assistance in equalizing the assessments. In doing so, on page 245 of 1 Cal.App., 81 P. 1083, 1084, it said: "When an assessment is too high, the taxpayer may be depended upon to furnish the evidence upon which they may act in reducing it; but if there is an undervaluation, the assessor having recorded his best judgment on the face of the assessment roll, we have no doubt that the board may call to its aid such maps, abstracts, data, and information as will enable the members to act fairly, intelligently, and legally in equalizing assessments. They are not limited to information and data the assessor may be able or willing to furnish. [Citing cases.]" Acting on the same principle, a board of equalization no doubt can send for and examine probate appraisements, lists of recent sales and prices paid, etc. Such information is used in effect to cross-examine the assessor as to the correctness of his assessments. The question then arises, did the board of supervisors enter into the purported contract with the plaintiff for the purpose of having material, when sitting as a county board of equalization, with which to cross-examine the assessor? That was a question of fact which was submitted to the trial court. The resolutions and minutes of the board are silent as to the purpose. Two of the five supervisors were called as witnesses. The deposition of another was used on the trial, but was not introduced in evidence. Finding XVIII is as follows: "That it is true that the purpose of performing such re-valuation and re-assessment of said property was to afford to said Assessor additional compensation during his term of office other than that allowed him by law." We think it is clear, therefore, that the case falls within the doctrine of Forward v. San Diego County, supra, and not within the doctrine of H. D. Haley & Co. v. McVay, supra.

[13-15] At the present time such contracts as the one involved in the case before us, are prohibited except as provided in sections 3673 and 3693 of the Political Code. At the time said contract was made, the statute was silent except as shown by certain provisions herein cited. To determine the powers of a municipal board the general rule applicable is quoted in Von Schmidt v. Widber, 105 Cal. 151, at page 157, 38 P. 682, 685, as follows: "The rule, as stated by Mr. Dillon (1 Mun.Corp. [4th Ed.] § 89), and approved in various authorities, is that: 'It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to

the declared objects and purposes of the corporation—*not simply convenient, but indispensable.* Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.'" (Italics by Supreme Court.) That the power of duplicating the assessment rolls of any county is not "indispensable", is not open to debate. Without the exercise of such a power this state has functioned for nearly a century. Assuming merely for argument that there is a doubt regarding the existence of the power in question the plaintiff must lose because, "Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied."

The judgment is reversed, with directions to enter judgment in favor of the defendant. The defendant will recover its costs on these appeals.

We concur: NOURSE, P. J.; SPENCE, J.

19 Cal.App.2d 738

GEISLER v. RUGH et al.

Civ. 10195.

District Court of Appeal, First District, Division 1, California.

March 25, 1937.

Rehearing Denied April 24, 1937.

Hearing Denied by Supreme Court May 24, 1937.

1. Automobiles 🔑245(40)

Whether motorist has used ordinary care to avoid colliding with other vehicles or with pedestrians, in proportion to danger shown by circumstances in each case, as required by basic speed law, is ordinarily for jury (St.1931, p. 2127, § 131½; St.1935, p. 176, § 510).

2. Automobiles 🔑245(6, 40, 72)

In action for death of pedestrian struck by automobile at scene of recent previous collision, issues of motorists' negligence and pedestrian's contributory negligence *held* for jury under evidence that driver was driving at night, at a speed not necessarily unlawful, and had right of way but swerved from lane marked for automobile travel, and meager evidence as to pedestrian's conduct (St. 1931, p. 2127, § 131½; St.1935, p. 176, § 510; Code Civ.Proc. § 1963, subd. 4).

3. Automobiles 🔑242(8)

It will be presumed that deceased pedestrian used ordinary care in looking for approaching vehicles (Code Civ.Proc. § 1963, subd. 4).

4. Automobiles 🔑246(60)

In action for death of pedestrian struck by automobile, giving instruction which stated presumption of pedestrian's exercise of due care in looking for approaching vehicles *held* not error where evidence did not clearly rebut presumption (Code Civ.Proc. § 1963, subd. 4).

5. Automobiles 🔑246(4)

In action for death of pedestrian struck by automobile, instruction that though pedestrian and motorist are required to use same degree of care, motorist is chargeable with greater care than pedestrian because vehicle is capable of inflicting injury on others *held* not error.

6. Trial 🔑243

In action for death of pedestrian who was struck by automobile, instruction that pedestrian and motorist had equal right to use streets and reciprocal rights and duties *held* not error, as against contention that instruction conflicted with instruction that pedestrian must yield right of way to vehicles under certain conditions, since jurors must have understood that pedestrian's duty to yield right of way is merely exception to general rule.

7. Automobiles 🔑246(31)

In action for death of pedestrian struck by automobile, requested instruction that it was pedestrian's continuing duty to look for approaching vehicles while crossing street *held* properly refused, under presumption that pedestrian looked before starting to cross, since once having looked pedestrian need not continue looking (Code Civ.Proc. § 1963, subd. 4).

8. Death 🔑99(4)

$20,000 to widow for death of assistant manager of circus *held* not excessive in view of decedent's life expectancy and annual earnings.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Action for wrongful death by Elizabeth Geisler against Duane Rugh and Joseph

W. Kramm, Jr. From a judgment on a verdict for plaintiff, defendants appeal.

Affirmed.

Decoto & St. Sure, of Oakland, and Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants.

Elliott Johnson and A. T. Shine, both of Oakland, for respondent.

PER CURIAM.

An action for damages based on the alleged negligence of defendants.

Plaintiff's husband, Joseph Geisler, was struck and killed by an automobile owned by defendant Kramm and which, with his permission, was being operated by defendant Rugh. Plaintiff recovered judgment against both defendants, who have appealed therefrom. They claim that the evidence was insufficient to show negligence on their part and that it established contributory negligence on the part of decedent; and further, that certain rulings of the trial court were prejudicially erroneous and that the award was excessive.

[1] Decedent at the time of his death was employed as the assistant manager of a circus. The circus had concluded a week's engagement in the city of Albany at a location northeast of the scene of the accident and about two blocks therefrom. The decedent was injured about 3 o'clock a. m. on October 8, 1934. A collision had occurred at the same place between an automobile and a tractor owned by the circus company, partially wrecking the tractor, parts of which were collected and assembled on the west side of San Pablo avenue. The automobile which caused this damage was then parked on the east side of the avenue. Decedent arrived on the scene at about 3 o'clock a. m., and after examining the automobile proceeded to cross the avenue to the place where the remains of the tractor were assembled. There was evidence that when he crossed the center line of the street the automobile operated by defendant Rugh was 225 feet to the north, and that when he reached a point 6 or 8 feet west of the center this automobile was from 65 to 70 feet away. A lane for automobile travel approximately 7 feet wide was marked on the pavement to the west of the center. This lane was between the center and the point which decedent had reached when he was struck. It appears that defendant Rugh was looking to the east and was not proceeding within the marked automobile lane but swerved at an angle toward the tractor. No warning was given, and decedent was struck by the front fender and headlight of the Rugh car. The testimony of the speed of this car varied, the highest testimony being 40 miles an hour. After the collision, it proceeded for a distance of 119 feet before stopping. A red warning light was held by a person standing near the tractor, and flashlights were being used by policemen at the scene of the accident. Defendant Rugh testified that he saw neither the lights nor decedent until after the collision. There was evidence that Rugh had been drinking; it was also shown that the place was well lighted and that a number of people had congregated near the wrecked tractor as well as on the sidewalk on the opposite side of the street. It appears that the automobile was not traveling in excess of the speed which under all conditions would be unlawful and that decedent crossed at a point other than within the crosswalk. It was also shown that the automobile had the right of way along the street, and under the Vehicle Act had "the privilege of the immediate use of the highway." Nevertheless, as provided by the Vehicle Code, § 510 (St.1935, p. 176), it was defendant's duty not to drive at a greater speed than was reasonable and prudent, having due regard to the traffic on the street, or at a speed which would endanger the safety of persons or property. Nor did the law relieve him from the obligation to use due care even though it was decedent's duty to yield the right of way. Vehicle Act (St.1923, p. 517), § 131½ (c), as added by St.1931, p. 2127. In this connection it has been held that the motorist must use ordinary care and caution in proportion to the danger shown by the circumstances in each case in order to avoid colliding with other vehicles or with pedestrians; and, as a general rule, the question whether such care has been used is one for the jury. Donat v. Dillon, 192 Cal. 426, 221 P. 193; Evans v. Mitchell, 2 Cal.App.(2d) 702, 38 P.(2d) 437.

[2, 3] We are satisfied that in the present case sufficient was shown to justify the submission of the issue of defendant's negligence to the jury. The evidence tends strongly to show that the decedent had in fact yielded the right of way to the automobile had it proceeded in the course it was following when he crossed the cen-

ter of the street; and it appears sufficiently that the swerving of the vehicle to the right, due, as it fairly appears, to the fact that the driver was not observing the street in front but the objects on his left, caused the collision. No one witness observed the acts of the decedent during the whole time that he was crossing the center of the street, nor did they testify that he failed to look for approaching vehicles. It is to be presumed that he used ordinary care in that regard (Code Civ.Proc., § 1963, subd. 4; Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027), and we cannot say from the circumstances shown that this presumption was overcome by the evidence.

Appellants contend on this question that the evidence shows as a matter of law that the decedent was guilty of contributory negligence. In the cases cited by them in support of this contention, namely, Horton v. Stoll, 3 Cal.App.(2d) 687, 40 P.(2d) 603, Ramsperger v. Los Angeles M. C. Co., 4 Cal.App.(2d) 673, 41 P.(2d) 562, Gaston v. Hisashi Tsuruda, 5 Cal.App.(2d) 639, 43 P.(2d) 355, and Chase v. Thomas, 7 Cal. App.(2d) 440, 46 P.(2d) 200, the injured persons failed to yield the right of way, and either walked directly into the path or against the side of the approaching vehicle. There was sufficient to go to the jury on this issue, and their conclusion was not unreasonable.

[4] Instructions, stating the presumption mentioned, were given. Appellants urge that under the evidence this was error. Whatever be the rule where the facts are certain, here the evidence was not such as to have that effect, and we cannot say that facts were proved contrary to the presumption. Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 210 P. 269. The instructions were therefore proper.

[5] Appellants also complain of an instruction that while decedent and the driver were required to use the same degree of care, the latter, owing to the fact that he was operating a vehicle capable of inflicting injury upon others, was chargeable with a greater amount of care than the former. Such an instruction has been approved in several cases, namely: Raymond v. Hill, 168 Cal. 473, 143 P. 743; Weihe v. Rathjen Mercantile Co., 34 Cal. App. 302, 167 P. 287; De Greek v. Freeman, 108 Cal.App. 645, 291 P. 854; Anderson v. Walters, 135 Cal.App. 380, 27 P. (2d) 100.

The jury was also charged that the rights and duties of persons using the public streets are reciprocal; that decedent had no more right to such use than the defendant; and that each had the same right. Appellants claim that these instructions conflict with another, stating that the pedestrian crossing the street at a point other than within a marked or unmarked crosswalk must yield the right of way to vehicles.

[6] The instructions must be read together, and the last but stated an exception to the general rule. This the jurors, as intelligent persons, must have understood, and it is not reasonable to assume that they were misled.

[7] The court refused an instruction that it was the duty of decedent to look both ways before he stepped into the street and to "look and observe any vehicle that was approaching during the time he was on the street from the direction in which danger would be apprehended," and that "this was a continuing duty which the law demanded of him, which he should perform before it could be said that he was using ordinary care. * * *" While no witness testified that the decedent looked to the north before starting to cross, it must be presumed that he used ordinary care in that regard. Having done so, and justifiably concluded that he could safely cross, it was not his duty to continuously gaze in that direction while crossing, and the instruction was properly refused. Filson v. Balkins, 206 Cal. 209, 273 P. 578; Henry v. Lingsweiler, 81 Cal.App. 142, 253 P. 357; Long v. Barbieri, 120 Cal.App. 207, 7 P. (2d) 1082.

[8] Lastly, it is claimed that the award against appellant Rugh, namely, $20,000, indicated that the jury were moved by passion and prejudice. In view of decedent's life expectancy and annual earnings, we cannot say that this amount was under the evidence excessive.

The conclusions of the jury were fairly sustained by the evidence, and no error was committed which would justify a reversal.

The judgment is affirmed.

20 Cal.App.2d 266

PEOPLE v. GREENWELL et al.

Cr. 2956.

District Court of Appeal, Second District, Division 1, California.

April 8, 1937.

Hearing Denied by Supreme Court May 6, 1937.

1. Witnesses ⚷380(3)

Refusal to permit defendant to impeach absent witness' convicting testimony which had been given at preliminary examination and had been read to jury *held* not error, where foundation had not been laid, notwithstanding that at time of preliminary examination, defendant had no knowledge of what witness' testimony would be, or any information regarding any person from whom impeaching evidence could be produced, and that absence of witness from trial prevented defendant from laying foundation (Code Civ.Proc. § 2052).

2. Criminal law ⚷696(1)

Denial of motion to strike properly admitted evidence supporting designated count of robbery information *held* not error, notwithstanding that count was thereafter dismissed.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Charles P. Russo and Jack Greenwell were charged with commission of the crime of robbery. From a judgment convicting him of such crime, Charles P. Russo appeals.

Affirmed.

George E. Stoddard, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

HOUSER, Presiding Justice.

In each of two counts that were contained in an information, defendant Russo and one Greenwell were charged with the commission of the crime of robbery. On the trial of the action Greenwell pleaded guilty as to count I, and thereupon the charge which theretofore had been preferred against him in count II was permitted to go "off calendar" as to him only. After all of the evidence had been introduced, and before the case had been submitted to the jury, in pursuance of a motion made by the district attorney, the trial court dismissed the action as to count II as it affected defendant Russo. But as to count I, Russo was convicted. He appeals from the ensuing judgment, as well as from an order by which his motion for a new trial was denied.

[1] The conviction of the appealing defendant depended nearly entirely upon testimony that was given by one Rowley. For the reason that on the date when the trial took place the said witness was outside the state of California and consequently was beyond the jurisdiction of the trial court, the testimony of said witness, as it was given at the preliminary examination of the defendants, was read to the jury. In that connection, on the ground that the foundation for such proposed impeachment had not been laid, defendant Russo's offer to impeach certain material statements of fact that were made by the said witness in his testimony was refused. However, appellant contends that, conceding that no attempt was ever made by him to lay the required foundation for such impeachment, for the several reasons that at the time when the preliminary examination of defendant was held, he had no knowledge as to what testimony the witness Rowley would give against him, nor any information regarding any person by whom he might produce evidence that would impeach certain or any of the material testimony that was given by the said Rowley; also, that by reason of the absence of said witness from the trial of the action, defendant was prevented from laying a proper foundation for a proposed impeachment of Rowley's testimony, the rule prescribed by the provisions of section 2052 of the Code of Civil Procedure should not be given application. In support of that contention, appellant asserts his inability to furnish this court with any authority. On the other hand, in like situations, many judicial decisions adhere strictly to the rule that is so definitely announced by the language of the statute. People v. Compton, 132 Cal. 484, 64 P. 849; People v. Witty, 138 Cal. 576, 72 P. 177; People v. Seitz, 100 Cal.App. 113, 117, 279 P. 1070; People v. Garnett, 9 Cal.App. 194, 98 P. 247; People v. Pembroke, 6 Cal.App. 588, 92 P. 668. It therefore follows that notwithstanding the possible disadvantage which, in the circumstances, defendant may have suffered in the matter, the point which he presents in that regard is legally untenable.

[2] Appellant assigns as constituting further prejudicial error the fact that although after all the evidence had been intro-

duced on the trial of the action, on motion of the prosecuting attorney the charge against defendant that was contained in count II of the information was dismissed, the trial court theretofore had refused to grant defendant's motion to strike from the record all evidence that tended to support that count. In that regard, it is not urged that the questioned evidence originally had not been properly admitted against defendant. It therefore becomes apparent that at the time when the motion to strike was made it was properly denied.

The judgment and the order by which defendant's motion for a new trial was denied are affirmed.

We concur: YORK, J.; DORAN, J.

---

19 Cal.App.2d 262

PEOPLE v. JOSEPH.

Cr. 200.

District Court of Appeal, Fourth District, California.

Feb. 15, 1937.

Criminal law ⚷1023(8)

Order denying motion to set aside amended indictment *held* not appealable (Pen.Code, § 1237).

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Aram Joseph was indicted by the People, and he appeals from an order denying his motion to set aside the amended indictment. On motion to dismiss the appeal. Appeal dismissed.

A. A. George, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The respondent has moved to dismiss this appeal on the ground that the same has not been taken in accordance with law, in that no appeal lies from such an order.

The order from which the purported appeal is taken is not an appealable order. Pen.Code, § 1237; People v. Hinshaw, 194 Cal. 1, 227 P. 156; People v. Simmons, 119 Cal. 1, 50 P. 844; People v. Izlar, 8 Cal. App. 600, 97 P. 685; People v. Williams, 8 Cal.App. 595, 97 P. 684.

The appeal is dismissed.

I concur: MARKS, J.

---

20 Cal.App.2d 216

TRACY v. GUIBBINI et al.

Civ. 10110.

District Court of Appeal, First District, Division 1, California.

April 6, 1937.

Rehearing Denied May 6, 1937.

Automobiles ⚷244(20)

Evidence in action for injuries to passenger in defendant's automobile, which collided with another automobile, that vehicles came to rest after impact on side of road opposite that on which defendant's automobile should have been traveling, that there were marks and gouges on both sides of center line of highway, and that right front of each automobile was damaged, justified trial court's inference of negligence of driver of defendant's automobile.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by Dallas D. Tracy against Lawrence J. Guibbini, also known as L. J. Gibbini, and others. Judgment for plaintiff, and named defendant appeals. Affirmed.

J. Hampton Hoge and A. Dal Thomson, both of San Francisco, for appellant.

Frank V. Campbell and J. Rainey Hancock, both of San Jose (L. H. Schellbach, of San Jose, of counsel), for respondent.

TYLER, Presiding Justice.

Action for personal injuries resulting from an automobile accident. The case was tried by the court sitting without a jury and judgment was entered for plaintiff in the sum of $11,644. The appeal is taken from the judgment.

The accident out of which the action arose occurred on November 11, 1933, at about midnight on a state highway in the open country about four miles north of Modesto. Plaintiff was riding as a passenger in an automobile owned by defendant and appellant Guibbini. The machine was a Chevrolet and was being operated by one James L. Kennedy, a business associate of defendant Guibbini. Kennedy died as the result of injuries received in the accident. There were no other persons in the machine except plaintiff and Kennedy, appellant not being present. Tracy, the plaintiff, claims he was asleep when the accident occurred and knew nothing concerning its cause. Appellant's machine was being driven along the highway in a southerly direction. There was a head-on collision with a Studebaker coupé, which was traveling in an opposite or northerly direction. The driver of this car disappeared after the accident and was not a witness at the trial. The complaint charged negligence on the part of Kennedy, the driver of the Chevrolet car, in running his machine so as to collide with the Studebaker. There was no direct testimony dealing with the actual manner of the happening of the accident, the plaintiff being asleep, the driver of appellant's car being killed, and the driver of the Studebaker having disappeared and not having been located at the time of the trial. No other persons were present. Certain witnesses who arrived upon the scene of the accident immediately after it occurred and who were witnesses at the trial testified as to the position of both cars on the pavement after the impact. It appeared also that two other cars collided with either or both of the damaged cars after they had been moved and placed upon their four wheels. The right front of each of the cars involved was damaged. Other physical facts show that at the probable point of impact there were gouges or scratches in the center of the paved portion of the highway on either side of the white line marking the center thereof. The highway at the place of the accident was some 26 feet in width, with a shoulder on each side of 8 feet. The testimony as to the positions of the cars after the impact was conflicting, but there was evidence to show that the cars came to rest on the east side of the highway, or on appellant's wrong side of the road, and that travel was diverted to the west side of the highway. Under these circumstances the trial court found that plaintiff had sustained damages in the amount heretofore stated through the negligence of appellant, and the findings negatived the existence of contributory negligence upon the part of plaintiff.

It is here claimed that the finding of negligence on the part of appellant is unsupported. No claim is made that the judgment is excessive. We are of the opinion that there is ample evidence to support the judgment. Physical facts are of importance in determining whether or not liability exists for an automobile accident. Thus it has been held that the positions in which two cars are found after a collision control in fixing liability, rather than the guesses or conjectures of witnesses whose testimony is refuted by those physical facts. Waizman v. Black, 101 Cal.App. 610, 281 P. 1087; Keyes v. Hawley, 100 Cal.App. 53, 279 P. 674. While conflicting, as above stated, there was evidence to show that the cars came to rest after the impact on the east side of the road, which compels the inference that Kennedy was not driving on his west side of the highway. Driving on the wrong side of the highway at the time of an accident is a proximate cause of a collision. This inference from the facts, without more, makes out a case of negligence. Then again, there was evidence to show marks and gouges on both sides of the white line center of the highway, and the right front of each car was damaged. From all of these circumstances the trial court was justified in drawing an inference of negligence on the part of appellant. Under these circumstances we cannot disturb the judgment.

Appellant next complains of the action of the trial court in applying the doctrine of res ipsa loquitur in aid of its conclusion of negligence, and it is contended that this doctrine does not apply, since its availability is based upon the ability of the defendant to explain the circumstances of the accident; that it cannot be applied in the instant case because through the death of the person operating the instrumentality the defendant has lost his ability to explain. We find nothing in the record to show that the court applied the rule in reaching its conclusion. Even if it be conceded that the doctrine was applied, and wrongfully so, still the evidence without the aid of the rule is sufficient to support the judgment.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

20 Cal.App.2d 58

PEOPLE v. WAHNISH.

Cr. 344.

District Court of Appeal, Fourth District, California.

March 29, 1937.

1. Criminal law ⚿1144(15)

Jurors must be presumed to have observed and applied the instructions given them by the court.

2. Criminal law ⚿1173(2)

Refusal to give instruction that witness for state was accomplice, though error, *held* not prejudicial where there was sufficient other evidence for corroboration (Pen.Code, § 1111).

3. Criminal law ⚿511(4)

Testimony of accused's accomplices in prosecution for burning insured truck *held* amply corroborated by evidence that accused attempted to get additional insurance for equipment of truck for more than its cost, that he was anxious to get indorsement on policy that additional insurance was effective, that he removed new tires from truck and put on old ones, that he removed part of truck's contents before the fire, and that he made untrue and evasive statements after fire which conflicted materially with his testimony on witness stand (Pen.Code, §§ 548, 1111).

4. Arson ⚿37(1)

Conviction for burning insured property *held* sustained by evidence that accused attempted to get additional insurance for equipment of truck for more than its cost, that he was anxious to get indorsement on policy that additional insurance was effective, that he removed new tires from truck and put on old ones, that he removed part of truck's contents before the fire, and that he made untrue and evasive statements after fire which conflicted materially with his testimony on witness stand (Pen.Code, § 548).

◆

Appeal from Superior Court, Riverside County; Fred Hamblin, Judge.

George Wahnish was convicted of a violation of the statute punishing the burning or destruction of insured property, and he appeals.

Judgment and order affirmed.

Thomas W. Cochran, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was accused of a violation of section 548 of the Penal Code. He was found guilty by a jury and has appealed from the judgment and from an order denying his motion for a new trial.

It appears from the evidence that the appellant was in the trucking business; that one Le Roy and one Le Baron were employed by him as truck drivers; that through an agent or broker named Hodge he obtained fire insurance on one of his trucks about February, 1936; that thereafter he rebuilt or added certain equipment to this truck; that on June 4, 1936, he applied to Hodge for additional insurance covering the added equipment; that about 2 o'clock p. m. on June 15, 1936, he received an order to move certain freight from Los Angeles to Phoenix, Ariz.; and that the same afternoon he called on Hodge and asked if the indorsement for the added insurance had arrived. On being told that it had not, he asked Hodge if he could get the indorsement and have it in his hands that afternoon. After calling the agent of the insurance company, Hodge informed him that the indorsement could not be delivered that afternoon. He then asked Hodge if he could not give him something to show that the additional equipment on the truck was covered and, as Hodge testified: "I wrote a statement out and gave it to Mr. Wahnish which he asked for."

The truck was loaded between 5 and 6 o'clock on that day, the load consisting of about five tons of sacked wheat, some packages of drugs and paper, and three large crates of furniture, which were placed on top of the load. The shipper stated that he was anxious to have this load go through on time and asked the appellant to accompany the truck in his own automobile, which he agreed to do. After being loaded the truck was taken to a service station where, upon the order of the appellant, eight new tires were taken from the truck and replaced with older tires from another truck owned by the appellant. Thereafter, with Le Baron as driver, the truck was started to Phoenix. Before starting, the appellant instructed Le Baron to stop at Beaumont and wait for him. Later that evening the appellant and Le Roy started in the appellant's car and caught up with the truck at Beaumont, where Le Baron was waiting. At the direction of the appellant Le Baron got into the appellant's car, and Le Roy and the appellant got into the truck. With Le Roy driving, the truck proceeded and Le Baron followed in the other car. About twenty-five miles east of Indio, at about 4 o'clock in the morning, a fire occurred resulting in practically a complete loss of the truck and its load. The appellant returned to Los Angeles and the next morning began an attempt to collect the insurance on the truck and on the added equipment.

Le Roy testified that after the truck was loaded the appellant told him, in the presence of Le Baron, that he wanted some of the tires taken off the truck as the truck would never reach Phoenix; that the appellant assisted in changing the tires; that the tires taken off the loaded truck were quite new, while those which were put on were about five months old; that after the tire change was made the appellant told him, "We might as well take this furniture off because there is no use burning it"; that he and the appellant took this furniture, which was crated and consisted of a davenport, two chairs, and a footstool, from the loaded truck and took it to the home of one Dell Giudice; that they asked permission to leave it there and did leave it there; that they then drove to Le Roy's house, where Le Roy left a small quantity of drugs taken from the truck; that they then went to a service station where the appellant had a five-gallon can filled with gasoline; that after getting something to eat he and the appellant got into the appellant's car and he drove to Beaumont; that they found the truck there and the appellant instructed Le Baron to take the can of gasoline from appellant's automobile and place it in the cab of the truck, which Le Baron did; that he and the appellant got into the truck, which he drove, and Le Baron followed in the automobile; that when they arrived at Whitewater grade the appellant instructed him to take the can of gasoline and get up on top of the load and pour the gasoline over the load; that he told the appellant there was too much traffic there, and the appellant replied, "We will go on then"; that they drove on as before to Indio, where they had some coffee, after which he and the appellant went on with the truck; that when they reached a point about three miles beyond Mecca, toward Box canyon grade, the appellant told him to get on top of the load and pour the gasoline over the load; that he got up, the appellant handed him the five-gallon can of gasoline, and he poured the entire contents of the can over the load; that under the instruction of the appellant he spread it over the entire load; that he got off the truck and the appellant struck a match and threw it on the load, which immediately caught fire; that the appellant then told him to drive the truck up the road "a ways"; that they got into the cab and he drove about a mile or a mile and a half when the appellant instructed him to pull the truck to the left side of the road and get out; that the appellant then took the fire extinguisher and emptied it on the ground, making no effort to play it on the flames; that a few minutes later Le Baron drove up in the appellant's automobile; that they watched the fire burn for about a half hour and then returned to Indio; that the appellant there asked a garage man to go out and pick up the truck and they returned to Los Angeles; and that the appellant instructed him and Le Baron that if anyone asked them how the fire started they should merely say they did not know.

Le Baron testified that before he left Los Angeles he heard the appellant say the truck would never reach Phoenix, and that he knew that he meant the truck was going to be burned; that he drove the truck to Beaumont and waited according to instructions; that the appellant there told him to follow in the automobile and told him they were going to stop at Whitewater and were going to burn the truck there; that he followed in the car; that at Whitewater the appellant told Le Roy to get up on top of the truck and pour the gasoline on the load; that Le Roy said he did not want to do this as there was too much traffic; that the appellant said they would go on to Indio and directed him to follow in the automobile, which he did; that at Indio the appellant told him he could sleep for a while; that he did so and followed the truck in about an hour; and that about twenty-five miles from Indio near the entrance to Box canyon he found the truck burning.

Le Roy's testimony that three crates of furniture, which were a part of this load, were left at a certain house was corroborated by the testimony of three occupants of this house, who testified that about 9:30 o'clock on the evening of June 15 Le Roy and the appellant came to this house, that Le Roy asked permission to leave the furniture there for a few days, and that three crates of furniture, including a davenport and some chairs, were left there.

The appellant argues that the evidence is insufficient to sustain the verdict for the reason that there was not sufficient corroboration of the testimony of the accomplices within the meaning of section 1111 of the Penal Code, and that the court erred in refusing to instruct the jury that the witness Le Baron was an accomplice, as a matter of law. These two points are argued together. The court instructed the jury that Le Roy was an accomplice, but refused to give a similar instruction with respect to Le Baron. It is conceded "that the court fully and fairly charged the jury as to the definition of an accomplice and the necessity and degree of corroboration to sustain a conviction on the testimony of such accomplice." It is argued, however, that there was no corroborating evidence tending to establish the commission of a crime or tending to connect the appellant with such crime, and that it therefore appears that the jury must have come to the conclusion that Le Baron was not an accomplice and then accepted his evidence as corroborating the testimony of the accomplice Le Roy.

In support of his contention that Le Baron was an accomplice and that it was prejudicially erroneous to refuse to instruct the jury to this effect, the appellant cites People v. Southwell, 28 Cal.App. 430, 152 P. 939; People v. Allison, 200 Cal. 404, 253 P. 318; People v. Swoape, 75 Cal.App. 404, 242 P. 1067; People v. Schumann-Heink, 98 Cal.App. 225, 276 P. 625; People v. Truax, 30 Cal.App. 471, 158 P. 510. While these cases support the proposition that the question of whether a witness is an accomplice is one for the court where the facts themselves are not in dispute and, further, that the failure to give such an instruction may be prejudicial under some circumstances, we think they are not controlling here. In People v. Ferlin, 203 Cal. 587, 265 P. 230, 236, the court said:

"Complaint is made by the defendant that the lower court erred in refusing to charge the jury, as matter of law, that the witness Hill was an accomplice. It is urged that this question, in view of the evidence in the case, was not a proper one to be submitted to the jury for determination. We are of the opinion that the defendant's contention is meritorious, for the evidence in the case unquestionably points to Hill as an accomplice. Moreover, the conduct of the prosecuting officer throughout the trial strongly indicates that Hill was so regarded. The question as to whether or not the witness Hill was an accomplice, under the evidence, was not seriously disputed upon the trial of the cause. It was the duty of the trial court, therefore, to instruct the jury, as matter of law, that Hill was an accomplice of the defendant. People v. Coffey, 161 Cal. 433, 436, 119 P. 901, 39 L. R.A.(N.S.) 704; People v. Howell, 69 Cal. App. 239, 242, 230 P. 991. However, this error cannot be said to have prejudicially affected the defendant. In People v. McDermott, 75 Cal.App. 718, 243 P. 485, it is declared that: 'The jury should have been instructed that Sova must be regarded as an accomplice. That question should not have been left to it to determine. However, it must be presumed that the jurors observed and applied the instructions given them. In other instructions the definition of an accomplice was correctly stated, as also was the rule that the defendant may not be convicted on the uncorroborated testimony of an accomplice, and that the corroborating evidence is not sufficient if it merely shows the commission of the crime and the circumstances thereof; and further, that such corroborating evidence must tend to connect the defendant with the commission of the crime. Hence it is inconceivable that the erroneous instruction given in any way prejudiced any right of the appellant.'

"Practically an identical situation is presented in the instant case, for the court below in several instructions correctly stated the definition of an accomplice, and likewise informed the jury that the testimony of an accomplice must be corroborated, and that the corroborating evidence must not only tend to show the commission of the offenses charged in the information, but must also tend to connect the defendant therewith."

[1, 2] In the case before us, the court correctly defined an "accomplice" and fully and completely informed the jury that the testimony of such an accomplice must be corroborated and that the corroborating evidence must not only tend to show the commission of the offense but also tend to connect the defendant therewith. It must be presumed that the jurors observed and applied the instructions thus given them. While we think the instruction complained of should have been given, we are unable

to hold that the failure to give it was prejudicial error.

In People v. Yeager, 194 Cal. 452, 229 P. 40, 49, the rules with respect to corroborative evidence are thus set forth: "It has been held that to corroborate an accomplice the evidence need not establish the actual commission of the offense, nor extend to every fact and detail covered by the statements of the accomplice, or to all the elements of the offense, nor prove that the accomplice has told the truth. The corroborative evidence must tend in some slight degree, at least, to implicate the defendant. While it need not be strong, more is required by way of corroboration than mere suspicion. It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight. It is not necessary to corroborate the accomplice by direct evidence. If the connection of the accused with the alleged crime may be inferred from the corroborating evidence in the case, it is sufficient."

[3] Considering the witness Le Baron as an accomplice, his testimony and that of Le Roy are amply corroborated by other evidence in the record. The testimony of the appellant with that of the witness Hodge thoroughly establishes that the appellant attempted to get additional insurance in the amount of $850 on equipment which had been added to the truck at a cost of $650; that he displayed great anxiety, just before the truck started on this trip, to get into his hands an endorsement to the policy showing that such additional insurance was effective; that when he was unable to get this he asked for a statement from Hodge showing that he was covered, and received some sort of a statement; and that both he and Hodge believed that he was covered on the additional equipment. The appellant admitted that he was present when new tires were removed from the truck and replaced with older tires immediately before the trip was begun. There is ample evidence that he participated in removing three crates of furniture from the truck and concealing the same. The morning after the fire he told the insurance agent that all of the tires on the truck were new and offered to show the bills for the same. Previous to the trial he told the shipper that during this trip he stopped at Indio while the truck went on, and when he caught up with it he found it on fire. At the trial he testified that he left Indio on the truck, with Le Roy driving; that he fell asleep; and that he awakened to find the whole load blazing. Two interviews with him shortly after the fire were taken down in shorthand and were admitted in evidence. These contain a number of untrue and evasive statements and conflict materially with his testimony on the witness stand.

[4] Not only was the other evidence sufficient to meet the requirements of section 1111 of the Penal Code, as corroborating the testimony of the two accomplices, but it would also appear to have been sufficient in itself, eliminating the testimony of both accomplices, to have supported a conviction.

Under such circumstances it cannot be presumed that the jury failed to follow the instructions given it by the court, it cannot be assumed that the verdict might have been different had the requested instruction been given, and it cannot be held that the failure to give the same was sufficiently prejudicial to justify a reversal.

The judgment and order are affirmed.

We concur: MARKS, J.; JENNINGS, J.

19 Cal.App.2d 611

WOOLLEY et al. v. SUPERIOR COURT IN AND FOR STANISLAUS COUNTY et al.

MILLER & LUX, Inc., et al. v. SAME.

Civ. 5749, 5750.

District Court of Appeal, Third District, California.

March 18, 1937.

Rehearing Denied April 17, 1937.

Hearing Denied by Supreme Court May 17, 1937.

1. New trial 🔑137

That one notice of motion for new trial was inadvertently called "motion to tax costs" and subsequently corrected, and that other notice of motion for new trial incorrectly designated which defendant was represented by attorney who acknowledged service thereof, but was corrected with acknowledging attorney's consent and attorney actually argued motion on behalf of proper defendant *held* merely clerical errors, not requiring denial of new trial.

2. Appeal and error ⚷911(1)

Where trial judge does not file affidavit replying to verified charges of bias and prejudice found in statement of disqualification, in determining whether judge was disqualified reviewing court must assume truth of matters alleged in such statement and consider only their legal sufficiency and whether they were timely made.

3. Judges ⚷51(2)

Unsuccessful parties *held* estopped from asserting alleged disqualification of trial judge on ground of bias under statute requiring statement of disqualification to be presented at earliest practicable opportunity where parties did not file statement of disqualification until hearing on motion for new trial although as shown by statement, all events constituting bias but one occurred and were known to complaining parties early in trial (Code Civ.Proc. § 170, as amended by St.1933, p. 1828).

4. Judges ⚷53

Unsuccessful parties lost right to object to qualifications of judge by conduct amounting to voluntary withdrawal of affidavit of bias and prejudice filed by them (Code Civ. Proc. § 170, as amended by St.1933, p. 1828).

5. Judges ⚷56

Disqualification of judge on statutory ground of interest, relationship, or having acted as attorney will, when established, void all proceedings had before such judge (Code Civ.Proc. § 170, as amended by St. 1933, p. 1828).

6. Judges ⚷49(1)

Bias of judge will, under statute, work a disqualification of judge only as to future proceedings (Code Civ.Proc. § 170, as amended by St.1933, p. 1828).

7. Judges ⚷51(2)

Where statement of disqualification is filed after judgment and extensions of time within which to oppose motions for new trials, and statement of disqualification shows that complaining parties were relying largely on facts within their knowledge before and during course of trial, trial judge *held* justified in striking the statement from record as being too late, especially where under circumstances new judge would probably not be able to rule on motion for new trial in time (Code Civ.Proc. § 170, as amended by St.1933, p. 1828; § 660, as amended by St.1933, p. 305).

8. Judges ⚷51(3)

Bias or prejudice of trial judge is never implied and must be established by clear averment.

9. Judges ⚷49(2)

That pending motion for new trial of action involving corporation's water rights, judge told state engineer that corporation had no water right and therefore state should not pay corporation for having diverted river, and that person whose name was included in corporation's title had stolen land and water rights involved *held* not to show bias and prejudice disqualifying judge under statute, since bias or prejudice must be directed against a party or party's counsel (Code Civ.Proc. § 170, as amended by St. 1933, p. 1828).

10. Appeal and error ⚷654

Where statement of disqualification of judge is not answered by judge, so that its averments will be taken as true, unsuccessful party seeking to disqualify judge *held* not entitled to amendment of record to show that continuance in order to file supporting affidavits had been asked.

11. Contempt ⚷6

Filing of statement of disqualification of trial judge *held* not "contempt of the court" under statute where manner of presentation was unobjectionable and no bad faith was shown, irrespective of previous conduct of attorneys charged with contempt (Code Civ.Proc. § 1209).

[Ed. Note.—For other definitions of "Contempt," see Words & Phrases.]

12. Contempt ⚷66(7)

Where statement of disqualification of judge is not answered by trial judge, reviewing court must assume that it was presented in good faith, as regards question of contempt because of such statement.

◆

Applications for writ of prohibition and of review by J. E. Woolley and others, and Miller & Lux, Inc., and others, respectively, against the Superior Court of the state of California, in and for Stanislaus County, and another.

Judgment set aside in part and writ of prohibition denied.

J. E. Woolley, Milton T. Farmer, and Athearn, Chandler & Farmer, all of San

Francisco, Roy V. Reppy and George E. Trowbridge, both of Los Angeles, Edward F. Treadwell, Vincent J. McGovern, and Treadwell, Laughlin & Treadwell, all of San Francisco, and Griffin & Boone, of Modesto, for petitioners.

James F. Peck and Theodore M. Stuart, both of San Francisco, for respondents.

PER CURIAM.

We are here concerned with an application to review the record of the above-entitled court and all the proceedings had by said court and the judge of the court in an action pending in the county of Stanislaus, wherein L. A. Vandervort and others were plaintiffs, and Southern California Edison Company, a corporation, and others were defendants, and particularly as to the legality of an order striking out a statement of disqualification filed against said judge, and of an order granting a motion for a new trial, and also with an application for a writ of prohibition seeking to restrain respondent Anthony Caminetti, Jr., a judge of the superior court of the state of California, from making any orders or taking any judicial action in said proceeding, it being the contention of petitioners that by the filing of the statement of disqualification and the failure of the respondent judge to answer the same as provided in section 170 of the Code of Civil Procedure (as amended by St.1933, p. 1828), the judge became disqualified by operation of law.

The important issue here presented has to do with the alleged disqualification of Judge Caminetti on account of his bias and prejudice, but there are certain other matters to which we will first direct our attention.

[1] Subsequent to the rendition of the verdict in favor of defendants in the case of Vandervort et al. v. Southern California Edison Company, a corporation et al., attorneys for plaintiffs filed a motion for a new trial. The notice thereof through inadvertence and error was addressed, among others, to W. R. Dunn, as attorney for defendant Pacific Gas & Electric Company, whereas it should have been addressed to Mr. Dunn, as attorney for San Joaquin Light & Power Company. However, in the place prepared for admission of service the designation of the company properly appeared, and in accepting service Mr. Dunn and his associates signed their names as attorneys for the San Joaquin Light & Power Company, that being the particular defendant represented by them. Before this notice had been actually filed with the clerk of the court, the irregularity was discovered by one of the attorneys for plaintiff, and after permission obtained from each of the attorneys who had admitted service of the notice, the notice was corrected and then filed. Furthermore, Mr. Dunn appeared at the time and place specified in the notice, and as attorney for San Joaquin Light & Power Company argued such motion upon behalf of his client.

Thereafter, and after notice of entry of judgment, a second notice of intention to move for a new trial was prepared and served by plaintiffs on defendants. Upon the form prepared by plaintiffs for admission of service of such notice, by inadvertence it read, "Due service of receipt of a copy of the within motion to tax costs is hereby admitted. * * *" This error was discovered and the error was corrected by interlineation to read, "Notice of motion for a new trial," and the same was thereafter filed. Mr. Treadwell refused to accept service, but service was made and established by affidavit. No one was injured by these very apparent clerical errors and no injury resulted. We therefore find no merit in these preliminary objections urged against the motions for a new trial.

We now approach the question of alleged bias and prejudice on the part of the judge who presided during the trial, as charged in the statement of disqualification filed under the provisions of section 170 of the Code of Civil Procedure by the attorneys for the defendants, other than San Joaquin Light & Power Company, which defendant did not join in this motion.

The action by Vandervort et al. was brought in the county of Stanislaus, for the purpose of obtaining a money judgment against the defendants therein named, jointly and severally, on the theory, among others, that the defendants unlawfully conspired to store, divert, and use waters of the San Joaquin river above the lands of plaintiffs, who claim their lands to be riparian to the San Joaquin river and overlie water-bearing gravels supplied by the San Joaquin river.

A. Caminetti, Jr., judge of the superior court of the state of California in and for the county of Amador, was assigned by the judicial council to try the issues raised in that action. The trial commenced on March 16, 1936, in the city of Modesto and continued practically continuously until the same was submitted to a jury on September

5, 1936. On that day a verdict was returned in favor of defendants. Thereafter attorneys for plaintiffs served the motions for a new trial hereinbefore referred to, which was set for hearing for October 2, 1936, and on the application of Mr. Edward F. Treadwell, the hearing thereon was continued from October 2d to October 6th, and again from October 6th to October 8th.

Upon the opening of the court on October 8th, there was presented and filed by defendants a statement of disqualification of the trial judge. At that time the court indicated its intention of first disposing of the motion for a new trial and then considering the statement of disqualification, whereupon some heated discussion took place between counsel and the court. The court nevertheless proceeded to consider the motion and granted the same as to all defendants except San Joaquin Light & Power Company, and as to that company the court permitted it to present its argument upon briefs to be thereafter filed.

The judge of the court then proceeded to consider the statement of disqualification filed against him and thereafter ordered the same stricken from the files and adjudged the attorneys who had signed the same guilty of contempt of court in the presence of the court, and imposed a fine of $250 upon each attorney. A stay was granted, pending which this writ of prohibition and writ of review was issued.

In order to pass upon this matter, it is necessary to consider in some detail the statement of disqualification on file. It is therein charged that by reason of the bias and prejudice of said A. Caminetti, Jr., in favor of plaintiffs and against the defendants, the defendants were unable to secure a fair and impartial trial. Among the facts constituting the grounds of disqualification and to prove bias and prejudice in favor of plaintiffs, it was alleged "that said Judge was biased and prejudiced against power companies in general, and opposed to the corporations' storage of water for power purposes," and during the trial of said action openly stated that he was opposed to power companies and considered them trusts and monopolies and against the public interest. It is also alleged that in a conversation with certain of the attorneys of record he stated, during the course of the trial, that Judge Woolley, attorney for Miller & Lux, Inc., was a fine fellow but his company was— and he then applied to said company an opprobrious epithet. It is also alleged that subsequent to the trial and during the pendency of the motions for a new trial, the judge on October 2, 1936, called upon Edward Hyatt, state engineer of the state of California, and during the course of the conversation stated to Mr. Hyatt that Miller & Lux, Inc., and its companies had no water rights and that Henry Miller had stolen the lands and had stolen the waters, and that in his opinion the state of California should not pay Miller & Lux, Inc., nor its subsidiaries, anything in connection with a contemplated plan of the state to divert the waters of the San Joaquin river at Friant from its watershed and away from the lands and canals of Miller & Lux, Inc., and other defendant companies. The statement of disqualification also declared these remarks were made for the purpose of injuring Miller & Lux, Inc., and its companies and was vicious and untrue.

It is also alleged in the statement that Judge Caminetti, before the commencement of this trial but after his assignment by the judicial council, had asked the attorneys for defendants to request the judicial council to excuse him from the trial thereof, and that the attorneys for the defendants requested the judicial council to excuse him from the trial of said case, and at that time told the council they believed he was disqualified by reason of bias and prejudice, but the judicial council replied that having been duly assigned he could only be excused under the provisions of section 170 of the Code of Civil Procedure. Petitioners herein aver that they had not so proceeded at that time, although believing him to be biased and prejudiced, because they were legally unable to establish that fact. Petitioners then alleged they were compelled to and did go to trial in said action before said judge and a jury. During the course of the trial, and after the plaintiffs had put in only a portion of their case, it is alleged in the statement, Judge Caminetti announced to defendants, petitioners herein, that it would make no difference what showing was made by any particular defendant, he would consider no motion for nonsuit or any motion for a directed verdict and would not pass upon the sufficiency of plaintiffs' case except on motion for judgment notwithstanding the verdict, and would, as to all the defendants, submit the entire matter to the jury which had been impaneled in the case.

During the entire trial of said cause, so it is alleged in the statement, the judge of the court took an active part in interrogating the witnesses, and in every instance in which questions were asked by him, they were asked directly for the purpose of obtaining some evidence in favor of plaintiffs, and in no case did the judge of the court ask any question or attempt to elicit any evidence supporting any of the claims of the defendants. Furthermore, it is alleged the judge became extremely annoyed at any objection made by defendants to questions asked by him, and in a loud voice would rule thereon showing his annoyance and general prejudice against defendants and their counsel.

That during the trial, when counsel for defendant power companies called to the attention of the court, errors made by the court in his statement of facts in the record, and insisted upon their right to make objections, or to call the attention of the court to such errors, the judge of the court would become extremely angry. It is alleged also, that time and again out of court he threatened to visit corporal punishment upon one of the attorneys for the defendants. It is also alleged that the judge of the court attempted to have the reporter change his record in regard to a matter in which he and certain of the attorneys were in dispute. Also, that during recesses of the court, the judge permitted attorneys for plaintiffs to retire to his chambers and there engage in consultations with the judge over matters connected with the case, and that these consultations were also carried on by the judge and attorneys for plaintiffs at the hotel where they met daily and dined in public consultation.

That prior to the argument of the case, so it is alleged, the judge of the court delivered to all the attorneys certain instructions which he said were the instructions that he was going to give the jury and that he would not allow any attorney to make any argument to the jury contrary to those instructions. Notwithstanding that statement, it is alleged he permitted attorneys for the plaintiffs to make arguments on the law whether in accordance with such instructions or not. On another occasion, long before the evidence had been concluded, it is alleged, the judge stated that the plaintiffs in the action had made a mistake in amending their complaint so as to ask for damages, and stated to one of the attorneys for defendants that if the prayer of the complaint was for an injunction and no jury was present, he would open the flood gates of Mendota dam and permit the flow of the waters of the San Joaquin river to the lands of plaintiffs. We have not set forth in full the statement of disqualification, covering some twelve or thirteen pages of the record, as it is too long to be here quoted in full, but we have attempted to set forth the salient feature of the charge.

Let us now, with these specifications of bias and prejudice before us, examine the law applicable thereto.

That portion of section 170 of the Code of Civil Procedure (as amended by St.1933, p. 1828) essential to a consideration of this matter, reads as follows:

"No * * * judge * * * shall sit or act as such in any action or proceeding; * * *

"5. When it is made to appear probable that, by reason of bias or prejudice of such * * * judge * * * a fair and impartial trial can not be had before him."

The section then provides the method of establishing such disqualification, and then prescribes the steps to be taken, as follows:

"The statement of a party objecting to the judge on the ground of his disqualification, shall be presented at the earliest practicable opportunity, after his appearance and discovery of the facts constituting the ground of the judge's disqualification, and in any event before the commencement of the hearing of any issue of fact in the action or proceeding before such judge."

[2] No affidavit was filed by respondent judge to the verified charges made by petitioners as provided by this section, and we must therefore assume such matters as are therein properly and timely alleged, to be true. The question therefore presented in the present state of the record is whether such allegations were timely made, and, if so, do they as a matter of law constitute grounds for disqualification?

[3] It is the contention of respondents that petitioners are now estopped to question the disqualification of respondent judge, for although, as claimed by petitioners, the judge was disqualified as early as February 12, 1936, because of bias and prejudice, which fact was then known to them, they failed to raise that question until October 8, 1936, and during that interval permitted respondent judge to proceed, without objection, to try, and to complete said action, occupying in actual trial over

100 days. With that contention we must agree.

Courts must guard against the possibility of a party, who claims the trial judge is biased or prejudiced, refraining from raising that question, trusting to get a favorable verdict, and thereafter raise the question to deprive the trial judge of his statutory duty to pass upon a motion for a new trial, thereby using section 170 of the Code of Civil Procedure as a tool to enable one to keep the benefit of a favorable verdict before a biased and prejudiced judge, and at the same time prevent that judge from passing upon a motion for a new trial.

It appears from certain uncontroverted affidavits that a meeting was called on February 12, 1936, in the office of the secretary of the judicial council in San Francisco by Mr. Treadwell, at which meeting was present Mr. Treadwell as attorney for Southern California Edison Company, Mr. Woolley as attorney for Miller & Lux, Inc., and its subsidiary corporations, Mr. Farmer as attorney for Chowchilla Farms, Inc., Mr. Dunn representing San Joaquin Light & Power Company, and Mr. Peck, Mr. Stewart and Mr. Finnell, Jr., attorneys for plaintiffs, and Mr. B. Grant Taylor, secretary of the judicial council. At this meeting, called to discuss the qualifications of Judge Caminetti, who had then been assigned by the council to preside at these trials, it was there asserted by at least one attorney for the defendants that Judge Caminetti was inexperienced in water litigation and desired to be released from the assignment to preside in the case of Vandervort et al. v. Southern California Edison Company et al., and that he was prejudiced against the defendants in that litigation. It was there further charged that Judge Caminetti favored plaintiffs because he had attended school with a son of Mr. Peck, one of the attorneys for plaintiffs. To this charge Mr. Peck replied that his son had passed away and that there was nothing in the acquaintanceship between the judge and the deceased son that could possibly cause bias and prejudice for or against the parties to the litigation.

At the conclusion of the conference the judicial council refused to revoke the assignment of Judge Caminetti unless the judge himself requested such revocation, and the attorneys for the defendants were told by the secretary of the council that if they considered Judge Caminetti was biased or prejudiced they should proceed to establish his disqualification in the manner prescribed by the Code, to which Mr. Treadwell replied in effect that he would file a statement of disqualification when the case was called for trial. When the case was called on March 12, 1936, all of the attorneys who were present at the conference in the office of the secretary of the judicial council were present in court and answered ready, but no statement of disqualification was filed nor any question of bias or prejudice raised until the return of the verdict of the jury some six months thereafter, and just prior to the consideration of a motion by the plaintiffs therein, for a new trial.

An examination of the statement of disqualification shows upon its face that with the exception of one instance, to be referred to later, all of the facts upon which the alleged bias and prejudice was founded, occurred, and were known to counsel long before the submission of the case. For instance, it is alleged in the statement of disqualification "that said judge is biased and prejudiced against power companies in general and is bitterly opposed to corporations' storage of water for power purposes" and "during the trial of said action openly stated that he was opposed to power companies. * * *" It is further alleged that he said during said trial that he was against these defendant power companies and thought they ought to pay the damages which they had done. It is further charged in the statement "that during the course of the above trial the said judge became biased and prejudiced against the defendant land companies and principally against Miller & Lux Inc., and its subsidiaries and affiliated companies," petitioners herein.

As a reason for not submitting a statement prior to the conclusion of the taking of the testimony, defendants alleged that they were satisfied that A. Caminetti, Jr., was biased and prejudiced, but were not able to legally establish the same. It is furthermore charged that said A. Caminetti, Jr., stated that if any attempt were made to disqualify him, the person who made it would be sent to jail. Just when this alleged threat was made does not appear, but obviously during the course of the trial. It is furthermore alleged that after plaintiffs had put in only a portion of their case in chief, and before any evidence whatever had been put in by defendants said judge announced he would not consider any motion for nonsuit or any motion for a directed verdict, and would not at any time consider the sufficiency of the plaintiffs' case except upon a motion for judgment notwithstanding the verdict.

It is also alleged that "during the entire trial of said case the said A. Caminetti Jr., took an active part in the trial thereof, examining witnesses * * * for the purpose of obtaining some evidence in favor of the plaintiffs, and in no case did the said A. Caminetti, Jr., ask any question or attempt to elicit any evidence supporting any of the claims of the defendants." "That said A. Caminetti, Jr., when he would attempt to elicit evidence on behalf of plaintiffs would become extremely annoyed at any objections made by defendants, and in a loud voice would make rulings showing his annoyance and of general prejudice against defendants or their counsel." "During the trial of said cause the said A. Caminetti, Jr., threatened counsel for the defendant power companies with contempt proceedings when they insisted upon their right to make objections or to call attention to errors made by the Judge in his statement of facts in the record." That at other times during the progress of the trial "he threatened to visit corporal punishment upon one of the attorneys for the defendants." It is charged that upon another occasion during the progress of the trial the judge attempted to get the reporter to change the record in a certain particular, which the reporter refused to do.

"During the entire trial of said cause, almost invariably after a recess was declared, the attorneys for plaintiffs would retire to the chambers of the Judge and there engage in consultations over matters connected with said case." It is also charged that such consultations were carried on by the judge and attorneys for plaintiffs at the hotel and in the public dining room. "Prior to the argument of said case, said Judge delivered to the attorneys certain instructions which he said were instructions he was going to give to the jury, and he would not allow any attorneys for the defendants to make any argument which was contrary to those instructions. Notwithstanding this, he permitted attorneys for plaintiffs to make any kind of argument on the law which they desired to make whether in accordance with the instructions or not."

It is also alleged that the judge stated that the plaintiffs in the action had made a mistake in amending their complaint so as to only ask for damages, and he was therefore unable to grant plaintiffs an injunction, and that if he had the power he would open the Mendota dam of Miller & Lux, Inc., in order to permit the flow of the waters from the San Joaquin river to the lands of plaintiffs.

The foregoing is a brief summary of the allegations and charges made in the statement of disqualification filed herein. We have quoted at length in order that it might become apparent that the facts upon which the charges of disqualification are based were known long before the conclusion of the taking of evidence, as appears from the very allegations of the statement. It is thus apparent that practically all of the allegations or charges made were known "during the course of the above trial" or "shortly after the said A. Caminetti Jr., was assigned to the above entitled action"; "and after plaintiffs had only put in a portion of their case in chief" "thereafter and after the case had proceeded for many weeks," "during the entire trial of said case," "during the trial of said case," "thereafter on other occasions when one of the attorneys for defendants submitted to said Judge certain forms of verdict"; "prior to the argument of said case," and many other expressions indicating that practically all the matters alleged were known to attorneys for defendants long prior to the conclusion of the trial. In fact, shortly after Judge Caminetti had been assigned to preside as the judge in the Vandervort action, and before the trial, the charge was then made by certain of the attorneys for the defendants that Judge Caminetti was prejudiced against the defendants in said litigation, that he lacked experience, and that by reason of the fact he had attended school with the son of James F. Peck, he was in favor of the plaintiffs. When the secretary of the judicial council stated the council would not revoke the assignment of Judge Caminetti, one of counsel for defendants stated he would proceed to file a statement of disqualification against Judge Caminetti when the said case was called for trial. It further appears without denial that shortly thereafter Mr. Treadwell, as attorney for one of the defendants, wrote a letter to the secretary of the judicial council further insisting that the assignment be revoked.

[4] In the recent case of Krebs v. Los Angeles Ry. Corp. (Cal.Sup.) 61 P.(2d) 931, 933, it was there charged the trial judge was biased and prejudiced, but the Supreme Court held that the moving parties had lost their right to object to the qualifications of the judge who passed upon the motion for a new trial, because of their failure to file the statement of the disqualification at "the earliest practicable opportunity" as required by section 170 of the Code of Civil Procedure. The court there said, "Notwithstanding the alleged bias and prejudice against plaintiffs' case which said judge evinced by his remarks and conduct during the trial, the jury returned a verdict for both plaintiffs. They desire to retain the judgment entered for them on said verdict, and urge the disqualification of said judge only for the purpose of invalidating the action taken by him on the defendant's motion for new trial.

"It is unnecessary here to set forth the acts and statements upon which plaintiffs rely to show prejudice. We are impelled to the conclusion that plaintiffs lost the right to object to the qualification of said judge, not only by failing to file a statement of his disqualification at 'the earliest practicable opportunity,' as required by section 170, Code of Civil Procedure (as amended by St.1927, p. 1403, St.1929, p. 958, and St.1933, p. 1828), but also by voluntarily withdrawing the affidavit of bias and prejudice filed by them after the hearing on defendant's motion for new trial."

And again, "If disqualification of the judge resting on bias and prejudice could not be waived, it would follow that the acts of bias and prejudice on which plaintiffs rely, if sufficient to set aside the order for new trial, would also invalidate the judgment which plaintiffs seek to retain. The acts which plaintiffs cite to demonstrate the disqualification took place during the trial and prior to said judgment."

It appears from the affidavit of Mr. Treadwell that at the close of the trial in Vandervort v. Southern California Edison Company et al., counsel for all of the defendants, after considering the matter, agreed not to file a statement of disqualification against Judge Caminetti. Also, when court and counsel were considering the statement of disqualification, Mr. Farmer stated: "I want to say this Your Honor, that all the matters appearing in this affidavit were prepared and presented to me weeks ago. I had no intention nor purpose of signing those affidavits—those matters—although I believe them to be true, until I was informed yesterday morning that Your Honor had gone to Sacramento and done the things which Your Honor has admitted that you did to-day in reference to the properties of Miller & Lux Inc. which could bear no other construction excepting a malicious and purposeful desire on your part to injure a party litigant before you. * * *" We must therefore assume counsel had reached the conclusion that the alleged acts of Judge Caminetti, either before or during the trial, were insufficient to show bias or prejudice on his part and such action was therefore equivalent to a withdrawal of all of the charges they could have then made.

[5, 6] With the exception of the Hyatt incident, which will be referred to later, and to which Mr. Farmer was referring in his statement to the court, the alleged grounds for disqualification have to do with the facts occurring either before or during the trial and before its close. Section 170 of the Code of Civil Procedure enumerates five grounds for disqualification. The first four go to the fundamental qualifications of the judge, and when established, void all proceedings. The fifth ground, that is, bias or prejudice, works a disqualification only as to future proceedings. That is undoubtedly one of the reasons the section demands of one who seeks to so disqualify a judge to do so at the earliest practicable opportunity after the discovery of the facts, or in any event before the commencement of the hearing of any issue of fact.

[7] When, as here, the statement of disqualification was filed after judgment, and after two extensions of time had been granted petitioners within which to oppose motions for new trials, and when it appears from the statement of disqualification that the defendants were relying largely upon facts within their knowledge before and during the course of the trial, the trial judge was justified in striking the statement from the record as being too late to comply with the provisions of section 170 of the Code of Civil Procedure. People v. Berman, 117 Cal.App. 334, 4 P.(2d) 226; People v. Nolan, 126 Cal.App. 623, 14 P.(2d) 880.

In Lindsay-Strathmore District v. Superior Court, 182 Cal. 315, 187 P. 1056, 1065, the court,[1] in considering a point somewhat similar to the one before us, said:

"It would seem to be [me] intolerable to permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not." [1]

In the case of People v. Berman, supra, the defendant, after having been convicted, procured an extension of time within which to move for a new trial. Shortly before the expiration of the statutory time for the pronouncement of sentence, he filed a statement of bias and prejudice. The delay in filing the statement could have resulted in the granting of the new trial by operation of law regardless of the merits of the motion. This situation was recognized and commented upon by both Justices York and Conrey, authors of the two opinions in the Berman Case.

This leaves for consideration as an additional ground of disqualification, a conversation between Judge Caminetti and Mr. Edward Hyatt, state engineer of the state of California, had October 2, 1936, and some weeks after the Vandervort trial had ended, and during the pendency of the motions for a new trial. In this conversation it is alleged in the statement of disqualification, that Judge Caminetti "informed the said Hyatt that Miller & Lux Incorporated, and its said companies had no water rights and that Henry Miller had stolen the lands and stolen the waters, and that the state authority of which the said Edward Hyatt was and now is the executive officer, would be very foolish to pay and should not pay Miller & Lux Incorporated, and the said companies, anything in connection with the plan of the state to divert the waters of the said San Joaquin river. * * *"

[8] It is to be seen from the foregoing, no reference at all was made to the Southern California Edison Company nor the San Joaquin Light & Power Company nor the Chowchilla Farms, Inc. As to Miller & Lux, Inc., and its companies, that was a statement that they had no water rights. Inasmuch as bias and prejudice is never implied and must be established by clear averments (Higgins v. City of San Diego, 126 Cal. 303, 58 P. 700, 59 P. 209; Blodgett v. Superior Court, 210 Cal. 1, 290 P. 293, 72 A.L.R. 482), we cannot read into this conversation any bias or prejudice.

[9] It further appears that Henry Miller, who was charged with having stolen the lands and the waters, was not a party to the present action, he having been dead for many years. It does not appear that there is more involved in this controversy as to Henry Miller than the use of his name in the title of the corporation. Bias or prejudice to be a basis of a suit, or charge as is here made, must be bias or prejudice directed against a party or their counsel. Estate of Dolbeer, 153 Cal. 652, 96 P. 266, 15 Ann. Cas. 207.

The conversation between Mr. Hyatt and Judge Caminetti was therefore insufficient to establish bias or prejudice on the part of Judge Caminetti either in favor of or against any party or counsel in the cause pending before him.

A situation somewhat similar to the Berman Case, supra, might have resulted here. The verdict was returned September 5, 1936; notice of motion for a new trial was filed September 14, 1936, and October 2, 1936, was the earliest date that court and counsel could fix for the hearing of the motion. Further extensions were obtained by counsel for petitioners to October 8th, by which time, 24 days had passed of the 60 days within which the court, by statute, was compelled to act upon a new trial, or the same would be automatically denied. Section 660, Code Civ. Proc. (as amended by St.1933, p. 305). We refer to this to illustrate the importance of the provisions of section 170 of the Code of Civil Procedure, requiring that such statements of disqualification be presented at the earliest practicable opportunity. It would have been almost a physical impossibility for any judge not familiar with this case, with its long record and several hundred exhibits, to have become sufficiently familiar, to have ruled upon the motion for a new trial within the time fixed by law. Perhaps the rule expressed in 33 Corpus Juris § 130 C might be here applicable: "Where disqualification, if permitted to prevail, destroys the only tribunal in which relief may be sought and thus effectually bars the doors of justice, the disqualified judge is bound to hear and decide the cause. But to justify a disqualified judge in sitting in a cause in which he is directly interested, the necessity must be imperative in the determination of which the greatest care should be exercised."

---

[1] See opinion on petition for rehearing in San Joaquin Light & Power Corp. v. Superior Court, in and for Stanislaus County, 66 P.(2d) 737.

In view, therefore, of our conclusions, that the statement attempting to charge bias or prejudice was filed too late, it was not error to strike the statement from the files.

[10] Respondents have filed applications to amend the record by attempting to show that on June 29, and while the Vandervort case was being tried, the case of Newhall v. Southern California Edison Company, Ltd., and Wilson v. Southern California Edison Company, Ltd., were called for setting, at which time Mr. Treadwell then asked the court for a sufficient continuation in those matters to file affidavits of bias or prejudice. Inasmuch, however, as the statement of disqualification was not answered either in the time or in the manner prescribed by section 170 of the Code of Civil Procedure, we are not concerned with any issue as to the truth of the allegations in the statements. The allegations not having been denied, we must assume them to be true. The question here confronting us is not as to the truth or falsity of the statement, but whether as a matter of law, it states any facts sufficient to entitle petitioners to the relief sought, and particularly whether or not the same was filed in time. The request to file the amendment to the record is therefore denied.

[11, 12] We cannot agree with the trial court, however, that the presentation or the filing of the statement of disqualification constituted a contempt of the court. Section 1209 of the Code of Civil Procedure states what acts or omissions constitute a contempt of the authority of the court. No criticism can be made of the manner of the presentation, and we must assume, in the absence of any reply by the trial judge that counsel acted in good faith in their recital of the facts upon which they based their allegations of bias or prejudice.

We are not now passing upon the conduct or remarks of counsel during the progress of a protracted trial, carried on during the very hottest part of an extremely hot summer in the San Joaquin Valley, and in a hall probably not conveniently arranged, but only with the time and manner of presenting this charge of disqualification. We cannot find in that alone, sufficient ground to uphold the judgment of contempt. That portion, therefore, of the judgment, finding those attorneys who presented the statement of disqualification, guilty of contempt, is set aside. The order striking the statement from the files is affirmed, and the writ of prohibition herein prayed for is denied.

19 Cal.App.2d 628

MILLER & LUX, Inc., et al. v. SUPERIOR COURT IN AND FOR STANISLAUS COUNTY et al. (two cases).

Civ. 5799, 5800.

District Court of Appeal, Third District, California.

March 18, 1937.

Rehearing Denied April 17, 1937.

Hearing Denied by Supreme Court May 17, 1937.

1. Judges ⚿51(2)

Statement of disqualification filed shortly after judge had declared his intention to try case despite previous request that other judge be procured, and before jury was impaneled *held* timely, though formal evidence had been introduced to prevent dismissal for want of prosecution, notwithstanding statute requiring that such statement be filed at earliest practicable opportunity and before commencement of hearing of any issue of fact (Code Civ.Proc. § 170, as amended by St.1933, p. 1828).

2. Judges ⚿51(2)

Introduction of formal evidence before impaneling jury, for sole purpose of preventing dismissal of action for want of prosecution, *held* not a "commencement of hearing of any issue of fact" within statute requiring statement of disqualification of judge to be filed before such commencement of hearing (Code Civ.Proc. § 170, as amended by St.1933, p. 1828).

3. Judges ⚿51(4)

Where no written answer is filed to statement of disqualification of judge and averments therein sufficiently show bias and prejudice on their face, averments must be taken as true.

Applications for writ of prohibition and review by Miller & Lux, Inc., and others against the Superior Court of the State of California in and for Stanislaus County, and Hon. Anthony Caminetti, Jr., Judge presiding therein.

Writ of prohibition allowed.

J. E. Woolley, Vincent J. McGovern, Athearn, Chandler & Farmer, and Milton T. Farmer, all of San Francisco, Roy V. Reppy and George E. Trowbridge, both of Los Angeles, Treadwell, Laughlin & Treadwell, of San Francisco, Griffin & Boone, of Modesto, Thomas J. Straub and W. R. Dunn, both of San Francisco, and F. H. Pearson, of Fresno, for petitioners.

Theodore M. Stuart and James F. Peck, both of San Francisco, for respondents.

PER CURIAM.

There was pending in the Superior Court of Stanislaus county at all the times herein referred to, four companion cases commonly referred to as the Vandervort, the Patterson, the Newhall, and the Wilson Cases, all involving issues having to do with certain water rights on the San Joaquin river, with the attorneys for the respective parties substantially the same.

The Vandervort and the Patterson cases were called for trial March 12, 1936, before Judge Caminetti of Amador county, sitting by designation of the judicial council. The Vandervort case was selected for trial, but counsel for plaintiffs in the Patterson case, in order to prevent the cause being dismissed for lack of prosecution under section 583 of the Code of Civil Procedure (as amended by St.1933, p. 853), asked and was granted permission to introduce a small amount of documentary evidence, occupying about thirty minutes in time. The case was thereafter continued from time to time. Similarly the Newhall and Wilson cases were called, a jury demanded, and an order made setting these cases for trial for June 29, 1936. On that date, while the Vandervort case was still being tried, those proceedings were likewise interrupted long enough to permit plaintiff to offer some evidence for the purpose of avoiding a dismissal. Over objection, a witness was sworn and examined briefly and the cause then continued.

On November 5, 1936, and upon the calling of these cases for further hearing, defendants in each of the three cases presented and filed statements of disqualification of Judge Caminetti. No written answer was filed to these statements, and without notice to defendants, and in their absence, these documents were ordered stricken from the files.

Thereupon defendants, as petitioners, sought a writ of prohibition to prevent Judge Caminetti from proceeding with the several trials or performing any judicial acts in connection therewith, and for a writ of review to annul the order striking from the files these statements of disqualification.

The specifications of bias and prejudice set forth in the statement presented by petitioners are very similar to those contained in the statement filed and considered by this court in the case of Woolley et al. v. Superior Court (Miller & Lux Incorporated v. Superior Court), 66 P.(2d) 680, an opinion concerning which was this day filed.

It is herein charged that the judge was biased and prejudiced, and such attitude was evidenced by his statements and conduct during the course of the Vandervort case, and they there set forth in detail many of the specifications considered by us in the case of Woolley et al. v. Superior Court (Miller & Lux Incorporated v. Superior Court) supra, including the conversation had with Mr. Hyatt, state engineer.

On October 8, 1936, when the matter of the disqualification of the judge in the Vandervort case was before the court, the judge is there alleged to have said, "I am going to withdraw the request that I made of Mr. Taylor to procure another judge to try the other cases (referring to the cases now before us) and you can get ready and prepare your statement of disqualification in those other cases because we are going to trial—we are going to trial on them," it being asserted by plaintiffs herein that this statement was made in a vindictive manner, and the said judge was seeking to try these cases for the sole purpose of injuring these defendants and punishing their counsel.

The situation here before us is entirely different from that presented in Miller & Lux Incorporated v. Superior Court, supra. There, the statement of disqualification was filed after the completion of the trial, after the return of the verdict of the jury, and after the entry of judgment and on the day set for hearing the motion for a new trial. We there held under the conditions existing, such an attempt to disqualify the judge on the ground of bias or prejudice came too late. No such condition here existed. All that was done in these cases was to introduce some formal evidence, very obviously not to establish any fact but merely to prevent a dismissal of the actions for failure to prosecute. It is apparent from the statement of the judge to the effect he was going to withdraw his request to procure another judge to try these cases that until that moment counsel did not know that Judge Caminetti intended to act under the assignment and preside in these particular trials, but, on the contrary, had reason to think he would not.

[1] In the Vandervort case the question there to be decided was whether or not the statement of disqualification was presented at the earliest practicable opportunity.

Here that question cannot be seriously considered. The statement of disqualification was filed very shortly after the announcement of Judge Caminetti that he proposed to try these cases. Also the statement was presented before a jury was impaneled and before the real issues in these cases were presented, and was clearly presented at the earliest practicable opportunity.

Here a series of actions against the same defendants were set for trial simultaneously. During the trial of the first cause, continuations were had in these actions so they could be tried at the conclusion of the Vandervort case. At the conclusion of that case this statement was filed, based upon proceedings had during the trial of the Vandervort case.

A somewhat similar situation was before the court in the case of Evans v. Superior Court, 107 Cal.App. 372, 373, 290 P. 662, 665, where the court said:

"* * * it is unnecessary to consider petitioners' point further as to the seasonableness of his application to disqualify Judge Tappaan, as it is plainly seen that the application to disqualify was filed as soon as the alleged bias and prejudice was ascertained by petitioners, and that there could not possibly have been a claim of bias and prejudice made by petitioners at or before the commencement of the McLeod Case, because any such claim originated in, grew out of, and was founded upon the opinion of the judge in the McLeod Case."

[2] It is also evident that these cases had never been commenced within the meaning of section 170 of the Code of Civil Procedure (as amended by St.1933, p. 1828). In the Wilson and Newhall cases, as before noted, these actions were called for trial on June 29th during the course of the trial of the Vandervort case, and without notice. The only evidence then taken was by a witness who testified he knew the plaintiffs and that their lands bordered on the San Joaquin river. He was then withdrawn, to be recalled at a later date. It seems to have been clearly understood by court and counsel that the purpose of this evidence was merely to void the operation of the statute. The court recognized that to be the purpose, and so stated. It is also apparently conceded by counsel for both parties that the pleadings were yet to be settled.

In view of the foregoing, regardless of what the effect may have been under section 583 of the Code of Civil Procedure, it cannot here be held that the acts constituted a commencement of a hearing of any issue of fact within the meaning of section 170 of the Code of Civil Procedure.

[3] As to the sufficiency of the statement of bias or prejudice, there can be no doubt. In People v. Compton, 123 Cal. 403, 56 P. 44, 49, the court said:

"In this case the defendant brought himself within the letter and the meaning of the provision. He made it appear by the facts set up in his affidavit (however ill-founded the affidavit may have been in truth) that the judge was biased and prejudiced against him. No counter affidavits were filed. There was, then, not even a conflict upon the facts. The duty of the trial judge was plain. The defendant having made it appear by affidavit, in conformity with the requirements of the statute, that the judge was biased or prejudiced against him, his motion should have been granted."

Here also no written answer was filed to the allegations of defendants and we must accept those that are properly stated to have been true.

It therefore appears that petitioners have presented substantial grounds for disqualification of Judge Caminetti in the trial of these cases, and having been filed at the earliest practicable opportunity, and no denial interposed, the writ of prohibition should be granted, and it is so ordered.

---

20 Cal.App.2d 49

CANVIN v. GENERAL BREWING CORPORATION et al.

Civ. 5736.

District Court of Appeal, Third District, California.

March 29, 1937.

Hearing Denied by Supreme Court May 27, 1937.

1. Negligence ⚿134(5)

Where waitress fell through trapdoor in booth left open by truck driver in delivering barrel of beer, evidence authorized finding that truck driver was negligent in leaving trapdoor open and unlighted for period of time consumed in conveying barrel distance of 50 feet to icebox.

2. Negligence 🔑134(11)

Where waitress fell through trapdoor in booth left open by truck driver in delivering barrel of beer, evidence authorized finding that truck driver's negligence in leaving trapdoor open and unlighted was a proximate cause of waitress' injuries, so as to make truck driver liable therefor notwithstanding waitress' employer was negligent in failing to provide safe way of conveying beer barrels to basement and in failing to warn waitress of peril.

3. Negligence 🔑61(1)

Negligence need not constitute the only proximate cause of injury to impose liability therefor.

4. Negligence 🔑15

Joint and several liability attaches to different individuals who are guilty of concurrent negligence which contributes to injuries sustained by third person.

5. Negligence 🔑135

In waitress' action against brewer and brewer's truck driver for injuries sustained when waitress fell through trapdoor in booth left open and unlighted by truck driver in delivering barrel of beer, evidence authorized finding that waitress was not contributorily negligent.

6. Appeal and error 🔑877(4)

Defendant could not complain because judgment awarding waitress damages for defendant's negligence provided that casualty insurer of waitress' employer should first be paid out of sum awarded, amount insurer expended for waitress' hospital and medical bills, since defendant was not harmed by such provision, even if provision amounted to allowance of claim for compensation paid in behalf of insured employer as lien on judgment (St.1931, p. 2370, § 26; St.1933, p. 1340, § 26a).

* * *

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by Ruby Canvin against the General Brewing Corporation and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Gerald M. Desmond, of Sacramento, for appellants.

W. H. Hatfield and John L. Brannely, both of Sacramento, and J. Oscar Goldstein, of Chico, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff was seriously injured as a result of falling through an open trapdoor into the basement from the luncheon and beer parlor where she was employed as a waitress. Through the negligence of the truck driver of the General Brewing Corporation, which furnished liquor to the beer parlor, the trapdoor was left open and unlighted while he was delivering a barrel of beer to their customer at the ice box in the basement of the building. This suit was brought against the brewing corporation and its truck driver only. The proprietor of the beer parlor was not a party to the action. A joint and several judgment was rendered against the defendants. From that judgment, this appeal was perfected.

It is contended the evidence fails to support the finding that the plaintiff was injured through the negligence of the defendants. On the contrary, it is asserted the proximate cause of the accident was due to the negligence of the proprietor of the beer hall in maintaining the dangerous trapdoor without adequate means of lighting it and without warning his employee of the peril. It is also claimed the plaintiff was guilty of contributory negligence, and that the court erroneously included in the amount of damages which she was awarded a sum of money paid by an insurance company for her hospital and medical care.

Dominic Bradovich operated a luncheon and beer parlor at 1018 Eighth street in Sacramento, called "Dominic's Drink Shop." He served sandwiches, light luncheons, and beer to his customers. The room is 50 feet in length, with a bar and a counter along one side at which customers were seated. Along the opposite side of the room there is a series of booths. At the farthest end of the room there is a booth containing a table and chairs, where the waitresses were accustomed to put on their uniforms before going to work. This booth was poorly lighted. There was a small incandescent electric globe covered with a shade attached to the wall above the table. In the floor of this booth to the left of the entrance, there is a 2½ by 3 foot trapdoor leading to the basement down a flight of very steep stairs. It was difficult to distinguish the presence of this trapdoor when it was closed. It was raised by means of a hasp and rested against the partition wall of the booth adjacent to the entrance. When the trapdoor was raised, it was concealed from the view of one entering the booth except for the few inches which extended beyond the casement. Directly above this trapdoor a telephone was attached to the wall. An electric light was also suspended from the ceiling over this trap, but it had not been burning for several days prior to the accident. The record contains evidence that the booth was quite dark in spite of the small light over the table.

Bradovich employed several waitresses who were kept extremely busy serving customers during the luncheon period. One witness called the place a "mad house" during meal times. The plaintiff was a young girl who had worked at that shop only a few days prior to the accident. Her hours of service were from 11 o'clock in the forenoon to 4 o'clock in the afternoon. She had never observed the trapdoor in the rear booth and did not know of its existence. She did not know that beer was taken to the basement by means of that door. She did not know the defendant Leslie and had never seen him conveying barrels into the basement.

The General Brewing Corporation had been supplying the Bradovich beer parlor with liquor regularly for many months. For four or five months Leslie, the truck driver of the brewing corporation, had been delivering barrels of beer almost daily to that place of business. It was the defendants' duty to place the barrels in the ice box in the basement, which was located 50 feet from the foot of the stairway. The basement was unlighted and absolutely dark. Leslie followed the custom of rolling the barrels in the side entrance through the kitchen to the rear booth. He would then switch on the light which hung from the ceiling over the trap and raise the door, letting it rest against the partition. He then lowered the barrel step by step to the basement floor and rolled it forward to the ice box, groping his way in the darkness, for there were no means of lighting the basement and he carried no flashlight. The trapdoor remained open while he completed that task. Three witnesses testified that Bradovich had repeatedly told Leslie not to deliver beer during the noon hour on account of the disturbance which it created and the danger incurred thereby.

Mr. Leslie testified that on September 7, 1934, at about 11:30 a. m. he asked the proprietor if he wanted some beer, and that he replied, "Yes, roll one in." He said that he then rolled a barrel in through the side entrance to the rear booth in the usual manner. He raised the trapdoor, but did not recall whether the electric light which hung from the ceiling was burning. He took the barrel down the stairway and was proceeding to roll it forward to the ice box when he heard a scream, and turning about he saw the plaintiff lying on the basement floor at the foot of the stairway.

The evidence is uncontradicted that the plaintiff, ignorant of the presence of the truck driver, or that the trapdoor in the rear booth existed, was engaged in serving customers from behind the counter, when the telephone in that booth rang. One of the waitresses told her to "answer the phone." She rushed back to do so. She knew the telephone was attached to the wall at the left of the entrance to that booth. The booth was inadequately lighted. The electric globe over the trapdoor was not lighted. She did not observe the trapdoor protruding beyond the casement of the door, and she did not see the open space. Reaching for the telephone as she entered, she plunged into the opening and fell headlong to the basement, fracturing her spine and sustaining numerous bruises and contusions. She was taken to the hospital, where she remained for some time, but apparently she never entirely recovered from her serious injuries.

The Ætna Casualty & Surety Company, which carried Bradovich's employer's casualty insurance, paid the plaintiff's hospital and medical bills amounting to $1,424.91. This suit for damages was brought against the General Brewing Corporation and its truck driver only.

Bradovich was not made a party to the suit. The action was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiff. A joint and several judgment for damages was rendered against the defendants for the sum of $6,424.91, in which it was provided that "out of said sum" the casualty company should "first be paid $1,424.91." From that judgment, the defendants have appealed.

[1] The evidence adequately sustains the finding that the General Brewing Corporation and its agent Fred Leslie were guilty of negligence in leaving the trapdoor open and unlighted for the period of time consumed in conveying the barrel of beer a distance of 50 feet to the ice box in an absolutely dark basement. It should have been reasonably anticipated that in the absence of the electric light which hangs from the ceiling of the booth directly over

the trapdoor, any person who was not previously warned of the danger might step into the open space, particularly on account of the inadequately lighted booth due to the absence of the light over the trap which was not burning.

[2-4] It also satisfactorily appears that this negligence on the part of the defendants was a proximate cause of the injuries which were sustained by the plaintiff as a result of falling into the unlighted trap doorway. Much space is consumed in appellants' briefs arguing that the proximate cause of the accident was the failure of the proprietor of the beer hall, Dominic Bradovich, to maintain a safe way of conveying the beer barrels to the ice box in the basement, and in neglecting to warn the plaintiff of the peril. It may be conceded for the purpose of this appeal, without so deciding, that Bradovich was also guilty of negligence which would have rendered him liable for damages. His liability would depend entirely on the question as to whether he should have reasonably anticipated that in the natural course of events some unwarned person was likely to step into the open trap and be injured thereby. 1 Shearman and Redfield on Negligence (6th Ed.) 67, § 32. But, even though it be conceded that Bradovich was guilty of negligence which became a proximate cause of the injuries sustained by the plaintiff, it does not necessarily follow that the defendants are therefore exempt for negligence which was also a proximate cause of the injuries. It is an established principle of law that negligence which establishes liability need not constitute the only proximate cause of injuries. It is a recognized principle that joint and several liability may attach to different individuals who are guilty of concurrent negligence. 19 Cal.Jur. 572, § 20; 45 C.J. 895, § 476; 1 Shearman and Redfield on Negligence (6th Ed.) 64, §§ 31, 32. In 45 Corpus Juris at page 895 it is said:

> "If the concurrent negligence of two or more persons combined together results in an injury to a third person, they are jointly and severally liable and the injured person may recover from either or all; the concurring negligence of one is no excuse or defense to another; each is liable for the whole, even though another was equally culpable, or contributed in a greater degree to the injury."

A multitude of authorities supports the principle of liability of one or all persons who are guilty of concurrent negligence which contributes to the injuries sustained. It is a rule too well established to require further discussion.

Under the circumstances of this case, we are of the opinion the defendants are guilty of negligence which became a proximate cause of the injuries sustained by the plaintiff, as distinguished from the sole and only proximate cause of the accident, and that they are therefore liable for damages sustained as a result thereof.

[5] The finding that the plaintiff was not guilty of contributory negligence is also sufficiently sustained by the evidence. Under the facts of this case, the alleged contributory negligence of the plaintiff was a question for the determination of the judge who tried the case, with whose ruling upon that subject we may not interfere. The record contains substantial evidence that the plaintiff had been employed as a waitress in the beer hall only a few days prior to the accident; she was unfamiliar with the meaning of conveying the beer barrels to the ice box in the basement; she had never seen nor had her attention been called to the dangerous trapdoor; she did not know that it existed; she had not been warned of that peril; the booth in which the open trapdoor was left by the defendants was inadequately lighted; it was too dark to readily observe the opening in the floor; in the confusion of the noon hour when the waitresses were extremely busy serving luncheons, the telephone, attached to the wall directly over the trapdoor, rang; she was directed to answer the phone; she hastened to do so, and failing to observe the protruding door or the open trap, she fell to the basement and was injured. It was a question solely for the trial court to determine under the circumstances of this case whether a reasonably prudent person should have seen and avoided the trapdoor. We are of the opinion the trial court reached the proper conclusion regarding the plaintiff's alleged contributory negligence.

[6] The defendants may not complain of the fact that the findings after specifically determining that the plaintiff suffered damages on account of their negligence in the aggregate sum of $6,424.91 and awarding her judgment for that amount, also provided in the judgment "that out of said sum of $6424.91 the Ætna Casualty and Surety Company first be paid $1424.91." The findings do determine that the surety

company did pay plaintiff's hospital and medical bills on account of her injuries in the sum of $1,424.91. These were legitimate expenses incurred by her on account of the accident, and were therefore properly included in the damages awarded to her. It is immaterial and harmless that the court held that she should repay the surety company from the judgment which she received. Certainly it is immaterial to the defendants what the plaintiff does with the money she receives in satisfaction of her judgment. It is contended that the court improperly awarded to Dominic Bradovich, the employer of the plaintiff, reimbursement for money necessarily expended on account of her injuries, pursuant to section 26a of the Workmen's Compensation Act (as added by St.1933, p. 1340), on the theory of subrogation of rights as therein provided. The judgment awards no damages to Bradovich. He was not a party to the action. The judgment specifically awards the entire sum of $6,424.91 as damages to the plaintiff. The statement that from that sum $1,424.91 is to be paid to the Ætna Casualty & Surety Company is harmless to the defendants. So far as we are able to construe the record, the provisions of sections 26 and 26a of the Workmen's Compensation Act (St. 1917, p. 854, as amended by St.1931, p. 2370 and added by St.1933, p. 1340 respectively) have no application to this case. It does not appear that an application was ever made on the part of either the employer or the employee to the Industrial Accident Commission for compensation on account of the accident which is involved in this case. If such a proceeding occurred, we have no record of it, and it is not involved in this action. Section 26a of the Workmen's Compensation Act, upon which the appellants rely, reads as follows:

> "If an injury to and/or the death of an employee is the proximate consequence of the act of a person other than the employer, the employer shall be entitled to recover from such person all moneys paid to the injured employee during the period of his disability and/or to his dependents either as salary, wage, pension or other emolument and in the recovery thereof, the employer shall be entitled to invoke all of the provisions of section 26 of this act."

We are not informed that the plaintiff ever made any claim for compensation on account of the injuries which she sustained which are involved in this action, to either her employer or to the Industrial Accident Commission. But if she did, it would not affect her right to full compensation from the defendants for her injuries sustained on account of their negligence. Section 26 of the Workmen's Compensation Act provides in that regard:

> "The claim of an employee for compensation shall not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer."

The preceding section provides for the right of an employer to prosecute a claim with the Industrial Accident Commission or to maintain an independent action against a third party who is liable for damages for injuries sustained by his employee to recover any money the employer was compelled to expend in behalf of his employee on account of such injuries. It also provides that the employer may join with the employee in an action or proceeding to recover such compensation. In the present action no such procedure occurred.

The preceding section, however, further provides that:

> "If the employer has not joined in the action or has not brought action, or if his action has not been consolidated, the court shall, on application of the employer, allow as a first lien against the entire amount of any judgment for any damages recovered by the employee the amount of the employer's expenditures for compensation."

Assuming, without so deciding, that, upon application of the employer in this case, the court did allow the claim of the Ætna Casualty & Surety Company for compensation paid in behalf of the insured employer for necessary expenses incident to the plaintiff's injuries, as a lien upon the judgment which she recovered, that is not a matter which is detrimental to the defendants, or in which they have any interest. If there was any error in that proceeding, it is harmless to the defendants. There is no merit in their attack upon the judgment in that regard.

The judgment is affirmed.

We concur: **PULLEN, P. J.; PLUMMER, J.**

20 Cal.App.2d 140

PEOPLE v. SEARING.

Cr. 2953.

District Court of Appeal, Second District,
Division 2, California.

April 2, 1937.

Hearing Denied by Supreme Court
April 29, 1937.

1. Criminal law 🔑1130(5)

Court of Appeal will not assume burden of searching record, in absence of citation of authority or argument, in support of alleged errors.

2. Criminal law 🔑1130(5)

Court of Appeal refused to consider proposition that trial court committed prejudicial error in reception and rejection of evidence, where appellant failed to furnish either authority or argument in support of proposition.

3. Assault and battery 🔑96(8)

In prosecution for assault with deadly weapon, instruction that if accused, after his previous difficulty with prosecuting witness, feared sudden attack from prosecuting witness, accused was justified in arming himself for self-protection *held* properly refused, where it was question for jury whether accused had previously had difficulties with prosecuting witness.

4. Criminal law 🔑829(1)

Instruction *held* properly refused where principles of law embodied therein were fully, accurately, and completely covered by other instructions given.

5. Witnesses 🔑277(7)

Permitting further cross-examination of accused after defense had rested *held* not error, in view of rule that witness once examined may be recalled when leave of court is first obtained (Code Civ.Proc. § 2050).

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

John Alfred Searing was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendant was convicted after trial by jury of assault with a deadly weapon. The appeal is from the judgment.

Viewing the evidence most favorable to the prosecution (People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558), the facts in the instant case are:

September 8, 1936, Mr. Evans took defendant's wife to her home after a dance. Defendant had shortly before left the party and walked home. After Mr. Evans and Mrs. Searing had driven into the driveway of her residence, defendant approached them and without warning struck Mr. Evans in the face and over the head with the butt end of a shotgun, which resulted in his receiving a broken nose and fractured skull.

Defendant relies for reversal of the judgment on the following propositions:

First: The trial court committed prejudicial error in the reception and rejection of evidence.

Second: The trial court committed prejudicial error in refusing to give the following instructions:

(a) "If the defendant, after his previous difficulty with Conrad Evans, feared a sudden attack from Evans, he was justified in arming himself for self-protection and defense, and, under such circumstances, his arming should not be construed as evidence of malice to injure Evans."

(b) "The law does not require that the defendant should wait until an actual assault upon him has reached the stage where resistance would be useless. If the situation is such that a reasonable man, in the situation of the defendant, would be justified in believing that his life was in danger, or that a felony was about to be committed upon him, he could act; and what is apparent danger, should be considered by you as real danger."

Third: It was prejudicially erroneous for the trial court to permit defendant to be further cross-examined after the defense had rested its case.

[1, 2] The law is settled that this court will not assume the burden of searching the record, in the absence of citation of authority or argument, in support of alleged errors. People v. Chutnacut, 141 Cal. 682, 685, 75 P. 340; People v. Schlosser, 99 Cal.App. 593, 278 P. 898; People v.

Santos, 134 Cal.App. 736, 742, 26 P.(2d) 522. In the instant case, defendant has failed to furnish us either authority or argument in support of his first proposition, therefore, we will not consider it.

[3] The instruction set forth in paragraph (a) of defendant's second proposition was properly refused for the reason that it instructs the jury on a matter of fact, to wit, that defendant had previously had difficulties with Mr. Evans. This was a question of fact to be left to the determination of the jury; therefore, the instruction was erroneous.

[4] The instruction included in paragraph (b) of defendant's second proposition was correctly refused for the reason that the principles of law embodied therein were fully, accurately, and completely covered by other instructions given the jury.

[5] The final proposition urged by defendant is untenable, in view of the settled rule that a witness once examined may be recalled when leave of the court is first obtained. Section 2050, Code Civ. Proc. In the instant case leave was granted the prosecution by the trial court to recall defendant for further examination after the defense had rested, and defendant has failed to show affirmatively that this ruling was erroneous. People v. Watts, 198 Cal. 776, 793, 247 P. 884.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

---

20 Cal.App.2d 120

PEOPLE ex rel. BOOLE v. NORTHWESTERN PAC. R. CO. et al.

Civ. 10231.

District Court of Appeal, First District, Division 2, California.

April 2, 1937.

Hearing Denied by Supreme Court May 27, 1937.

Public service commissions 🔑19½

Quo warranto proceedings *held* not to lie to cancel ferry franchise, where amended complaint admitted that ferry company was operating ferry but alleged that service rendered was sham and pretense and inadequate, since jurisdiction was vested in Railroad Commission to determine adequacy of service (Code Civ.Proc. § 803; Const. art. 12, §§ 22, 23; Gen.Laws 1931 and Supps. 1933 and 1935, Act 6386).

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Quo warranto proceedings by the People of the State of California, on the relation of Fred W. Boole, to cancel ferry franchise for nonuser and abandonment, against the Northwestern Pacific Railroad Company and the Southern Pacific Golden Gate Ferries, Limited. From a judgment in favor of the defendants, the relator appeals.

Affirmed.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and Edgar Forbes Wilson, and Keyes & Erskine, all of San Francisco, for appellant.

E. J. Foulds and R. S. Myers, both of San Francisco, for respondents.

SPENCE, Justice.

This action was brought on relation of Fred W. Boole, a resident and taxpayer of the city of Belvedere. It is described by plaintiff as a quo warranto proceeding under the provisions of section 803 of the Code of Civil Procedure to cancel a franchise for "non-user and abandonment." A demurrer to the amended complaint was sustained without leave to amend and from the judgment entered in favor of defendants, plaintiff appeals.

The particular franchise referred to in the amended complaint was granted in 1924 by the board of supervisors of the city and county of San Francisco. It was embraced in ordinance No. 6244 (new series) and granted the right to operate a ferry from San Francisco to Tiburon in Marin county.

The amended complaint alleged "That said defendants have not, nor have either of them, ever used said franchise granted May 19th, 1924, for rendering to the public any service in the way of ferry transportation between said San Francisco and said Tiburon; that said defendants have not, nor have either of them, within ten years last past, rendered, under any franchise or franchises now held by them, or either of them, any service between San Francisco, Belvedere and/or Tiburon." The foregoing allegations would indicate a "non-user" or "abandonment" of said franchise, but there were further allegations contained in said amended complaint which conflicted with, or at least modified, the foregoing allegations. It was alleged that "defendants, and each of them, are and at all times herein mentioned have been corporations * * * authorized to engage in, and actually engaged in the transportation of persons and property by ferry between the City and County of San Francisco and points in Marin County, California, particularly Sausalito, Belvedere and Tiburon." It was further alleged that defendants had theretofore operated and were then operating boats on two round trips per day between San Francisco and Tiburon. Then followed allegations that said boats were operated solely as a "sham and pretense" for the purpose of holding defendants' franchises.

The demurrer to said amended complaint was both general and special. It set forth in particular that said amended complaint did not state sufficient facts in that it was alleged therein that defendants were actually engaged in the transportation of persons and property between San Francisco and Tiburon and that therefore the determination of the adequacy of the service was within the exclusive jurisdiction of the Railroad Commission.

The briefs of the parties have narrowed the issues on this appeal. It is conceded therein that the superior court has jurisdiction to cancel a franchise under certain circumstances and that while the Railroad Commission has jurisdiction to determine whether the service actually rendered under a franchise is adequate and, if not, to require adequate service, said commission has no jurisdiction to cancel a franchise under any circumstances. It is further conceded that the courts may take judicial notice of the decisions of the Railroad Commission. Among said decisions is that of Marvelous Marin et al. v. Southern Pacific Golden Gate Ferries, Ltd., 36 Cal. Railroad Comm. 536, decided in 1931. The petition therein was for an order directing the Southern Pacific Golden Gate Ferries, Limited, one of the defendants herein, to increase the ferry service between San Francisco and Tiburon upon the ground that the service being rendered was inadequate. It appears from said decision that defendants were then operating two round trips per day between said points and that the territory of Tiburon and Belvedere and vicinity had a population of approximately 1,000 inhabitants. Said petition was denied. It may also be deemed conceded that the ordinance granting the franchise in question contained no provision regarding the frequency of the service to be rendered thereunder.

In our opinion, the trial court did not err in sustaining defendants' demurrer to the amended complaint without leave to amend. It affirmatively appeared from the allegations of said amended complaint that the defendants had been and were actually operating boats and rendering some service under said franchise despite other allegations of the amended complaint which were based upon the plaintiff's conclusion that the service rendered was a sham and pretense and in fact no service at all because of its claimed inadequacy. But since 1912, exclusive jurisdiction has been vested in the Railroad Commission to determine the adequacy of service actually being rendered under a franchise by any public utility within the purview of the Public Utility Act. (Const., art. 12, §§ 22, 23; Public Utilities Act, Deering's General Laws, 1931 and Supps. 1933, 1935 Act 6386.) We therefore conclude that when the amended complaint affirmatively showed that some service had been and was actually being rendered under the franchise, said amended complaint was insufficient to state a cause of action for the cancellation of said franchise upon the theory of "non-user and abandonment" at least in the absence of further allegations showing a decision of the Railroad Commission determining that the service rendered was inadequate. No such showing was made here, but, on the contrary, the decision in Marvelous Marin et al. v. Southern Pacific Golden Gate Ferries, Ltd., supra, showed that said commission had determined otherwise. Attention should again be called to the fact that when the allegations of the amended complaint are taken as a whole, they do not present a situation showing that no service whatever had ever been rendered under the franchise or a situation where service previously rendered had been wholly abandoned either with or without the authorization of the Railroad Commission.

Plaintiff cites and relies upon People ex rel. Warfield v. Sutter Street Ry. Co., 117 Cal. 604, 49 P. 736, but it is sufficient to point out that said case is not applicable under the facts before us as it was decided in 1897 and before the adoption of the present constitutional provisions creating the Railroad Commission and before the enactment of said Public Utilities Act. No authorities directly in point have been called to our attention, but there are authorities from other jurisdictions which lend support to the views expressed herein. State ex rel. Wear v. Cincinnati & L. E. R. Co., 128 Ohio St. 95, 190 N.E. 224; Lake Shore Electric Ry. Co. v. State, 125 Ohio St. 81, 180 N.E. 540; Village of Lowellville v. East End Traction Co., 33 Ohio App. 523, 169 N.E. 831.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

---

19 Cal.App.2d 679

BERNSTEIN v. PACIFIC STATES SAVINGS & LOAN CO.

Civ. S. C. 40.

District Court of Appeal, Second District, Division 1, California.

March 23, 1937.

1. Bills and notes 🔑347

Party purchasing after maturity a negotiable note which owner intrusted to agent for collection only was not a "holder in due course," and hence did not take title to note free from defects of title of prior parties (Civ.Code, §§ 3128, 3138, 3139).

[Ed. Note.—For other definitions of "Holder in Due Course," see Words & Phrases.]

2. Bills and notes 🔑347

Statute providing that negotiable instrument remains negotiable until it has been restrictively indorsed or satisfied did not change law so as to permit purchaser of negotiable note after maturity to take title free from defects of title of prior holders on ground that negotiable instrument remains negotiable after maturity (Civ.Code, § 3128).

3. Bills and notes 🔑347

At common law, an instrument negotiable in beginning remained negotiable after maturity.

4. Bills and notes 🔑427(2)

Maker of negotiable note has right to insist that payment be made to lawful owner, and it is always a defense that holder or one who sues is not true owner (Civ. Code, §§ 3128, 3138, 3139).

5. Bills and notes 🔑349

One who purchases negotiable note after maturity must inquire into circumstances of execution of note and its later history, and, if he fails to do so, he does not stand in any better position nor is he less negligent than former owner who has delivered note bearing general indorsement to agent for collection, and there is special duty to make inquiry where instrument is offered for sale at a price less than one-third of its face value (Civ.Code, §§ 3128, 3138, 3139).

6. Bills and notes 🔑349

Purchaser of negotiable note after maturity, which note had been wrongfully sold by assignee's agent which was instructed merely to collect note, could not claim ignorance of facts which purchaser would have learned except for breach of duty to make inquiry as to rights of former holders, and no estoppel could arise in purchaser's favor (Civ.Code, §§ 3128, 3138, 3139).

7. Bills and notes 🔑347

Rights of $1,000 note assignee who indorsed note generally and delivered it to agent for collection only *held* to prevail over rights of party who purchased note after maturity for $275 from party to whom note had been wrongfully sold (Civ.Code, §§ 3128, 3138, 3139).

◆

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Eva Bernstein against the Pacific States Savings & Loan Company, wherein defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Affirmed.

John L. Mace, of Los Angeles, and Roy D. Reese, of San Francisco, for appellant.

Eugene L. Wolver, of Los Angeles, for respondent.

SHINN, Justice pro tem.

It is shown by the findings, which are not questioned, that plaintiff, owner by assignment of a negotiable promissory note for $1,000, bearing an indorsement to her, indorsed the same generally after its maturity and delivered it to American Mortgage Company, as her agent, for the purpose of collection. The agent, in violation of its instructions, sold the note to McCabe-Fewell & Co., who sold it to State Guaranty Corporation, from whom defendant acquired it for a consideration of $275. Plaintiff had no knowledge of these transfers, and defendant had no knowledge of the limit of authority of plaintiff's agent, American Mortgage Company.

Plaintiff prevailed in this action to quiet title to the note, and defendant appeals.

Appellant contends that, as the note was negotiable and was purchased for value without knowledge of plaintiff's rights as the real owner, title passed free from any defects in the title of appellant's transferer, notwithstanding the fact that each of the several transfers took place after the maturity of the note.

Both legal and equitable claims are involved in this proposition.

[1-4] Appellant did not establish a legal title to the note. Respondent's agent had no authority to sell the note. Having purchased after maturity, appellant was not a holder in due course, and, while a holder in due course takes title to a negotiable instrument free from defects of title of prior parties under the Negotiable Instruments Law, others do not. Civ.Code, § 3138; Chase v. Whitmore, 68 Cal. 545, 9 P. 942; Woodsum v. Cole, 69 Cal. 142, 10 P. 331; McPherson v. Weston, 85 Cal. 90, 24 P. 733. Appellant seeks to avoid the application of these authorities, contending that the rules followed by the court in deciding them were changed by the adoption of section 3128 of the Civil Code, which provides that a negotiable instrument remains negotiable until it has been restrictively indorsed or satisfied, and that such was not the law at the time the cases were decided. From this premise it is argued that, because a negotiable instrument remains negotiable after maturity, a purchaser thereof takes title free from defects of title of prior holders. The premise is unsound; the Civil Code section did not change the law in this respect. At common law the rule was that an instrument negotiable in the beginning remained negotiable after maturity. Pitman v. Walker, 187 Cal. 667, 203 P. 739. There was no statutory law in this state to the contrary at the time the cited cases were decided. It was not assumed by the court in any of the cases that an instrument which was negotiable before maturity became nonnegotiable after maturity. The authorities are therefore in point. A negotiable instrument not held in due course is subject to all defenses as if it were nonnegotiable. Civ.Code, § 3139. The maker, of course, has the right to insist that payment be made to the lawful owner, and it is always a defense that the holder or the one who sues is not the true owner. Legally appellant could not recover on the note from the maker as against the defense that respondent was the true owner.

[5-7] If appellant has a better right to the note than respondent has, it would be because respondent is estopped to set up her prior title. She indorsed the note generally and delivered it to her agent, a corporation presumably of good standing and reputation. She was a victim of misplaced confidence. Upon the other hand, appellant acquired the note long after maturity and after it had passed through the hands of two prior holders. Furthermore, it acquired a $1,000 note for a consideration of $275. Its claim to protection upon equitable grounds is without merit unless the facts which we have stated establish negligence upon the part of respondent in delivering the note bearing her general indorsement to her agent for collection, and unless they establish the further fact that appellant was free from negligence in acquiring the note without making any inquiry as to the rights of prior holders, whose ostensible prior ownership appeared on the note itself. If appellant's position should be sustained, the effect would be to give to the purchaser of a negotiable instrument after maturity a title free from defects of title of prior parties, which by statute is given only to holders in due course. The equities of the case do not justify the extension to the purchaser of the past-due paper rights which are denied under the Negotiable Instruments Law. Overdue commercial paper is tainted with suspicion. The promise of the maker to pay upon a day certain becomes a questionable one when the day passes without payment having been made. It is incumbent upon one who purchases after maturity to inquire into the circumstances of the execution of the paper and its later history. If he fails to do so, he does not stand in any better position, nor is he less negligent, than a former owner who has delivered the paper bearing his general indorsement to his agent for collection. We think there is an especial duty to make inquiry where the instrument is offered for sale at a price less than one-third of its face value. Boyd v. Bearce, 48 Cal.App. 46, 191 P. 560; Jordan v. Grover, 99 Cal. 194, 33 P. 889. Certainly this is a

circumstance which should put a prudent person upon inquiry both as to the liability of the maker and the title of prior holders. Appellant should be charged with notice of whatever facts would have been discovered by an inquiry conducted with reasonable diligence. Such an investigation would have disclosed readily that the transfer by American Mortgage Company was made in violation of its authority as agent. Appellant cannot claim ignorance of facts which it would have learned except for its breach of duty to make inquiry as to the rights of former holders. No estoppel can arise in its favor when knowledge of the facts is imputed, as it must be, to appellant. Its purchase must be regarded as having been made subject to respondent's rights as the lawful owner of the note. The foregoing views are sustained by the weight of authority. Numerous cases supporting them are to be found in note in 68 A.L.R. at page 989. Without quoting from any of the cases there cited and discussed, it is sufficient to say that the reasoning to be found therein amply sustains the rule that the rights of the legal owner of a note who has indorsed and delivered it to an agent for collection only should prevail over those of one who purchases for value after maturity under such circumstances as the record before us discloses.

The judgment is affirmed.

We concur: YORK, Acting P. J.; DORAN, J.

---

20 Cal.App.2d 133

MOHUN et al. v. TIMM et al.

Civ. 11291.

District Court of Appeal, Second District, Division 2, California.

April 2, 1937.

1. Contracts ⟹354

Implied finding that plaintiffs performed services at defendants' request *held* irreconcilable with finding that at no time was there any agreement or understanding had between plaintiffs and defendants, and that no contract or agreement was actually ever entered into or agreed on by and between parties to action, and hence judgment for plaintiffs who sued on contract would be reversed.

2. Appeal and error ⟹1071(1)

Where there are irreconcilable findings on a material issue, appellate court must reverse the case.

◆

Appeal from Superior Court, Los Angeles County; Ben B. Lindsey, Judge.

Action by J. B. Mohun and another against W. D. Timm and another. From a judgment for plaintiffs, defendants appeal.

Reversed and remanded.

Bertrand Rhine and Glen Behymer, both of Los Angeles, for appellants.

Frank T. O'Neill, of San Francisco, and J. B. Mohun, in pro. per., for respondents.

McCOMB, Justice.

This is an appeal upon the judgment roll alone from a judgment in favor of plaintiffs after a trial before a court without a jury.

The conceded facts are:

"A.

"Pleadings.

"The complaint in two separate counts alleged causes of action based upon an express contract, the substance of such contract being that on or about March 25, 1936, plaintiffs, who were lawyers, entered into a contract with defendants, airplane designers and manufacturers, to form a corporation for the purpose of designing, constructing, and selling airplanes; and agreed to share between themselves in stated proportions any bonus or promotion stock issued by the corporation. It was further alleged that defendants refused to perform the contract as a result of which plaintiffs were damaged in a large sum of money.

"B.

"Findings.

"The trial court made the following findings, which are material on this appeal.

"I

"That it is not true that on or about the 25th day of March, 1936, or at any other time or at all, that plaintiffs and defendants entered into an agreement in writing or otherwise whereby said parties associated themselves together in a joint enterprise for the purpose of organizing a corporation under the laws of the state of California for the purpose of designing, constructing, or selling airplanes or aircraft pursuant to the terms of said alleged agreement, or at all; and it is not true that on or about the 1st day of April, 1936, plaintiffs and defendants formed and organized a corporation for such purposes or otherwise or at all, known as 'General Aircraft Corporation', or filed its articles of incorporation with the Secretary of State on said date, but that it is true that the plaintiffs caused to be filed on or about said date, certain purported articles of incorporation of a corporation called 'General Aircraft Corporation' purporting to have been executed and acknowledged by the defendants and the plaintiffs, while in truth and in fact said articles of incorporation had not been executed by the defendants or either of them, nor acknowledged, before a notary public; that the defendants had signed but not acknowledged, certain proposed articles of incorporation but that the plaintiffs subsequently and without the knowledge or consent of the defendants, or either of them, changed the terms and provisions of said articles as signed by defendants by substituting a page thereof, changing the stock structure of said corporation from stock of no par value to stock having a par value of one dollar per share; that this fact was not discovered by defendants until after suit was filed herein. * * *

"That it is true that while the plaintiffs and defendants were still negotiating for a possible deal or enterprise the plaintiffs filed suit herein, and in that manner terminated the negotiations between plaintiffs and defendants."

"II

"That it is true that the defendants received certain benefits from certain things done and performed and certain moneys expended by plaintiffs in the prospective possible enterprise then under discussion and negotiation between plaintiffs and defendants. That the reasonable value of the services performed by plaintiffs plus the amount of such expenditures is the sum of Twenty-five Hundred Dollars ($2,500.00). The Court further finds that all of the allegations contained in Paragraphs II and III of the second cause of action are untrue save and except to the extent found to the contrary in this paragraph of these findings." (It is to be noted that the foregoing express finding that plaintiffs performed services for defendants gave rise to an implied finding that the services were performed at defendants' request [Aydelotte v. Billing, 8 Cal.App. 673, 675, 676, 97 P. 698].

"III

"* * * It is true that at no time was there any agreement or understanding had between the plaintiffs and defendants. * * *"

"IV

"that no contract or agreement of any kind was actually ever entered into or agreed upon by and between the parties to this action."

[1] This is the sole question necessary for determination:

Are the foregoing findings irreconcilable on any material issue?

This question must be answered in the affirmative. The implied finding, which was on a material issue, set forth in paragraph II, supra, that the services performed by plaintiffs were performed at defendants' request is irreconcilable with the findings in:

(a) Paragraph III, supra, that at no time was there any agreement or understanding had between the plaintiffs and defendants.

(b) Paragraph IV that no contract or agreement of any kind was actually ever entered into or agreed upon by and between the parties to this action.

[2] The rule is settled that, where there are irreconcilable findings upon a material issue, an appellate court can do nothing but reverse the case. Hollywood Cleaning & P. Co. v. Hollywood L. Service, 217 Cal. 131, 137, 17 P.(2d) 712.

The judgment is reversed and the cause remanded for a retrial.

We concur: CRAIL, P. J.; WOOD, J.

20 Cal.App.2d 91

PEOPLE v. WIER.

Cr. 2963.

District Court of Appeal, Second District, Division 2, California.

April 1, 1937.

1. Criminal law 🔑1159(5)

On question whether evidence sufficiently identified defendant as person committing crime and whether alibi was established, the question for appellate court is whether there is any substantial evidence identifying defendant as at the scene of the crime and as the person who committed it, the weight to be given such testimony being a question for the jury.

2. Criminal law 🔑392

On trial for robbery and violation of Vehicle Code, it was not prejudicial error to permit prosecution to show search for absent witness whose name had been mentioned in question asked one of defendant's witnesses, as without such showing it might well have been contended that the question was asked in bad faith, especially where jury was instructed to disregard the whole matter and treat it as if it had never been mentioned (St.1935, p. 174, § 503).

3. Criminal law 🔑1130(3)

Where defendant complaining of instruction on alibi testimony does not set out in his brief the respects in which the instruction was erroneous, the court will not endeavor to find ways in which to upset the judgment.

4. Criminal law 🔑761(11)

Instruction that flight of person immediately after commission of crime, or after he was accused of crime, was not sufficient in itself to establish his guilt but was fact which, if proved, jury might consider in deciding guilt or innocence, and that weight to which such circumstance was entitled was a matter for the jury to determine, was not erroneous as presupposing commission of the crimes charged, as it was the instruction prescribed by statute (Pen.Code, § 1127c).

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Walter Herman Wier was convicted of offenses, and he appeals.

Affirmed.

Thomas Higgins, Jr., and Claire V. Eberhard, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

This appeal is taken by the defendant from a judgment of conviction of robbery and of violation of section 503 of the Vehicle Code (St.1935, p. 174), and from an order denying defendant's motion for a new trial.

A robbery was committed on September 29, 1936, in which a substantial sum was taken from a cash register in a Los Angeles café. Three eyewitnesses to the crime testified that the person who committed it was wearing a dark pair of pants, a light-colored felt hat, and a brown jacket—two witnesses testifying that the jacket was made of suede. At the time of his arrest, defendant had in his possession a pair of pants and a suede jacket, which were identified by two of the witnesses as being similar to those worn by the perpetrator of the crime. The three eyewitnesses testified that defendant resembled the person who committed the robbery. Two of the witnesses had, prior to defendant's arrest, identified certain photographs as being likenesses of the person who committed the robbery. These photographs were pictures of the defendant. The defendant by his own admission left California and showed up at Phœnix, Ariz., in the early morning of October 1, 1936, and remained out of the state until his arrest about a month later. Defendant testified that during the return trip to California he made the following statement to the arresting officer: "Well, if it looks too hot it is a cinch that I will be convicted. I would be willing to plead guilty on one count, if you would be willing to cooperate and drop the other two counts." The defendant testified that, at the time the robbery was committed he was in bed in a house in San Bernardino. This testimony was supported by the testimony of two witnesses, who said they were in the house with the defendant at that time.

[1] Defendant's first contention is that the evidence identifying him as the person who committed the crime is insufficient to support the verdict. The second

contention is that there is no conflict in the evidence establishing an alibi, and therefore it must be taken as true. These contentions may be answered together. On appeal the question for this court to determine as to both contentions is whether there is any substantial evidence identifying defendant as at the scene of the crime and as the person who committed it. In our view there is. People v. Griggs, 114 Cal.App. 133, 299 P. 555, and cases therein cited. The weight to be given such testimony was a question for the jury.

[2] The defendant's next contention, although vaguely stated, is that the court committed prejudicial error in permitting the district attorney to produce testimony with reference to an endeavor to locate a witness who would contradict the statement of one of the defendant's witnesses. The name of this witness had been mentioned by the prosecutor in his question to the witness for the defendant. The record shows that the defendant also put on a witness who testified that he had made a search for the absent witness. Thereafter the jury was instructed by the court to disregard the whole matter and treat it as if it had never been mentioned, and that no inferences were to be drawn from the fact that a witness was mentioned but not produced. There is no merit in this contention of defendant. If the district attorney had not produced testimony that a search had been made for the witness, the defendant might well have contended that the question was asked in bad faith. People v. Stafford, 108 Cal. App. 26, 290 P. 920.

[3] The defendant's next contention is that the court erred in giving a certain instruction on alibi testimony, but he does not set out in his brief in what respects the instruction was erroneous, and this court should not exercise its ingenuity in an effort to find ways in which to upset a judgment of the trial court. A similar instruction was approved in People v. Dowell, 204 Cal. 109, 266 P. 807.

[4] The court gave the following instruction on flight: "The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine." The defendant's final contention is that the instruction was erroneous because it "clearly presupposes the commission of the crimes charged in the information by the defendant," and he cites in this behalf People v. Lee Nam Chin, 166 Cal. 570, 137 P. 917, and People v. Sheffield, 108 Cal.App. 721, 293 P. 72, 77. In defense of this instruction the Attorney General takes recourse in article 6, § 4½, of the Constitution. The proper answer to the contention is that the instruction is the one prescribed by statute where an instruction on flight is given. Pen.Code, § 1127c.

Judgment and order affirmed.

We concur: WOOD, J.; McCOMB, J.

MORRIS v. GIBSON (RECLAMATION DIST. NO. 108 et al., Interveners).

Civ. 5742.

District Court of Appeal, Third District, California.

April 2, 1937.

Appeal and error 🔑832(1)

Opinion of District Court of Appeal in original proceeding by holder of reclamation district bonds for decree determining how rental moneys, derived by district from lands acquired thereby, should be applied, set aside, and petitions for rehearing granted for purpose of taking accounting after reference therefor to determine whether district bond fund is insolvent and what district's financial condition is.

On petitions for rehearing.

Original opinion set aside and petitions granted.

Prior opinion, 65 P.(2d) 956.

Clark, Nichols & Eltse, of Berkeley, for petitioner.

Ralph W. Rutledge, of Colusa, for respondent.

A. C. Huston, of Woodland, Thomas Rutledge, of Colusa, Horace B. Wulff, of Sacramento, and Athearn, Chandler & Farmer, Milton T. Farmer, and Edward G. Chandler, all of San Francisco, for interveners.

PER CURIAM.

The opinion heretofore filed in this cause is hereby set aside and the petitions for rehearing are hereby granted, for the purpose of having an accounting taken after reference therefor, in order that it may be determined whether the bond fund of Reclamation District No. 108 is or is not insolvent, and also, as to what the financial condition of said district actually is. After an accounting is had, the cause will be placed upon the calendar for further hearing.

---

20 Cal.App.2d 76

HARTMAN v. BOARD OF CHIROPRACTIC EXAMINERS.

Civ. 10230.

District Court of Appeal, First District, Division 1, California.

March 31, 1937.

Rehearing Denied April 30, 1937.

Hearing Denied by Supreme Court May 27, 1937.

1. Physicians and surgeons 🔑11(2)

Inquiry concerning previous convictions of applicant for chiropractic license was proper in determining moral character of applicant, and false answer to such inquiry was a willful "deception" within statute authorizing revocation of license for fraud or deception in applying therefor (Chiropractic Act, § 10 [St.1923, p. lxxxviii]).

[Ed. Note.—For other definitions of "Deception," see Words & Phrases.]

2. Physicians and surgeons 🔑11(2)

Conviction for first-degree murder *held* to involve "moral turpitude," as respects whether applicant for chiropractic license was guilty of fraud or deception in stating, on applying for license, that he had never been convicted of crime of such nature (Chiropractic Act, § 10 [St.1923, p. lxxxviii]).

[Ed. Note.—For other definitions of "Moral Turpitude," see Words & Phrases.]

3. Physicians and surgeons 🔑11(2)

Applicant for chiropractic license *held* guilty of fraud and deception in stating, on applying for license, that he had never been convicted of crime involving "moral turpitude," notwithstanding prior commutation of sentence for first-degree murder, which did not nullify original sentence or lessen offense, but merely substituted lesser for greater punishment (Chiropractic Act, § 10 [St.1923, p. lxxxviii]).

4. Limitation of actions 🔑5(3)

Statute of limitations *held* not to bar proceeding for revocation of chiropractic license, since statute does not apply to such proceedings (Chiropractic Act, § 10 [St.1923, p. lxxxviii]; Code Civ.Proc. § 340, and § 22, as amended by St.1933, p. 1805).

5. Certiorari 🔑28(3)
Prohibition 🔑10(2)

Statute of limitations, if a defense to proceeding for revocation of chiropractic license, would not deprive state board of chiropractic examiners of jurisdiction of such proceeding (Chiropractic Act, § 10 [St.1923, p. lxxxviii]; Code Civ.Proc. § 340, and § 22, as amended by St.1933, p. 1805).

6. Certiorari 🔑21
Prohibition 🔑6(2)

Neither prohibition nor certiorari would lie to restrain revocation of license to practice chiropractic by state board of chiropractic examiners, since function of boards of such character in such proceedings is administrative and not judicial (Chiropractic Act, § 10 [St.1923, p. lxxxviii]).

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Proceeding by Emerson B. Hartman against the State Board of Chiropractic Examiners. From a judgment for respondent, petitioner appeals.

Affirmed.

M. James McGranaghan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne and Darwin Bryan, Deputy Attys. Gen., for respondent.

PER CURIAM.

An appeal from the judgment in favor of the State Board of Chiropractic Examiners in a proceeding brought by appellant, Hartman, to review an order by the board revoking his license to practice chiropractic in the state of California.

The Chiropractic Act (St. 1923, p. lxxxviii) provides in section 10 that the board may revoke a license "for the employment of fraud or deception in applying" for it, and also that "any person who is a licentiate * * * against whom any of the foregoing grounds for revoking * * * is presented to the board with a view of having the board revoke * * * a license, shall be furnished with a copy of the complaint and shall have a hearing before the board in person or by attorney, and witnesses may be examined by the board respecting the guilt or innocence of the accused."

On March 8, 1930, a complaint was filed with the board, charging that appellant had employed fraud and deception in applying for a license in that he falsely stated in his application that he had never been convicted of a crime involving moral turpitude; but in truth he was on November 2, 1916, in the superior court of San Joaquin county, Cal., convicted of murder in the first degree. A copy of the complaint with a citation was served on appellant, and a hearing was had before the board on August 2, 1936, at which he was present and testified. Whether he was represented by counsel at the time is not clear from the record; however, he there stated that he wished to make his own defense. A certified copy of the judgment in the criminal case was introduced, showing the conviction alleged, and that thereupon the appellant was sentenced to the state prison for life. It was further shown, however, that the term was subsequently commuted and served. Appellant admitted this, and that he had made a false answer as to the fact of his conviction in his application to the board. He insisted, however, that moral turpitude was not involved in the offense, and that therefore the evidence upon which the board acted was insufficient to justify the order of revocation.

[1, 2] It was proper for the board, in determining the moral character of the applicant, to inquire concerning previous convictions of crime; and a false answer to such a question was a willful deception. State Bar of California v. Hull, 103 Cal. App. 302, 284 P. 492. There is no merit in the contention that the crime for which appellant was convicted did not involve moral turpitude. Holloway v. Holloway, 126 Ga. 459, 55 S.E. 191, 7 L.R.A.(N.S.) 272, 115 Am.St.Rep. 102, 7 Ann.Cas. 1164.

[3] Nor did the commutation of sentence nullify the original sentence or lessen the offense, but merely substituted a lesser for a greater punishment. In re Bogden, 62 Cal.App. 377, 216 P. 967.

[4, 5] Appellant further contended that the proceeding to revoke his license was barred by section 340 of the Code of Civil Procedure; but, as held in Re Lowenthal, 78 Cal. 427, 21 P. 7, and Bold v. Board etc., 133 Cal.App. 23, 23 P.(2d) 826, the statute of limitations does not apply to such proceedings. See Code Civ.Proc. § 22, amended by St.1933, p. 1805. Nor would the statute, if a defense, deprive the board of jurisdiction. Ex parte Tyler, 107 Cal. 78, 40 P. 33.

[6] In the recent case of Whitten v. Cal. State Bar, etc. (Cal.Sup.) 65 P.(2d) 1296, it was held that prohibition will not lie to restrain the revocation of licenses by boards of this character, the function of the board in such proceedings being administrative and not judicial. For the same reason, certiorari will not lie; and there being no facts in the present case which would warrant other relief, the judgment appealed from must be affirmed.

The judgment is affirmed.

---

20 Cal.App.2d 211

CICUREL v. PLAZA SERVICE CORPORATION OF CANADA.

Civ. 10239.

District Court of Appeal, First District, Division 1, California.

April 5, 1937.

1. Principal and agent ⇨69(1)

Agent must use utmost good faith and must not postpone his principal's interest to his own or use information acquired in the course of his agency as a means of acquiring an advantage for himself, but where there is no breach of duty in those respects, and agent obtains a lease on information which is not confidential, or acquired by reason of or in the course of employment, rule has no application.

2. Principal and agent ⇨69(1)

In action by agent, who had conducted defendant's hat and valet concessions in ho-

tels, for balance of salary and portion of profits due after termination of employment, defendant *held* not entitled to damages, on its counterclaim, on ground that agent had procured new contracts for concessions for himself while still in defendant's employ, where hotels had decided not to renew contracts with defendant, and agent had failed in attempt to obtain renewal for defendant because of conduct of defendant's new manager who had tried to settle arrears with one hotel for less than amount due under contract.

◆

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by William Cicurel against the Plaza Service Corporation of Canada, wherein defendant filed a counterclaim and cross-complaint. From a judgment for plaintiff, defendant appeals.

Affirmed.

Smith, Southwell & Smith, of San Francisco, and Joseph D. Lear, of Buffalo, N. Y., for appellant.

Philip S. Ehrlich, of San Francisco (Albert A. Axelrod and Julien R. Bauer, both of San Francisco, of counsel), for respondent.

PER CURIAM.

Appeal from a judgment in favor of plaintiff upon his complaint and against the defendant on its counterclaim and cross-complaint.

The defendant is engaged in the business of conducting hat and valet concessions in hotels, paying therefor stipulated sums as provided in its different contracts. It held a contract with the Crocker Hotel Company, a corporation, by which it conducted such concessions in the St. Francis Hotel, and one with the Palace Hotel Company, a corporation, for the valet concession in the Palace Hotel, both hotels being situated in San Francisco. Defendant's rights under its contract with the first corporation commenced on May 1, 1929, and continued to May 27, 1933. Its contract with the latter corporation was in effect from May 18, 1929, to May 18, 1934. The plaintiff was employed during the above periods as defendant's manager in San Francisco at a weekly salary and a percentage of the profits from the two concessions last mentioned. When plaintiff's employment terminated, he claimed from the defendant an unpaid balance of salary, and a share of the profits, aggregating $4,945.40, to recover which this action was brought.

As a defense and by way of counterclaim for damages, defendant alleged that before the termination of its contracts with the two corporations mentioned, and while plaintiff was still in its employ, he negotiated for and subsequently procured contracts between himself and the corporations for the concessions which defendant had held.

The trial court found that after the expiration of defendant's contracts the corporations made contracts with the plaintiff; that he had used his best efforts to induce the corporations to renew with the defendant; further, that plaintiff did not solicit the contracts or negotiate therefor before the expirations mentioned, but that the corporations refused to renew with the defendant and, after the latter's contracts expired, requested plaintiff to take over the concessions. It was also found that plaintiff's employment terminated on May 18 and each new contract was executed after that date. Judgment was entered accordingly.

Defendant claims that the findings are unsupported and are insufficient to sustain the conclusions of the trial court.

It appears that the entire capital stock of defendant company was held by one Crespi, who died some time before the expiration of the contracts. The management of the company then devolved upon an attorney in New York. The defendant was in arrears some $1,500 in its payments under the contract with the Crocker Hotel Company. Defendant's new manager made several offers of payment in sums less than the amount due, which were not accepted and, according to the testimony of officers of the hotel company, the latter before the expiration of its contract had decided not to renew with the defendant. The evidence shows that plaintiff used his best efforts to obtain a renewal for the defendant, and it is evident that his failure was due solely to the conduct of defendant's new manager.

With regard to the contract with the Palace Hotel Company, the latter's officers testified that before its expiration this company had decided not to renew with the defendant.

Testimony, which the trial court believed, was clearly sufficient to support the finding of plaintiff's good faith, that there was no previous solicitation on his own behalf, and that the renewals could not have been obtained by the defendant.

[1, 2] It is well settled that an agent must use the utmost good faith and must not postpone his principal's interest to his own or use information acquired in the course of his agency as a means of acquiring an advantage for himself [Gower v. Andrew, 59 Cal. 119, 43 Am.Rep. 242; Rezos v. Zahm & Nagel Co., 78 Cal.App. 728, 246 P. 564; Consumers Co. v. Parker, 227 Ill.App. 552; Davis v. Hamlin, 108 Ill. 39, 48 Am.Rep. 541]; but where there is no breach of duty in these respects, and a lease is obtained upon information which is not secret or confidential, or by reason of or in the course of an employment, the rule has no application [Cohn v. Clare, 6 Cal.App.(2d) 504, 44 P.(2d) 634]. Here the evidence shows, and the court found, there was no breach of faith; and it is clear that defendant's conduct and not that of plaintiff caused the refusal to renew with the defendant. The facts bring the case within Goldstein v. Burrows, 237 Mass. 79, 129 N.E. 389, where an analogous situation was held not to constitute grounds for relief.

The judgment is affirmed.

20 Cal.App.2d 71

LEWIS et al. v. NANCE.

Civ. 1803.

District Court of Appeal, Fourth District, California.

March 30, 1937.

1. Contracts 🔑147(3)

Instrument should be examined in its entirety to determine parties' intention.

2. Mines and minerals 🔑78(1)

Oil lease, obligating lessee to start drilling within 90 days from date thereof, *held* to require start of actual drilling, not merely erection of derrick or work preliminary thereto, within such time, in view of other provisions.

The lease provided that lessee should have exclusive right to prospect or drill for oil and right to establish and maintain buildings and equipment necessary or convenient in production of oil; that, if oil wells were drilled on adjacent properties within specified distance from boundary lines of leased property, lessee should begin construction of derrick or instrumentality for drilling offset wells on latter property within 30 days after commencement of drilling on former wells; and that no notice need be given lessee by lessors as to time of erection of derrick, commencement or continuance of drilling, but that lease should terminate on lessee's failure to comply with such condition.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by Lawrence V. Lewis and another against M. K. Nance. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Crail, Shutt & Crail, of Los Angeles, for appellant.

L. G. Campbell and Eugene M. Elson, both of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title to certain real property as against the rights of the defendant under an oil lease. The findings and judgment were in favor of the plaintiffs, and the defendant has appealed.

The case was tried upon stipulated facts from which it appears that the respondents leased the property to the appellant for the purpose of drilling for oil on May 29, 1933; that in May or June, 1933, the appellant employed an oil well driller to drill a well thereon; that a notice of intention to drill was filed on June 30, 1933; that on August 10, 1933, an equipment company agreed to supply the appellant with tools and equipment for drilling an oil well on this lease as soon as a derrick had been erected; that on August 26, 1933, the appellant caused the land to be surveyed and made locations thereon for three oil wells; that on the same day some sand, gravel, cement, and tools for the building of a derrick were placed upon the property and workmen began excavating for four concrete corners upon which the derrick was to be placed; that on August 27, 1933, the excavations for these four corners were completed to a depth of three feet and concrete was placed therein; that on the same day excavation for a cellar was begun, which work was continued throughout August 29, 1933; that on that day two truckloads of rig lumber were hauled on the property and workmen commenced cutting said lumber into sizes suitable for the erection of an oil derrick; and that the erection of a derrick was begun on August 29 and was practically completed on September 1, 1933, at which time work ceased because of a temporary restraining order issued in an action brought by a third party. In the meantime, notice declaring a forfeiture was served by the respondent upon the appellant on August 29, 1933.

The lease in question contained the following clause: "The Lessee agrees to start the drilling of a well for oil within ninety (90) days from the date of this agreement, and to continue the work of drilling such well, after commencing the same, with due diligence. * * *"

The appellant attacks the findings and judgment, but in effect the sole point raised involves an interpretation of this clause of the lease. It is conceded that the ninetieth day under the lease was August 27, 1933, and the question is whether the commencement of operations preliminary to the installation of an outfit to be used in drilling an oil well is a compliance with this provision of the lease, or whether compliance therewith required an actual penetration of the ground with a drill during the ninety-day period.

Cases from other jurisdictions are cited by both parties, from which it appears that there is a marked distinction between oil leases which are, by their terms, made dependent upon the commencement of operations preparatory to drilling and leases which require that actual drilling be commenced within a given time. Necessarily the class into which a particular lease falls must depend upon the language there used.

[1, 2] It is a familiar rule of construction that an instrument should be examined in its entirety in order to determine the intention of the parties. Some light is thrown upon our problem by other portions of the lease in question. Paragraph 3 thereof provides that the lessee shall have the exclusive right of prospecting or drilling for oil and the right to establish and maintain such buildings and equipment as may be necessary or convenient in the production of oil from the property. Paragraph 7 provides that in the event oil wells are drilled on adjacent properties within a specified distance of the boundary lines of the property covered by this lease the lessee shall, within thirty days from the date drilling is commenced on any such well, "begin the construction of a derrick or instrumentality for drilling oil wells" on the property here leased in order to offset the other well. It is to be noted that in paragraph 5, with which we are directly concerned, the lessee is required to start the drilling of a well within a specified time, while in paragraph 7 he is required merely to begin the construction of a derrick. This distinction is further recognized in paragraph 19 of the lease, which includes the following: "* * * providing, however that no notice need or shall be given by the Lessors to the Lessee as to time of erection of derrick, commencing of drilling or the continuance of drilling as is herein otherwise provided for. As to such matters it is understood and agreed that this lease shall terminate by the mere failing of the Lessee to comply with such condition."

Here a distinction is plainly drawn between the erection of a derrick on the one hand and the commencing of drilling on the other. It is difficult to imagine a reason for using this language if, as the appellant claims, the erection of a derrick or work preliminary to the erection of a derrick was all that was required by that portion of paragraph 5, with which we are here concerned.

We think the language of this particular lease must be interpreted as requiring the starting of actual drilling within the time named. This interpretation is supported by some cases from other jurisdictions. Solberg v. Sunburst Oil & Gas Co., 73 Mont. 94, 235 P. 761; Forney v. Ward, 25 Tex. Civ.App. 443, 62 S.W. 108; Hennig v. Wichita Natural Gas Co., 100 Kan. 255, 164 P. 297. The distinction between leases with respect to whether actual drilling or the beginning of operations preparatory to drilling is required has been recognized in two cases in this state. Johnston v. Courtial, 216 Cal. 506, 14 P.(2d) 771; Wooten v. McAdoo, 110 Cal.App. 48, 293 P. 694.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

20 Cal.App.2d 103

ROBISON v. PAYNE, County Treasurer.

Civ. 5756.

District Court of Appeal, Third District, California.

April 1, 1937.

1. Statutes 🔑4

All legislative power of state, except right of initiative and referendum, is vested in Legislature.

2. Statutes 🔑4

State Legislature may exercise all legislative powers not delegated to federal government or forbidden by Federal or State Constitution.

3. Constitutional law 🔑35

Provision of constitutional amendment, limiting expenditures of political subdivisions until certain date, that Legislature "may impose" same limitations thereafter, gave Legislature privilege of electing whether to continue such limitations, but required it, after so electing, to impose same limitations as such amendment; words "may impose" and "shall have power" being mandatory (Const. art. 1, § 22; art. 11, § 20, adopted in 1933).

[Ed. Note.—For other definitions of "Shall Have," see Words & Phrases.]

4. Constitutional law 🔑38

Act of Legislature in conflict with Constitution is void.

5. Statutes 🔑64(1)

Provision or part of act may be unconstitutional without rendering whole act void, if constitutional portions can be separated from unconstitutional portions.

6. Statutes 🔑64(1)

Doctrine that unconstitutional provision or part of act does not render whole act void, if constitutional portions can be separated from unconstitutional portions, should be applied only where parts are so distinctly separable that one can stand without the other and court can see that Legislature intended valid part to be enforceable though other parts failed.

7. Statutes 🔑64(4)

Statute extending limitations, imposed by constitutional amendment, on political subdivisions' expenditures after date of their expiration by terms thereof, as authorized thereby, but authorizing increase over such limitations by vote of mere majority of electors, providing for cumulative expenditures by subdivisions not increasing their expenditures over preceding year by authorized percentage, and changing base for determining maximum expenditures and meaning of "expenditures," *held* invalid as clearly conflicting with Constitution in fundamental provisions inseparable from rest of act, so as to remove all limitations on expenditures (St.1935, p. 1254; Const. art. 11, § 20, adopted in 1933).

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Proceeding by P. Q. Robison for a writ of mandate to Irwin E. Payne, as Treasurer of Lake County. From a judgment denying the writ, petitioner appeals.

Reversed.

W. H. Hazell and Lovett K. Fraser, both of Lakeport, for appellant.

Burt W. Busch, Dist. Atty., of Lakeport, for respondent.

James J. Arditto, Deputy Atty. Gen., amicus curiæ.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In December, 1935, appellant sold and delivered to the Kelseyville Fire District of Lake County certain equipment of the value of $27.81. A claim was presented for this amount, which was audited and allowed. Upon presentation to respondent, as treasurer of the county of Lake, payment was refused on the ground that it would involve an expenditure by the district in excess of the limitation prescribed by chapter 356, Statutes of 1935, and would therefore be an illegal expenditure. A writ of mandate was then sought to compel respondent to honor the claim, but the writ was denied, and the matter is now before us on appeal from that judgment.

In 1933 the Legislature proposed a constitutional amendment to article 11 of the State Constitution (St. 1933, p. 3073), which, among other things, added a new section thereto, known as section 20. This proposed amendment was submitted to the People at a special election in June, 1933, and adopted. By its terms the limitations imposed by section 20 expired

June 30, 1935, but provided "* * * the Legislature may impose thereafter the same limitations for such period or periods as it may determine."

In 1935 the Legislature attempted to extend the limitations provided for in section 20 of article 11 and enacted chapter 356, Statutes of 1935 (page 1254). The issue involved in this proceeding pertains to the constitutionality of this latter statute. Appellant contends that the limitations imposed by chapter 356 are different from, and in conflict with, those imposed by section 20 of article 11 of the Constitution, and that consequently the act of the Legislature is unconstitutional, and therefore there were no limitations on expenditures after June 30, 1935.

A comparison of the statute with the Constitution reveals that the statute allows an increase over the 5 per cent. limitation if a majority of the electors of the political subdivision involved authorize an increase, whereas article 11, section 20, of the Constitution requires a two-thirds vote. The Constitution requires that the 5 per cent. increase in expenditures each year be based upon the expenditures of the preceding year, while the statute provides for cumulative expenditures in cases where the political subdivision has not increased its expenditures by 5 per cent. over the preceding year. Differences also exist between the Constitution and the statute in fixing the base for determining the maximum, and also in the meaning of "expenditures" as used in the respective acts.

The question then is: Was the Legislature necessarily controlled by the limitations set forth in article 11, section 20, of the Constitution?

[1, 2] It is recognized that all legislative power of the state, except the right of initiative and referendum, is vested in the Legislature, and that body may exercise all legislative powers not delegated to the federal government, or the exercise of which is not forbidden by the Constitution of the United States, or of the State of California. It is conceded if no constitutional provision was involved, the Legislature could impose any limitation in expenditures it saw fit, but we do have a definite constitutional provision effective until June 30, 1935, containing the provision that "the legislature may impose thereafter the same limitations * * *." Between the adoption of the constitutional amendment and June 30, 1935, the Legislature could not vary the constitutional limitations on expenditures, but we are now concerned with the construction of article 11, section 20, after June 30, 1935, as applied to the power of the Legislature to enact chapter 356, Statutes of 1935, as it was written.

[3] Article 1, § 22, of the Constitution declares the provisions of the Constitution are mandatory and prohibitory unless by express words they are declared to be otherwise.

Accordingly, it was held in Fresno National Bank v. Superior Court, 83 Cal. 491, 24 P. 157, that where a provision of the Constitution is expressly made permissive as by the use of the word "may," it will not be deemed mandatory. But in Mundell v. Lyons, 182 Cal. 289, 187 P. 950, 951, the court in interpreting the language, "The Legislature, by uniform and general laws, may provide for the formation of new counties," held it was proper to examine a constitutional provision in the light of its history, and when so read the prohibitory intent of that language was plain. The court there said: "If it were permissive only, so that the Legislature still retained the power to create new counties, it both failed of the very purpose for which it was adopted and was also wholly futile, since, without it, the Legislature had the power, which it had frequently exercised, to do the very thing which the amendment gave it permission to do."

So, likewise, in section 20 the words "may impose" and "shall have power" must likewise be given a mandatory interpretation. In the absence of constitutional restriction, the Legislature would have had the power to impose any limitation on expenditures it saw fit. Therefore, in using the words "may impose" the Constitution must have intended to give the Legislature the privilege of electing whether the limitations should be continued or not, but having so elected, the Legislature was required to impose the same limitations as provided in section 20 of article 11. Otherwise, as held in Mundell v. Lyons, supra, the language of the Constitution was futile since without it the Legislature had the power to do the very thing which the amendment purported to give it permission to do.

Having concluded that the Legislature was obligated, if it desired to continue the limitations on expenditures in force, to reenact the conditions set out in the Constitution, the next question is: Is chapter 356, Statutes of 1935, in violation in whole or in part of the article 11, section 20, of the Constitution?

[4, 5] There is no doubt that an act of the Legislature which conflicts with the Constitution is void (In re Shattuck, 208 Cal. 6, 279 P. 998), but it is also an accepted principle that a provision or part of an act may be unconstitutional, and still the whole act may not be void. Paladini v. Superior Court, 178 Cal. 369, 173 P. 588; Beneficial Loan Soc. v. Haight, 215 Cal. 506, 11 P.(2d) 857. It is necessary, however, if the constitutional portions of the statute are to stand alone and remain in full force, that they can be separated from the unconstitutional portions. Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418; In re Weisberg, 215 Cal. 624, 12 P.(2d) 446; People v. Yosemite Lumber Co., 191 Cal. 267, 216 P. 39.

[6] This doctrine should be applied, however, only where (1) the parts are so distinctly separable that one can stand without the other, and (2) where the court is able to see that the intention of the Legislature was that the part declared valid should be enforceable, even though the other parts should fail. In re Wong Hane, 108 Cal. 680, 41 P. 693, 49 Am.St. Rep. 138; People v. Monterey Fish Products Co., 195 Cal. 548, 234 P. 398, 38 A.L.R. 1186; City of Stockton v. Frisbie & Latta, 93 Cal.App. 277, 270 P. 270; Pasadena High School Dist. v. Upjohn, 206 Cal. 775, 276 P. 341, 63 A.L.R. 408.

[7] Applying those principles to the statute before us and recalling the variances between the statute and the Constitution, we find clear conflict, not in its minor provisions, but in its fundamentals existing between the two. The conflicting provisions in the statute are inseparable from the rest of the act, and if the conflicting provisions are eliminated we cannot say the act would then express the true intent of the legislature.

We are of the opinion, therefore, that chapter 356, Statutes of 1935, violates article 11, section 20, and is invalid, and there being now no limitation on expenditures, the judgment of the trial court must be reversed. It is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

---

20 Cal.App.2d 124

STEINBERG v. EVANS et al.

Civ. S. C. 24.

District Court of Appeal, Second District, Division 1, California.

April 2, 1937.

1. Appeal and error 🔑110

Appeal from order denying plaintiff's motion for new trial after judgment for defendant in suit to enjoin sale of realty under trust deed foreclosure *held* unauthorized.

2. Mortgages 🔑338

Detailed statement, showing payments of interest almost two years in arrears shortly before notice of breach of obligations, imposed by note and trust deed on maker, was recorded by trustee, *held* admissible in evidence on trial of maker's suit to enjoin sale of realty on foreclosure.

3. Bankruptcy 🔑355

Mortgagor's trustee, to whom mortgagor's bankruptcy trustee sold mortgaged realty, subject to mortgagor's assignment to mortgagee of rents, lease, and agreement with tenant, on date of recording of mortgagee's declaration of maturity of all sums secured by trust deed because of mortgagor's breach of obligations imposed thereby, *held* entitled to uncollected rents due before recordation of mortgagee's second notice of breach and election to sell realty under trust deed.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Suit by Samuel H. Steinberg, as trustee for Anna L. Stine, against H. M. Evans and others. From a judgment for defendants and an order denying plaintiff's motion for new trial, plaintiff appeals.

Judgment affirmed, and appeal from order denying motion for new trial dismissed.

Philip N. Krasne and Leon Kaplan, both of Los Angeles (A. Frederick Lamken and Benjamin J. Goodman, both of Los Angeles, of counsel), for appellant.

W. I. Gilbert, of Los Angeles, for respondents H. M. and Mary E. Evans.

DESMOND, Justice pro tem.

[1] The plaintiff brought suit for an injunction to prohibit the sale of real estate under trust deed foreclosure proceedings; also for declaratory relief and an accounting. The trial court refused to grant the injunction, and by its findings determined that the defendants had "rendered to the plaintiff an accounting for all rents received and the application thereof," etc. From the judgment, holding that the defendants were entitled to proceed with the sale of the premises in question, this appeal is taken, the appellant maintaining that the court committed error in refusing an accounting to the appellant; that the accounting which was submitted by the respondents is legally insufficient; that the evidence fails to support the finding of fact and the judgment based thereon that a default existed under the terms and conditions of the note and deed of trust. It is also contended that the court erred in failing to find that the appellant was entitled to all uncollected rents which became due prior to the actual foreclosure sale. The attempted appeal from the order of the trial court denying plaintiff's motion for a new trial must be dismissed, since, under the circumstances of this case, it is not authorized. Gray v. Cotton, 174 Cal. 256, 162 P. 1019.

Although the Title Insurance & Trust Company, which was named as trustee in the deed of trust for the benefit of H. M. Evans and Mary E. Evans, appears in the case as a defendant and respondent, where the term defendants or respondents appears in this decision it will be understood, as a matter of convenience, to refer to Mr. and Mrs. Evans, and not to the Title Insurance & Trust Company.

Addressing our attention to the appeal from the judgment, we find the following situation: Anna L. Stine, owner of the real estate involved in this suit, was adjudicated a bankrupt in involuntary proceedings on July 17, 1931. She had constructed upon her property a building, designed for the undertaking business, and had leased the premises to Edwards Brothers, Inc., on October 15, 1929, for a term of 25 years, on an ascending scale of rentals. On April 9, 1930, Mrs. Stine borrowed $60,000 from the respondents, and as security for payment of the promissory note given at that time she executed a deed of trust, attaching to the premises in question, naming Title Insurance & Trust Company as trustee thereunder. On June 16, as additional security for this loan, Mrs. Stine assigned to respondents the lease which she had executed to Edwards Brothers, Inc. This assignment provided that upon the assignor's failure to perform under the terms of the note and trust deed, the assignees should have the right while default continued to enforce performance of the terms of the lease, "including the collection of rents." The assignment closed with the following clause: "Second: It is understood and agreed that the parties hereto intend to and hereby do bind themselves, their heirs, executors, administrators and assigns, to all of the terms, covenants, conditions and agreements of this assignment of lease."

On August 4, 1930, Edwards Brothers, Inc., assigned its interest in the lease to Edwards Brothers, Ltd. The involuntary petition in bankruptcy was filed against Mrs. Stine on May 18, 1931, but a little less than four months previously, on January 23, 1931, the Title Insurance & Trust Company had filed for record a notice of breach of the obligations of the note and deed of trust. After a trustee in bankruptcy had been appointed, an agreement called a "stipulation" was entered into by him and respondents on November 19, 1931, under the terms of which respondents delivered to the trustee for record a rescission of their election (which had been recorded on January 23, 1931) declaring due the entire amount represented by the trust deed. It was also provided that the "$60,000.00 note and trust deed be and the same are reinstated in full force and effect according to their respective terms and provisions, the same as though no Declaration or Election to Declare the whole of said note due and payable had been made or recorded." The stipulation provided further that the lessee, Edwards Brothers, Ltd., should pay to the trustee in bankruptcy the rents accrued and payable October 15, 1931, and all future accruing rents, and that the trustee, upon the receipt thereof, should forthwith pay said rents to the respondents. From the rents received, all accrued and accruing interest on the $60,000 note, according to its terms and provisions, was also to be paid under the terms of the stipulation, and it was provided that the payments on principal specified in the note, namely, $2,000 every six months, beginning April 9, 1934, should be paid to the date of maturity of the note, April 9, 1940, at which time the unpaid balance would become due and payable, according to the terms of the note and the trust deed securing the same.

Paragraph VII of the stipulation provided: "In the event said Los Angeles property is sold by the trustee in bankruptcy of said Stine or by the exercise of the option to purchase executed by Stine to said Edwards, or otherwise, said Evans shall be paid out of the proceeds of sale, an amount sufficient to pay and discharge all said items and amounts then unpaid hereinbefore specified to be paid said Evans—with interest thereon as hereinbefore provided—including all amounts of principal and interest on said notes then due and payable; the principal and interest of said $60,000.00 note not then due and payable shall become due and payable according (to) the terms, conditions and provisions of said note and trust deed securing same."

Paragraph VIII provided: "If said Evans does not receive payment of the rents as and when specified in said lease, said Evans may enforce payment thereof, and of all the items and amounts—to be paid to said Evans—with interest thereon—as hereinbefore specified, according to the terms, conditions and provisions of said lease and the assignment thereof and said notes and trust deed respectively."

Paragraph IX reads as follows: "That said $60,000.00 note and the said trust deed securing same, shall, except as by this stipulation modified, in all respects be and remain in full force and effect according to their respective terms, covenants and provisions."

Paragraph XI provided: "So long as said rents are paid to said Evans as herein and in said lease provided, said Evans will not declare any default under said notes or trust deeds or either of them."

By paragraph XII it was agreed: "This stipulation is executed to avoid and adjust litigation on the matters herein involved, and *if for any reason the same is not carried out and executed according to its terms and intention*, the *respective parties hereto are remitted to all their rights, the same as if this stipulation had not been made.*" (Emphasis ours.)

Acting under this stipulation, the trustee in bankruptcy collected from the lessee of the premises certain rents, some of them reduced in amount by agreement with the respondents, to whom they were paid, until finally, on May 25, 1934, the respondents declared all sums secured by the deed of trust due and payable, because of the breach of the obligations imposed by the note and deed of trust securing the same, specifying particularly that "interest is in default in an amount of $9,979.81 * * * also that principal payment in the amount of $2,000.00 was due April 9th, 1934, and remains unpaid." While this declaration was signed and acknowledged by the respondents on May 25th, it was not recorded by the trustee, Title Insurance & Trust Company, until June 8, 1934. On that date, the trustee in bankruptcy sold to "S. H. Steinberg, Trustee," the real estate here involved, "subject to all encumbrances, liens, assessments and taxes of record, mechanic's liens, judgments, *assignment of rents, lease and agreement with Edwards Brothers, Ltd.*" (Italics ours.) This deed, executed on June 8, 1934, was recorded on June 20, 1934, and passed title to several items of property in addition to the Los Angeles real estate, including "all of the right, title and interest of the bankrupt estate in and to any remaining property, rights in action, choses in action, and equities held by the trustee herein," etc. The consideration for the deed, according to its recital, was $350.

Upon receiving legal title to the Los Angeles property as trustee for Anna L. Stine, this appellant, as such trustee, filed a suit to enjoin the proposed foreclosure pursuant to the notice of breach and election to sell which had been recorded on the 8th of June, 1934. This suit was successful, and judgment was entered in favor of the plaintiff on September 20, 1934. In this connection, we may note that following the filing, on June 8th, of the notice of breach and election to sell, the respondents received two payments of rent under the Edwards Brothers lease, namely, $750 on June 11, 1934, and $750 on June 18, 1934. Prior to the time that judgment was entered enjoining the sale under that notice of breach, another notice of breach and election to sell under the deed of trust was recorded on September 1, 1934. This was followed by the filing on November 7, 1934, of the present action, which was unsuccessful from the plaintiff's point of view in the lower court, and no bond being posted upon the appeal taken, the property was sold after several continuances, on May 28, 1935. Respondents became the purchasers of the property in question, bidding therefor the sum of $60,000, minus the charges of sale.

[2] While the notice of breach of September 1, 1934, is not before us, we observe that the trial court made a finding that "the terms of said written agreement, more particularly the terms of paragraph VII thereof, were breached by the sale of the above-described premises to the plaintiff herein for a consideration of $350." That amount was very obviously insufficient to meet the obligations due respondents on the date of sale; therefore, under another provision of the stipulation, the respondents were remitted, by the breach thus occurring, to their rights "the same as if this stipulation had not been made." One of these was the right to foreclose for delinquency in money payments under the terms of the note and trust deed. The accounting had in this case satisfies us that such delinquency existed in a large amount. But appellant claims that no proper accounting was made to the court. The following colloquy appears in the transcript:

"Mr. Gilbert (counsel for respondent): Very well. What does your Honor want to do about the third cause of action? Do you want to take up the time in the accounting here, or do you want to refer it to a referee?

"The Court: If it is not too extended—

"Mr. Gilbert: It is not extended. I have it—I can put on the accounting now, if you want to do it; but if counsel wants us to go out and get all these vouchers and bring them in, that is another thing.

"Mr. Goodman (counsel for appellant): No. Let counsel proceed with his accounting and let us see how we get along. We may not need those things. I think the court can determine for himself.

"Mr. Gilbert: All right."

The accounting was rendered by means of a statement summarizing receipts and expenditures, concerning which the witness Wheeler, son-in-law and agent of the respondents, was cross-examined at some length. It showed that there were due and unpaid, in addition to the sum of $60,000, the face of the note, delinquent interest payments, penalty interest, and accrued interest, in the sum of $13,155.49, plus advances for insurance premiums and first half of 1934–1935 taxes, $582.14. We have examined this statement, and note that the first payment of rents made under the stipulation with the trustee in bankruptcy is dated December 3, 1931. It was more than a year thereafter, to wit, on December 27, 1932, before the respondents were able to enter a credit for a payment of quarterly interest due on the trust deed note. Rentals received in the intervening period were all applied to the payment of items that by the terms of the stipulation were to have precedence, such as overdue taxes, attorney's fees, trustee's fees, payments on assessments, and payments for items of operating equipment on the premises. The entry of December 27, 1932, to which we have referred, shows a credit on the interest payment that was due October 9, 1930, more than two years previously. It appears from this entry that this was in fact the second quarterly payment that had fallen due under the terms of the note, for the first quarterly payment upon this note dated April 9, 1930, was payable on July 9, 1930. For a period of almost two years following this entry of December 27, 1932, the statement shows payments applied, as available from the rents, to liquidation of the overdue quarterly payments of interest, the entry under the last date of the account, June 18, 1934, showing a credit on the quarterly interest that fell due July 9, 1932. It will be seen, therefore, that payments of interest were almost two years in arrears at a time shortly before the notice of breach was recorded. This detailed statement was received in evidence over the objection of the appellant. No error arose here, in our opinion, under the principles referred to in San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 53 P. 410, and Globe Mfg. Co. v. Harvey, 185 Cal. 255, 196 P. 261. See 10 Cal.Jur. 134, and notes.

[3] Referring to the claim that the court erred in failing to find that the appellant was entitled to the uncollected rents which became due on July 15 and August 15, 1934, prior to the recordation of the notice of breach and election to sell on September 1, 1934, we believe the decision of the court that respondents are entitled to those rents is sustained by the weight of authority. Collier on Bankruptcy (3d Ed.) p. 1198; Associated Co.

v. Greenhut (C.C.A.) 66 F.(2d) 428. It will be remembered in this connection that the conveyance to Steinberg as trustee for Mrs. Stine was made by the trustee in bankruptcy "subject to * * * assignment of rents, lease and agreement with Edwards Brothers, Ltd."

Judgment affirmed. Attempted appeal from the order denying motion for new trial dismissed.

We concur: HOUSER, P. J.; YORK, J.

---

20 Cal.App.2d 214

ANTONSEN v. SAN FRANCISCO CONTAINER CO., Inc., et al.

Civ. 10391.

District Court of Appeal, First District, Division 2, California.

April 5, 1937.

1. Judgment 🔑106(5)

Pleadings of defendants in action for money had and received by which defendants sought recovery for breach of written contract, which were designated as cross-complaints and which were acknowledged as cross-complaints in receipt of service, *held* "cross-complaints" as respects right of plaintiff to set aside default judgments entered thereon on ground pleadings were not cross-complaints and did not require an answer.

[Ed. Note.—For other definitions of "Cross-Complaint," see Words & Phrases.]

2. Judgment 🔑145(2), 146

Plaintiff *held* not entitled to set aside default judgments on cross-complaints even if judgments were independent judgments thereon and it was error to enter independent judgments, in absence of showing of a defense to causes of action set forth in cross-complaints or that error, if any, in entering such judgments was prejudicial (Code Civ.Proc. § 475).

3. Appeal and error 🔑223

Whether default judgments on cross-complaints should have been set aside because cross-complaints were served upon plaintiff's original attorney after such attorney had been suspended from practice of law and such service was invalid was not determined by reviewing court where it did not appear that claim had been urged in trial court or that any showing was made with respect thereto.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Louis J. Antonsen against the San Francisco Container Company, Incorporated, the Pacific Container Company, Limited, the Pacific Container & Excelsior Company, corporations, Arthur H. Sommer and another, wherein the corporate defendants and defendant Sommer filed answers and cross-complaints. From an order of the trial court denying plaintiff's motion to set aside his defaults for failure to answer the cross-complaints and the judgments entered against him and in favor of the cross-complainants, the plaintiff appeals.

Affirmed.

Waldo F. Postel, of San Francisco, for appellant.

Rudolph J. Scholz, of San Francisco, for respondents.

SPENCE, Justice.

This is an appeal by plaintiff from an order of the trial court denying plaintiff's motion to set aside the defaults of plaintiff for failure to answer two cross-complaints and to set aside the judgments entered against plaintiff and in favor of the cross-complainants.

Plaintiff commenced this action in March, 1931, by filing a complaint against defendants for money had and received in the sum of $3,000. The corporate defendants filed an answer and cross-complaint. Said cross-complaint was based upon the alleged breach by plaintiff of a written contract and the prayer thereof was for damages in the sum of $10,000. Defendant Sommer also filed an answer and cross-complaint. Said cross-complaint was also based upon the alleged breach by plaintiff of a written contract and the prayer thereof was for damages in the sum of $5,000. Receipt of copies of said answers and cross-complaints was acknowledged under date of April 6, 1931, by the attorney who had filed plaintiff's complaint. Under date of August 24, 1931, other attorneys were substituted as attorneys for plaintiff. On September 30, 1931, the default of plaintiff was entered and on the same day, after a hearing by the court, judgments by default were entered against plaintiff. The court found that all of the allegations of the cross-complaints were true except as to damages and further found that the corporate defendants have been damaged only in the sum of $3,500 and that defendant Sommer had been damaged only in the sum of $1,897. Judgments were entered accordingly.

The record presented on this appeal discloses no other proceedings in said cause until the year 1936, when plaintiff's substituted attorneys withdrew and plaintiff's present attorney was appointed. Under date of September 4, 1936, plaintiff served a notice of motion to set aside said defaults and said judgments. Said motion was made upon the ground that said defaults were improperly entered and that said judgments were void because the "alleged cross-complaints were not cross-complaints" and "did not require any answer by plaintiff" and that the court was without jurisdiction to enter either said defaults or said judgments and that said judgments were "void upon their faces." No affidavits or other documents accompanied the notice of motion and it was stated in said notice that the motion would be based "upon the judgment roll herein and upon all the files, papers and proceedings in said action." A hearing was had and said motion was denied on September 24, 1936. No bill of exceptions is presented on this appeal and the certificate of the trial judge to the typewritten transcript states that there was no testimony taken on the hearing of the motion and that the papers included in said transcript and no others were used and considered on the hearing.

[1, 2] We find no error in the trial court's ruling denying the motion to set aside said defaults and said judgments. The pleadings in question were cross-complaints, they were so designated and in each instance receipt was acknowledged of the "within answer and cross-complaint." The court had jurisdiction of the parties and of the subject-matter and neither judgment was void upon its face. Assuming, without deciding, that there is merit in plaintiff's claim that said judgments were independent judgments on said cross-complaints and that it was error to enter such independent judgments, we are nevertheless of the opinion that plaintiff failed to make a sufficient showing upon his motion to set aside said judgments. There was no showing to indicate that plaintiff had any defense to the causes of action set forth in said cross-complaints or that the error, if any, in entering said judgments was prejudicial. Code Civ.Proc. § 475.

[3] Plaintiff further claims that the cross-complaints were served upon his original attorney five days after said attorney had been suspended from the practice of law and that said service was invalid. It is a sufficient answer to state that it does not appear that this claim was urged in the trial court in support of plaintiff's motion or that any showing was made with respect thereto.

The order is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

GREAT WESTERN DISTILLERY PRODUCTS, Inc., v. JOHN A. WATHEN DISTILLERY CO. et al. *

Civ. 11277.

District Court of Appeal, Second District, Division 2, California.

March 25, 1937.

Rehearing Denied April 15, 1937.

Hearing Granted by Supreme Court May 24, 1937.

1. Monopolies ⚷17(2)

Contract making plaintiff, except one other, exclusive purchaser in California of defendant's warehouse receipts for whisky, *held* not void as contract restraining exercise of lawful trade or business (Civ.Code, § 1673).

2. Statutes ⚷181(2)

Statutes are interpreted in light of reason and common sense.

3. Monopolies ⚷12(1)

Contracts between individuals, main purpose and effect of which are to promote and increase business in line affected, will not be held to be in restraint of trade merely because operation of contract might in some possible theoretical way incidentally and indirectly restrict trade in such line (Civ.Code, § 1673).

---

*For subsequent opinion see 74 P.2d 745.

4. Sales 🔑1(3)

Contract making plaintiff, except one other, the exclusive purchaser in California of defendant's warehouse receipts for whisky, *held* not fatally uncertain because price of merchandise was not fixed, since price could be supplied by implication that reasonable price was intended (Civ.Code, § 1729(4).

5. Sales 🔑78

When price is not specified in contract for sale of goods, whether executory or executed, price is supplied by implication that reasonable price is intended (Civ.Code, § 1729(4).

6. Contracts 🔑9(3)

Failure to specifically limit duration of contract making plaintiff, except one other, the exclusive purchaser in California of defendant's warehouse receipts for whisky did not fatally affect contract and did not give rise to right to terminate contract at will without liability for damages.

7. Sales 🔑84

Even where contract for sale of goods is silent as to its duration, the party seeking to terminate it must give the other party reasonable notice thereof, and such termination cannot be effected until at least a reasonable time has expired.

8. Contracts 🔑9(3)

Contract making plaintiff, except one other, the exclusive purchaser in California of defendant's warehouse receipts for whisky, as long as the plaintiff purchased and continued to purchase from defendant all of its warehouse receipts for whisky that it exploits in California, *held* sufficiently certain and valid as to duration.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the Great Western Distillery Products, Incorporated, against John A. Wathen Distillery Company, and another. From an adverse judgment, plaintiff appeals.

Reversed.

Goldenhorn & Komins, I. Faerber Goldenhorn and Robert Komins, all of Hollywood, and Solomon Rosenbaum, of Los Angeles, for appellant.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for respondents.

CRAIL, Presiding Justice.

A general demurrer to the plaintiff's first amended complaint was sustained without leave to amend and judgment was entered accordingly. The appeal is taken from said judgment.

Under the allegations of one of the counts of the complaint the parties entered into an agreement which, when boiled down, reads as follows: The defendant enters into an agreement with the plaintiff whereby the defendant agrees with the plaintiff that as long as the plaintiff purchases and continues to purchase from the defendant all of its John A. Wathen Distillery Company warehouse receipts for whisky that it may require and sells and exploits in California said warehouse receipts, and refrains from selling and exploiting warehouse receipts from any other distillery, the defendant will not sell in California any of the said warehouse receipts to any other person except one in San Francisco. The complaint further alleges that the plaintiff, relying upon the said agreement, purchased from the defendant a quantity of said warehouse receipts at the time of entering into said contract and that thereafter the plaintiff continued to purchase quantities of said receipts from the defendant and at all times has been and now is and will continue to be ready, willing, and able to purchase additional receipts and will refrain from purchasing receipts from other distilleries; that in reliance upon said agreement the plaintiff expended large sums of money for the purpose of advertising, circularizing, and exploiting the defendant's warehouse receipts, and further large sums of money for opening branch offices in California for the purpose of carrying on the business contemplated by said contract, stating the amounts; that the defendant breached said contract, stating the facts, and that by reason thereof the plaintiff was damaged in certain sums, naming them.

In another count plaintiff, in addition to the above, alleges that the defendant did willfully, falsely, and fraudulently enter into said contract with intent to deceive and defraud the plaintiff and to induce the plaintiff to purchase and agree to purchase in the future and sell, advertise, circularize, and exploit said warehouse receipts. That said representations, agreements, and covenants of the defendant were fraudulent and false and known by the defendant to be fraudulent and false in that the defendant never intended to perform the same, and that defendant did, during the term of said representations, willfully, and maliciously and with intent to injure the plaintiff's business sell and dispose of large numbers of said warehouse receipts to others.

[1] The first contention of the defendant is that the foregoing contract is void as a contract and unavailing as a representation, in this, that it violates section 1673 of the Civil Code, which provides, in effect, that every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void. In our view of the contract its terms indicate that it was entered into, not for the purpose of restricting any trade or business, but for the purpose of promoting one. It is true the contract makes the plaintiff, except one other, the exclusive purchaser in California of the defendant's warehouse receipts, but obviously, both the purpose and effect of the contract are, not to restrict the sale of the defendant's receipts, but to create an instrumentality by which the receipts will be exploited and sold. The contract does not restrain any one from exercising a trade or business of any kind within the purview of section 1673 of the Civil Code.

[2, 3] Statutes are interpreted in the light of reason and common sense, and it may be stated as a general rule that courts will not hold to be in restraint of trade a contract between individuals, the main purpose and effect of which are to promote and increase business in the line affected, merely because its operations might possibly in some theoretical way incidentally and indirectly restrict trade in such line. This view has often been sustained by the Supreme Court of the United States in analogous cases. See numerous cases cited and digested in Ripy & Sons v. Art Wall Paper Mills, 41 Okl. 20, 136 P. 1080, 51 L.R.A.(N.S.) 33.

[4, 5] The defendant's next contention is that the contract was fatally uncertain in that there is no agreement as to the price of the merchandise to be sold by the defendant and purchased by the plaintiff. There is no fatal uncertainty in this respect. The rule is that when no price is specified in a contract for the sale of goods, whether executory or executed, the price is supplied by the implication that a reasonable price is intended. Dickerman v. Ohashi Importing Co., 63 Cal.App. 101, 218 P. 458; Williston on Sales (2d Ed., 1924), § 171. This rule was adopted in the Uniform Sales Act and has been incorporated into our law by section 1729 (4) of the Civil Code, which provides as follows: "Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case."

[6, 7] The final contention of the defendant is that the contract was for an indefinite time and therefore was terminable at the will of either party thereto. The failure to specifically limit the duration of the contract did not fatally affect it and did not give rise to a right to terminate the contract at will without a liability for damages. Even where a contract for the sale of goods is silent as to its duration, the party seeking to terminate it must give the other party reasonable notice thereof, and such termination cannot be effected until at least a reasonable time has expired. Southern Pacific Co. v. Spring Valley Water Co., 173 Cal. 291, 159 P. 865, L.R.A.1917E, 680; 13 Corpus Juris 604, § 630.

[8] In the instant case the contract is not silent with regard to its duration. On the contrary, it provides that "as long as the plaintiff purchases and continues to purchase, * * *" etc., the contract will remain in effect. The contract is very similar to the one involved in the case of Noble v. Reid-Avery Co., 89 Cal.App. 75, 264 P. 341, 342. In that case the agreement was that the plaintiff was to purchase for resale from the defendant a large quantity of welding rods, and would, from time to time, purchase additional amounts as necessity required and "it was distinctly understood at the time of the first order of goods * * * that [the plaintiff] should have the exclusive right to sell the goods and represent the [defendant] in * * * Southern California, as long as they were able to give faithful service and a business management to the trade and produce the trade that was warranted in the territory allotted to them, and no longer." The court said, "Such provisions for the duration of the contract are sufficiently certain and valid. As a general proposition the failure of an executory contract to state a time presently definite for its termination does not render it void for uncertainty." Citations for the rule are given, and the question is rather fully discussed.

Since these are the only points raised against the validity of the contract, and since there is no merit in any of them, it is our decision that the complaint is not vulnerable to general demurrer and that the judgment should be reversed.

Judgment reversed.

I concur: WOOD, J.

---

20 Cal.App.2d 196

PEOPLE v. McCONNELL.

Cr. 1945.

District Court of Appeal, First District, Division 1, California.

April 3, 1937.

Hearing Denied by Supreme Court May 3, 1937.

1. Criminal law ⇨1202(1)

Admission of defendant, accused of grand theft, of prior felony conviction in California for grand larceny, *held* not improper, notwithstanding that the grand larceny of which he was convicted was no longer a felony, as respects whether defendant could be sentenced as an habitual criminal (Pen.Code, § 644; St.1923, p. 237).

2. Criminal law ⇨1202(1)

In determining whether prior California conviction was for a felony, so as to make defendant an habitual criminal, date of such prior conviction, and not date of subsequent trial for another offense, must be considered (Pen.Code, § 644).

3. Criminal law ⇨997

That defendant, convicted for grand theft and sentenced as habitual criminal, improperly admitted that prior California grand larceny conviction was a felony conviction, could not be made basis for issuance of writ of error coram nobis, where defendant could have, but did not, raise such question on appeal from judgment in grand theft prosecution (Pen.Code, § 644).

◆

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

William McConnell was convicted for grand theft and sentenced as an habitual criminal, and, from an order denying his petition for a writ of error coram nobis, he appeals.

Order affirmed.

William McConnell, in pro per.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

TYLER, Presiding Justice.

Appeal from an order sustaining a demurrer to a writ of error coram nobis without leave to amend and denying the petition for the writ. From the order denying the writ petitioner has appealed.

[1, 2] It appears from the facts that on December 31, 1928, the district attorney of Contra Costa county filed an information charging appellant with grand theft, and two prior convictions of grand larceny, one in Alameda county and one in El Dorado county. One of the two prior convictions, that in El Dorado county was committed on October 24, 1920, and the amount involved was $80. This crime at the time of its commission constituted a felony. Appellant pleaded guilty to the substantive charge of the crime of which he was charged in the information filed on December 31, 1928, and admitted the two prior convictions. He was sentenced to Folsom state prison as an habitual criminal under section 644 of the Penal Code. Appellant contended at the hearing of the writ, and here contends, that upon his trial in 1928 when he admitted the prior conviction occurring in El Dorado county, the law had been amended in 1923 (St. 1923, p. 237) so that the theft of $80 was no longer a felony, and that therefore he improperly admitted that offense as a prior felony conviction. There is no merit in this contention. The Habitual Criminal Act, section 644 of the Penal Code, contains no provision that the prior felony must be such an offense at a subsequent date of prosecution. The date of conviction, therefore, is the time to be considered in determining whether or not the offense was a felony at the subsequent trial.

In support of his claim appellant has cited us to the case of People v. Pace, 2 Cal.App.(2d) 464, 38 P.(2d) 202. The case does not support his contention. There the prior conviction was the theft of $10 committed in a sister state where the offense constituted a felony but would have been a misdemeanor in this state and not subject of a state's imprisonment either before or after the 1923 amendment. Where prior convictions charged have been suffered in sister states, section 668 of the Penal Code controls. It is there provided that the question of a defendant being an habitual criminal must be measured by the punishment to be imposed in this state for the offense. People v. Shaw, 137 Cal.App. 533, 30 P.(2d) 1031.

[3] Moreover, appellant could have raised the question here presented on an appeal from the judgment, but no appeal was taken. Under these circumstances the point made cannot be the basis subsequently for the issuance of a writ of error coram nobis. People v. Lawyer, 11 Cal.App.(2d) 718, 54 P.(2d) 747.

The order is affirmed.

We concur: CASHIN, J.; KNIGHT, J.

---

20 Cal.App.2d 193

HALL et al. v. BERLINER et al.

Civ. 1743.

District Court of Appeal, Fourth District, California.

April 2, 1937.

1. Negligence 🔑136(14)

Ordinarily, question of whether person is guilty of gross negligence is one of fact to be determined by trier of facts.

2. Appeal and error 🔑994(3)

Where no conflict in evidence exists, if different conclusions on issue of gross negligence may rationally be drawn from evidence, finding of trier of facts on such issue may not be disturbed, and it is only when it must be declared that no conclusion other than that person charged was guilty of gross negligence may properly be deduced from evidence that reviewing court is justified in setting aside trial court's finding to the contrary.

3. Appeal and error 🔑1008(1)

In action for death of guest when automobile in which guest was riding turned over, gross negligence of host who while driving thirty-five miles per hour turned to his left to pass box truck, sounded horn when truck suddenly turned to its left, and, in attempt to avoid collision, host turned sharply to right and went off highway, *held* for trial court sitting without jury.

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by Wallace Edward Hall, a minor, by Russell E. Hall, his guardian ad litem, and Russell E. Hall against J. J. Berliner and another. From a judgment for defendants, plaintiffs appeal.

Affirmed.

See, also, 138 Cal.App. 484, 32 P.(2d) 685.

Brittan & Mack, of Bakersfield, and Richard C. Waltz, of Beverly Hills, for appellants.

Borton, Petrini & Conron, of Bakersfield, for respondents.

JENNINGS, Justice.

On July 20, 1931, Maeme Louise Hall was killed when the Packard coupe in which she was riding as a guest turned over. The plaintiffs in this action are the surviving husband and the minor child of the deceased. The defendants are Edna Williams, the owner of the automobile, who was riding in it at the time the accident occurred and J. J. Berliner, who was then driving the car with the owner's consent. The cause was tried before the court without a jury and at the conclusion of the trial the court found that the defendant Berliner was driving the automobile in a negligent manner at the time of the accident, but that he was not guilty of gross negligence in the operation of the car. Judgment was accordingly rendered in favor of the defendants. This appeal has been taken by plaintiffs from the judgment so rendered.

Prior to the occurrence of the accident Berliner was driving south on the Bakersfield-Los Angeles highway at a speed of approximately 45 miles per hour. When he had arrived at a point approximately 25 miles south of the city of Bakersfield, he observed a box truck which was headed south. At this time Berliner was approximately 1 mile north of the truck. He continued to proceed at a speed of about 45 miles per hour until he arrived at a point approximately 75 feet from the rear end of the truck when he retarded the speed at which he was driving the Packard to 35 miles per hour, turned to his left and sounded the horn with the intention of passing the truck on its left side. He then observed that an automobile was approaching from the south and it was his opinion that this last-mentioned vehicle was distant from him approximately 1½ miles. Just at this time the box truck turned sharply to its left and proceeded ahead of him on the east side of the highway. Berliner continued to sound the horn of the Packard at intervals. When he arrived at a point about 25 to 35 feet north of the rear end of the truck, he turned the Packard sharply to the right and ran off the highway where the automobile came in contact with an embankment of stones and turned on its side. At this point the paved portion of the highway was 20 feet wide and the dirt shoulders on both sides of the pavement had been plowed and filled with sand. On the west side there was a drop of 8 or 10 inches from the edge of the pavement to the plowed shoulder of the highway. The Packard proceeded along the shoulder for a distance of 40 feet to the point where it turned on its side.

The sole point urged by appellants on this appeal is that the above-narrated facts indicate that respondent Berliner was guilty of gross negligence as a matter of law. This contention may not, in our opinion, be sustained.

[1] It is here conceded that ordinarily the question of whether or not a person is guilty of gross negligence is one of fact to be determined by the trier of facts. The concession is proper. It is supported by numerous California authorities among which are the following decisions: Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327; Malone v. Clemow, 111 Cal.App. 13, 295 P. 70; Taylor v. Cockrell, 116 Cal.App. 596, 3 P.(2d) 16; Meighan v. Baker, 119 Cal.App. 582, 6 P.(2d) 1015; Smith v. Wagner, 137 Cal.App. 556, 30 P.(2d) 1020; Goodwin v. Goodwin, 5 Cal.App.(2d) 644, 43 P.(2d) 332. It is, however, maintained that the evidence produced during the trial of this action was not conflicting and that the facts developed thereby showed that no conclusion other than that respondent Berliner was guilty of gross negligence could properly have been reached.

[2, 3] It is unquestionably the rule that, where no conflict in the evidence exists, if different conclusions upon the issue of gross negligence may rationally be drawn from the evidence, the finding of the trier of facts on the issue may not be disturbed. Malone v. Clemow, supra; Goodwin v. Goodwin, supra. It is only when it must be declared that no conclusion other than that the person charged was guilty of gross negligence may properly be deduced from the evidence that a reviewing court is justified in setting aside the trial court's finding to the contrary. The undisputed evidence disclosed by the record does not justify a declaration that the only rational conclusion deducible therefrom is that respondent Berliner was guilty of gross negligence. The factual situation here presented is very similar to that which was presented in Simpson v. Steinhoff, 131 Cal.App. 660, 21 P.(2d) 960, where this court refused to reverse a judgment of nonsuit in favor of a host driver who was a defendant in an action brought by a guest.

The judgment from which this appeal has been taken is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

---

20 Cal.App.2d 246

METROPOLITAN LAUNDRY CO., Limited, v. GREENFIELD et al.

Civ. 10347.

District Court of Appeal, First District, Division 1, California.

April 7, 1937.

1. Injunction 🔑146

Though temporary injunction generally will not be granted on complaint alone when defendant files answer specifically denying all material allegations of complaint, there may be peculiar circumstances justifying temporary injunction, even in face of absolute denials in answer.

2. Appeal and error 🔑954(1)
Injunction 🔑135

Granting or refusing of temporary injunction is a matter addressed to sound discretion of trial court, whose actions will not be disturbed on appeal except where abuse of discretion is shown, especially where motion is based on complaint alone and verified answer denying all material allegations of complaint.

3. Injunction ⚷152

Trial court did not abuse discretion in granting temporary injunction restraining defendant from engaging in laundry business, though plaintiff's motion was based only on complaint, to which was attached defendant's contract not to engage in such business, and on defendant's answer denying facts pleaded in the complaint, where plaintiff's rights were in danger of being infringed upon, and injunction merely prohibited defendant from doing those things he contracted not to do.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by the Metropolitan Laundry Company, Limited, against B. C. Greenfield and others. From an order granting plaintiff a preliminary injunction restraining the named defendant from violating a contract with plaintiff, the named defendant appeals.

Affirmed.

See, also, (Cal.App.) 61 P.(2d) 495.

Otto G. Kuklinski, of San Francisco, for appellant.

Thomas, Beedy & Paramore, of San Francisco, for respondent.

TYLER, Presiding Justice.

Appeal from an order granting a temporary injunction. The action in which the relief was prayed for and granted was one for damages. The allegations are to the effect that defendant Greenfield was employed by plaintiff as a laundry driver to collect from and deliver to customers of plaintiff certain laundry work; that at the time Greenfield entered upon his employment he agreed in writing that while in the employment of plaintiff, or thereafter, should such employment be terminated, he would not solicit, divert, or take away, or furnish to any person, for a period of one year after the termination of such employment, information that would lead to the obtaining of plaintiff's customers. The complaint alleged that the employment had terminated and Greenfield had and was violating his contract with plaintiff by soliciting plaintiff's customers to bestow their work upon a competitor of plaintiff, and many customers had in consequence been induced to give their work to a rival concern to the great and irreparable damage of plaintiff. The answer denied the facts pleaded in the complaint and alleged certain other facts which it is claimed show that plaintiff was not entitled to maintain the action. Upon reading the verified complaint, to which was attached Greenfield's contract with plaintiff not to solicit plaintiff's customers, a preliminary injunction was issued by the terms of which Greenfield was restrained from doing such acts as his agreement recited he was not to do. It is from the order granting the injunction that Greenfield has appealed.

[1-3] Appellant makes the contention that he was denied the opportunity of presenting his defense, and the action of the trial court in issuing the injunction after the filing of his answer was an abuse of discretion, arbitrary and erroneous. While it may be conceded to be the general rule that a temporary injunction will not be granted upon the complaint alone when defendant files an answer specifically denying all the material allegations of the complaint (Crandall v. Woods, 6 Cal. 449; Gagliardo v. Crippen, 22 Cal. 362), yet there may be peculiar circumstances in a case justifying a temporary injunction even in the face of the absolute denials in the answer (Lutz v. Western Iron & Metal Co., 190 Cal. 554, 213 P. 962). The granting or refusing to grant a temporary injunction is a matter which is addressed to the sound discretion of the trial court, and its action will not be disturbed on appeal except where an abuse of discretion is shown, and this is especially true where the motion is based upon the complaint alone and a verified answer denying all the material allegations of the complaint. Pavilion Ice Rink v. O'Brien, 60 Cal.App. 185, 212 P. 632. There may be peculiar circumstances in a case justifying a temporary injunction, even in the face of absolute denials in the answer. De Godey v. Godey, 39 Cal. 157. Here, according to the allegations of the complaint, appellant Greenfield was placed in a position of confidence, and the rights of his employer are in danger of being infringed upon by his unfair practices in using to his own advantage and to the disadvantage of his former employer the trade secrets and the list of customers confidentially reposed in him. We cannot say that the trial court under such circumstances abused its discre-

tion in granting the relief prayed for. The preliminary injunction in this case does no more than prohibit appellant from doing the very things he contracted under his agreement not to do, and upon the granting of the order a bond was required of plaintiff.

The order is affirmed.

We concur: CASHIN, J.; KNIGHT, J.

---

20 Cal.App.2d 261

GERONTOPOULOS v. GERONTOPOULOS et al.

Civ. 10453.

District Court of Appeal, First District, Division 2, California.

April 8, 1937.

1. Partition 🔑63(3)

Evidence in partition suit *held* to justify trial court's finding against defendant's claim that plaintiff sold his half interest in premises to his cotenant before entry of divorce decree awarding defendant all of such cotenant's interest, in absence of documentary evidence substantiating such claim.

2. Estoppel 🔑70(1)

Evidence in partition suit that plaintiff saw newspaper announcement concerning, and complaint in, defendant's action against plaintiff's cotenant for divorce *held* not to justify application of doctrine of estoppel against plaintiff, who was not party to such action, wherein defendant obtained decree awarding her all of cotenant's interest in premises.

3. Partition 🔑16

Divorced wife's declaration of homestead on certain premises after commencement of partition suit by cotenant of her former husband, whose interest therein was awarded her by divorce decree, *held* not to defeat plaintiff's right to undivided half interest therein, in absence of proof of executed agreement for sale of such interest to cotenant before entry of decree.

4. Partition 🔑85

Court did not err in limiting contribution of plaintiff in partition suit for improvements, made by his cotenant and latter's wife primarily for their benefit while occupying premises as their home without paying plaintiff any compensation therefor, to specified amount ordered paid to wife from plaintiff's half interest in proceeds of partition sale after divorce decree awarding her cotenant's interest in premises.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by John Gerontopoulos against Stamatia Gerontopoulos and others. From an interlocutory decree of partition, defendants appeal.

Affirmed.

Julian D. Brewer, of San Francisco, for appellants.

John R. Tyrrell and W. L. A. Calder, both of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff brought this action seeking a decree of partition as to certain premises consisting of a city lot with a nine-room dwelling house erected thereon. An interlocutory decree of partition was entered adjudging that plaintiff was the owner of an undivided one-half interest in said premises and ordering the sale thereof. Defendants appeal from said interlocutory decree.

In 1915 plaintiff and his brother, Gust Gerontopoulos, owned the premises as tenants in common. The brothers were natives of Greece and had established themselves as partners conducting a grocery business in San Francisco. After the purchase of said premises, Gust Gerontopoulos married defendant Stamatia Gerontopoulos in 1916. The remaining defendants are the minor children of said parties. Defendant Stamatia filed a divorce action against Gust in 1932. She obtained a decree in said action awarding to her all of the interest of Gust in said premises subject to certain restrictions upon her right to alienate or encumber her interest during the minority of the children. It was for this reason alone that the children were named as defendants in this action and we may, for the purpose of this discussion, treat Stamatia as the sole defendant and refer to her as such.

[1] It is conceded that the title to the premises was originally vested in plaintiff and his brother Gust and it is further conceded that all of Gust's interest in the premises became vested in defendant by

virtue of the divorce decree. It was defendant's claim, however, that plaintiff had orally agreed to sell his interest to Gust, that said oral agreement had been fully performed, and that Gust had become the sole owner of the premises long prior to the entry of the decree in the divorce action. The trial court found against this claim of defendant and concluded that plaintiff was the owner of an undivided one-half interest in the premises and entitled to partition thereof. Defendant's main contention on this appeal is that the trial court erred in making said findings and conclusions, but we find no merit in this contention.

The evidence in support of defendant's claim was unsatisfactory in many respects and said evidence was contradicted in all of its material phases. If it be conceded that there was evidence to support defendant's claim, it must also be conceded that there was ample evidence to support the claim of plaintiff. There was evidence to show that after the marriage of defendant in 1916, the parties all lived together in said dwelling house during most of the time up until 1925; that during said time plaintiff occupied one of the rooms in said house and that defendant merely did the work necessary to keep house for the family group; that the provisions for all were supplied from the grocery store owned by plaintiff and his brother; that no accounts were kept or claims made showing any definite financial arrangements between the parties with respect to the running of the dwelling house; that there was no oral agreement made concerning the sale of plaintiff's interest in the premises to Gust and no oral agreement made that plaintiff was to be charged $30 per month for the services of defendant as housekeeper to be applied on the alleged purchase price as claimed by defendant; that plaintiff left said dwelling house in 1925, but continued to pay half of the taxes and insurance at all times; that for approximately two years following plaintiff's leaving, Gust paid plaintiff $15 per month as rent for the exclusive use of said dwelling house; that thereafter plaintiff refused to pay for further repairs and improvements, and there was some discussion of Gust's purchasing plaintiff's interest; that no such purchase was made, but Gust continued to have the exclusive use of the premises without payment of rent and thereafter made repairs and improvements without consulting plaintiff and without plaintiff's knowledge. It being admitted that plaintiff was still the holder of the record title to an undivided one-half interest and there being no documentary evidence of any kind to substantiate defendant's claim regarding the alleged sale, the trial court was entirely justified in determining upon the evidence before it that said claim was without foundation in fact.

[2] Defendant makes the further contention that the trial court erred in not applying the doctrine of estoppel against plaintiff. Defendant calls our attention to evidence showing that plaintiff had seen an announcement in a local newspaper concerning the divorce proceeding between defendant and Gust and that he had later seen the complaint in that action. We find nothing in the record which would justify the application of the doctrine of estoppel and defendant presents no authorities sustaining her contention. Plaintiff was not a party to the divorce action and the court, in determining the issues therein, could not and did not deal with any question concerning the real property in question except that of the relative rights of the parties to that action with respect to any interest which said parties had in said real property.

[3] Defendant states a further contention as follows: "Where one co-tenant homesteads the property held in common between them, the non-homesteading co-tenant, who has lost the right of possession thereof, may not dissolve and terminate the homestead by partition proceedings." It may be stated that after the commencement of this action, defendant made a declaration of homestead upon the premises. It is unnecessary to discuss defendant's last-mentioned contention further than to point out that it is based upon the premise that plaintiff had "lost the right to possession of the property by executed agreement of sale." As above indicated, the trial court found against the existence of any such executed agreement of sale.

[4] The final contention of defendant is that even assuming that the trial court was justified in adjudging that plaintiff was the owner of an undivided one-half interest, it erred in "limiting contribution for the improvements made by Gust and Stamatia to $180." This sum was the amount which was ordered paid to defendant out of plaintiff's one-half interest in the proceeds of the sale. Defendant had asserted a claim for expenditures for repairs and improvements made throughout the occupancy of the premises and even as early as 1917. The amounts of the alleged expenditures was in

excess of $3,000. The evidence affirmatively showed that plaintiff did contribute his shares of some of the alleged expenditures. It further appeared that most of the alleged expenditures were for the ordinary type of repairs and improvements and that they were made after plaintiff had ceased to occupy the premises. These expenditures were apparently made primarily for the benefit of defendant and her husband, who actually occupied the premises as their home and who paid no compensation to plaintiff therefor from 1927 until the date of trial. Under these circumstances, it does not appear that the trial court erred in limiting plaintiff's contribution to the amount specified. See note on "Adjustment on Partition of Improvements Made by Tenant in Common," 1 A.L.R. 1189 et seq. and cases cited.

The decree is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

---

20 Cal.App.2d 297

COMMERCIAL STANDARD INS. CO. v. MARGOLIS et al.

Civ. S. C. 43.

District Court of Appeal, Second District, Division 1, California.

April 10, 1937.

Appeal and error 🔑1011(1)

Trial court's finding on conflicting evidence in judgment creditor's action to set aside homestead on realty purchased by plaintiff at execution sale that dwelling house, in which defendant spouses spent considerable time, was considered their permanent abode and apartment occupied by them only temporary abode, must be accepted by appellate court as final; not being unreasonable.

◆

Appeal from Superior Court, Los Angeles County; Benjamin C. Jones, Judge.

Action by the Commercial Standard Insurance Company against Joe Margolis, also known as Joseph D. Margolis, Alma Margolis and another, in which defendants filed a cross-complaint. From a judgment for defendants on the cross-complaint and an order denying a new trial, plaintiff appeals.

Judgment affirmed, and appeal from order denying a new trial dismissed.

Phillip W. Silver and Paul C. Hill, both of Los Angeles, for appellant.

Edward I. Linder and Nathan M. Dicker, both of Los Angeles, for respondents.

SHINN, Justice pro tem.

In this action by a judgment creditor to set aside a homestead upon real property which he had purchased at execution sale the court decided that prior to the sale the property had been impressed with a valid homestead declared by defendant Alma Margolis for the benefit of herself and her husband, Joseph D. Margolis, the judgment debtor. Plaintiff's judgment thus executed was not obtained before the filing of the declaration nor was the debt one for which a homestead could be sold except by the method prescribed by section 1245 and following sections of the Civil Code under which method a creditor may secure the application upon the judgment of the amount realized upon a sale in excess of the homestead exemption. No proceedings were had under these sections. The court found that at the time the declaration was made and filed Alma Margolis and her husband were actually residing upon the homestead premises. Judgment was in favor of said defendants upon their cross-complaint to quiet title against the claims of plaintiff, evidenced by the sheriff's certificate of sale, and plaintiff appeals.

Appellant assails the finding that the declarant and her husband actually resided upon the premises as being unsupported by the evidence. The argument presented here is such as should have been and doubtless was presented to the trial court. We have read the extensive quotations from the record contained in the briefs. The testimony shows that the parties had two places of abode in different sections of the city: One the dwelling house in question and the other an apartment. It appears that the dwelling house had been the home of Joseph D. Margolis for ten years or more although in later years he had maintained a room or an apartment elsewhere. He and his wife spent a considerable part of their time, principally week-ends, in the dwelling house where other members of the husband's family also resided. The husband and wife kept their furniture and some of their clothing in the dwelling house and it appears that they occupied an apartment as well principally for the reason that the dwelling house was located at some distance from the site of the husband's business activities, in which the wife acted as his assistant, whereas the apartment was conveniently close to the place of business.

The court weighed this evidence against evidence that Joseph D. Margolis some two years prior to the filing of the declaration of homestead made affidavit when registering as a voter that he resided at the apartment address. The trial court was confronted with conflicting evidence from which it had to determine the intent of the parties with reference to the matter of residence and the court's conclusion that the dwelling house was considered their permanent abode and the other a temporary one, only, was not unreasonable.

Under all of the circumstances in evidence, the finding as to residence is brought within the rule which requires us to accept the trial court's determination as final upon the question of mixed law and fact involved. Quinn v. Nevills, 7 Cal. App. 231, 93 P. 1055; Bradley v. Davis, 156 Cal. 267, 104 P. 302; In re Estate of Peters, 124 Cal.App. 75, 12 P.(2d) 118.

Judgment is affirmed; the appeal from the order denying a new trial is dismissed.

We concur: YORK, Acting P. J.; DORAN, J.

---

20 Cal.App.2d 339

IDA MAY CO., Inc., v. ENSIGN.

Civ. 5782.

District Court of Appeal, Third District, California.

April 13, 1937.

Hearing Denied by Supreme Court June 10, 1937.

1. Trade-marks and trade-names and unfair competition 🔑10

Though person may confer rights by consent on another to use his personal name as a trade-mark, ordinarily personal names may not become trade-marks, as between persons of same or similar names, since each has equal right to use his own name in his own business.

2. Trade-marks and trade-names and unfair competition 🔑73(1)

Corporation which used Christian and middle name of individual, and which registered that name with secretary of state as its exclusive property, *held* not entitled to enjoin individual from using her full name in her business, where individual was guilty of no fraud, deceit, or connivance to detriment of corporation, and there was no evidence that individual had authorized exclusive use of her name by corporation as a trade-mark.

Appeal from Superior Court, Los Angeles County; Allan B. Campbell, Judge.

Suit by the Ida May Company, Incorporated, against Ida May Ensign. From a judgment in favor of the defendant, the plaintiff appeals.

Affirmed.

Paul M. Joseph and Leonard J. Meyberg, both of Los Angeles, for appellant.

MacFarlane, Schaefer, Haun & Mulford and Raymond V. Haun, all of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered against it in a suit for damages and to enjoin the defendant from employing her own personal name of "Ida May" as a part of the name under which she conducts a similar business. On the theory that no fraud or deceit was exercised by the defendant in conducting her business under the name of "Ida May Ensign," it was determined there was no infringement of the plaintiff's alleged trade-mark and no unfair competition established by the proof which was adduced.

The plaintiff is a corporation engaged in the mercantile business of selling at retail a special high-class grade of women's wearing apparel, with a permanent place of business at 726 South Flower street in the city of Los Angeles. The complaint is couched in two counts. The first cause of action charges the defendant, Ida May Ensign, with unfair trade practices in the conducting of a similar business at 3258 Wilshire boulevard in the same city, to the damage of plaintiff. The second count alleges that in 1934 the plaintiff registered with the secretary of state, pursuant to law, the trade-name of "Ida May" as its exclusive property to be used in connection with its said business, and that the defendant, Ida May Ensign, thereafter infringed upon plaintiff's said trade-name by the use of her own name in her separate business. The plaintiff sought to enjoin the defendant from infringing on said trade-name and from continuing to use that name in connection with her business, and demanded judgment for damages for said infringement and unfair trade practice, both of which were denied. Findings were adopted favorable to the defendant, and a judgment was rendered in her favor denying the injunction and providing that the plaintiff take nothing by its action.

The appellant concedes that the evidence is conflicting and that it must therefore be assumed the record adequately supports the findings. But it is contended the findings are ambiguous and insufficient to determine the issues proffered by the pleadings, and that the judgment is not supported by the findings. It is chiefly asserted that the court failed to affirmatively find that the defendant, Ida May Ensign, did not infringe on plaintiff's exclusive trade-mark, "Ida May."

The question of law to be determined is whether the plaintiff, the Ida May Company, Inc., could lawfully claim the exclusive right to register according to law and use in its mercantile business the Christian and middle names of the defendant, "Ida May," so as to preclude her from thereafter employing the use of her own name in connection with the maintenance and operation of her own business independently of the plaintiff's business.

We are of the opinion there is no merit in appellant's contention that the findings are ambiguous or insufficient to support the judgment. An elaborate set of findings was adopted. With specific reference to the allegations of the complaint, the court affirmatively found each issue, except the statements which were admitted by the answer, to be untrue. The court further specifically found all of the new matter affirmatively alleged in the answer to be true. Moreover, the court also found: "That each and all of the allegations of plaintiff's complaint not admitted by the pleadings and not herein specifically found to be true are untrue, and that each and all of the allegations of the answer and affirmative defense of the defendant Ida May Ensign not herein specifically found to be untrue are true."

In effect the court has clearly found that in 1912 the plaintiff was incorporated under the name of Stuart McCrossin Company and engaged in a general millinery business in Los Angeles, in which corporation the defendant, Ida May Rohrer, then unmarried, was a stockholder, and the president; that in 1913 the company changed its name to the "Ida May Co., Inc.," and changed its business from general millinery to the merchandising of a highly specialized class of women's apparel, which has ever since been conducted at 726 South Flower street in Los Angeles; that the company used the trade-name of "Ida May" in connection with its business on labels, wrappers, and stationery; that the defendant married in 1919 and thereafter assumed the surname of her husband, being known as and called Ida May Ensign; that she became ill in 1934 and retired temporarily from active participation in the business; that soon thereafter the plaintiff filed its petition in bankruptcy and in an effort to compromise its indebtedness with creditors demanded of the defendant that she transfer her shares of stock to the company upon a threat to sell her stock for unpaid assessments or impose upon her a stockholder's liability; that she thereupon transferred her stock to the company without consideration and severed her interest and association with the company; that thereafter the corporation for the first time registered in the office of the secretary of state pursuant to law the alleged trade-name, "Ida May," as its exclusive property for use in its business, and recorded notice thereof in the county of Los Angeles; that in February, 1935, the defendant opened a similar business of merchandising women's wearing apparel on Wilshire boulevard under the name of "Ida May Ensign," which was the true name by which she was known and called since her marriage in 1919; that she did not obtain or use a list of plaintiff's customers or attempt to solicit, entice, or encourage any customer of the plaintiff to patronize her business; that she did not advertise or represent that she was interested in or connected with the plaintiff's business, but on the contrary explained to every customer who raised the question that she was in no way connected with that business; that she performed no act and made no statements to deceive customers into believing that she was interested in or connected with the plaintiff's business; and that none of plaintiff's customers were so deceived or misled by her conduct, acts, or declarations to the detriment of the plaintiff's business or otherwise. The court specifically determined in that regard: "That it is true that the defendant has not at any time resorted to any artifice or done any act calculated to mislead the public or the customers and patrons of the plaintiff as to the identity of the respective establishments or to produce any injury to the plaintiff."

The court then followed these findings of facts with its conclusions of law, the only material one of which is that, "The plaintiff is not entitled to any relief by reason of its complaint on file herein."

There are other conclusions which are couched in the form of declarations of law, clearly intended to determine that, since the defendant was guilty of no artifice or fraud in the conducting of her business or the use of her own name "Ida May Ensign" to identify her business, the plaintiff is not entitled to enjoin her from using that part of her own name which the corporation registered as its trade-mark for its own exclusive benefit.

The findings are not ambiguous. The court has specifically determined each material issue against the plaintiff. While the court did find that the plaintiff registered as its trade-mark the Christian and middle names of the defendant with the secretary of state pursuant to law, after she had severed her connection with the corporation, and that the defendant did subsequently establish a similar business under her full name, including her Christian and middle names, it is also specifically found that she employed no artifice to deceive the public or to mislead any individual regarding the identity of the respective businesses, and that no act or conduct of the defendant did mislead or deceive any customer of the plaintiff or any individual in that regard.

[1] It is well settled that while a person may confer rights by consent upon another to use his personal name as a trade-mark, ordinarily personal names may not become trade-marks because, as between persons of the same or similar names, each has an equal right to use his own name in his own business. The right to consent to the use of a personal name by another party as a trade-mark is in conflict with the principle that trade-marks become property rights which are necessarily exclusive in their nature. Tomsky v. Clark, 73 Cal.App. 412, 238 P. 950, 952; 63 C.J. 358, § 54; J. V. Boudrias Fils Ltee. v. Boudrias Freres Ltee., [Canada] 4 D.L.R. 328. In the present case there is no evidence that the defendant authorized the exclusive use of her name by the plaintiff as a trade-mark.

[2] Since it is conceded in this case that the evidence supports the findings, and the findings specifically determine the fact that the defendant was guilty of no fraud, deceit, or connivance to the detriment of plaintiff in the use of her own name to identify her business, the case of Tomsky v. Clark, supra, is decisive of this appeal. The facts of that case are somewhat similar to this cause. Regarding the inherent right of an individual to use his own name to identify his business, so long as he does not thereby deceive the public or other individuals to the detriment of his competitor, the court appropriately said in that case:

"The mere fact that appellants filed a certificate of copartnership to operate a business under the family name of another gave them no perpetual right to the use of such name to the exclusion of the real owner thereof, so as to deprive him from ever afterwards engaging in the same kind of business in his own name or through the medium of a corporation bearing his name. And it would have made no difference, even if there had been some one connected with appellants' firm by the name of Rauer. Morton v. Morton, 148 Cal. 142, 82 P. 664, 1 L.R.A.(N.S.) 660. The right to do business under one's own name is one of the sacred rights known to the law; and a family name is incapable of exclusive appropriation, and cannot be thus monopolized. Nims on Unfair Competition and Trade Marks (2d Ed.) § 67.

"Every man has the absolute right to use his own name in his own business even though he may interfere with and injure the business of another bearing the same name; provided he does not resort to any artifice or do any act calculated to mislead the public as to the identity of the establishments or to produce injury to the other beyond that which results from the similarity of names."

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

20 Cal.App.2d 198

LANDIS et al. v. FIRST NAT. BANK OF LAMANDA PARK.

Civ. 5785.

District Court of Appeal, Third District, California.

April 3, 1937.

Rehearing Denied May 1, 1937.

Hearing Denied by Supreme Court May 27, 1937.

1. Corporations 🔑123(16)

Complaint *held* sufficient to state cause of action for accounting to estate of deceased stockholder of defendant bank for amount paid latter for deceased's stock in excess of amount paid therefor by one purchasing it from another bank, to which it was pledged by deceased, for defendant bank's benefit through agency of latter's president, who was executor of deceased's will (Civ.Code, §§ 2228, 2229, 2234).

2. Appeal and error 🔑917(1)

In dealing with complaint and demurrer thereto on appeal from judgment dismissing action after sustaining demurrer, District Court of Appeal must consider every item well pleaded in complaint as true.

3. Corporations 🔑123(16)

Complaint in legatees' action for accounting of amount paid defendant bank for testator's stock therein in excess of amount paid therefor by one purchasing it from another bank, to which it was pledged by testator, for defendant bank's benefit through agency of latter's president, who was executor of will, *held* sufficient, though not alleging demand on executor to prosecute action; facts alleged showing uselessness of such demand.

4. Descent and distribution 🔑91(2)

Generally, beneficiaries cannot prosecute actions to recover property belonging to decedent's estate, unless executor or decedent's personal representative cannot or will not act, or such representative, by collusion with debtor or otherwise, obstructs natural course established by law for transmission of estate to decedent's heirs.

5. Descent and distribution 🔑91(2)
Wills 🔑748

Decedent's heirs or legatees under his will may sue for recovery of estate's assets, in removal of which into other parties' hands executor or decedent's personal representative was one of moving parties.

6. Executors and administrators 🔑115

Executor of estate or personal representative of deceased holder of bank stock, pledged as security for indebtedness contracted by deceased, was required to act with utmost good faith in relation thereto and have it sold for highest possible obtainable price, instead of endeavoring to buy it or arranging to have it bought for benefit of bank, of which he was president; such stock constituting part of estate's assets, subject to lien of pledge.

7. Executors and administrators 🔑74, 75

Executor of will occupied trust relation toward testator's estate and all beneficiaries under will.

8. Corporations 🔑123(16)

Complaint, stating facts showing that certificates of defendant bank's stock, pledged by decedent to another bank, were sold by latter to ostensible purchaser for benefit of defendant bank through agency of latter's president, who was executor of estate, for stated sum, while defendant received ten times as much therefor from others, *held* to show that estate was damaged in amount of difference between such sums and hence entitled to accounting therefor by defendant, which stood in same position as president thereof in relation to transactions concerning trust property (Civ.Code, §§ 2228–2239).

9. Trusts 🔑198

Generally, trustee may not buy trust property for his own benefit.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Ruth Landis and others against the First National Bank of Lamanda Park. From a judgment of dismissal, plaintiffs appeal.

Reversed with directions.

Walter M. Campbell and Walter M. Campbell, Jr., both of Los Angeles, for appellants.

Wilton W. Webster, of Pasadena, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon an appeal by the plaintiffs from a judgment of dismissal following the sustaining, without leave to amend, the defendant's demurrer to the plaintiffs' second amended complaint. Motion to file a second amended complaint was also denied.

The action is for an accounting for and on account of 137 shares of the capital stock of the defendant bank, belonging to William Wallace Flatt, now deceased, pledged by him to the Citizens Commercial Trust & Savings Bank of Pasadena, hereinafter referred to as "Citizens Bank," as collateral security for the payment of moneys borrowed by him from said bank, which stock was afterwards sold by the said bank, and purchased for the benefit of the defendant bank through the agency and activity of its president, and immediately thereafter distributed to certain subscribers therefor, at a greatly increased price per share.

The plaintiffs in this action are legatees under the last will and testament of William Wallace Flatt, deceased. A copy of the will is attached to the second amended complaint, but need not be set forth herein. The will of the deceased was probated during the year 1932. The estate, however, is not yet closed. Among the assets of the estate were the shares of stock herein just mentioned, and certain other shares of stock not material for our present consideration.

Prior to his death Flatt was a stockholder and director of defendant's bank. Earl Grimes, the president of the defendant bank, was, during all the times herein mentioned, the executor of the last will and testament of William Wallace Flatt, deceased.

On or about March 17, 1933, the Citizens Bank purported to sell 137 shares of the capital stock of the defendant bank without giving notice to any one except Grimes and the attorney of the defendant bank. The price agreed upon for the sale of said stock was $25 per share, amounting to the sum of $3,425. One Joseph Schweikert was the ostensible purchaser, with money furnished by said Grimes under an agreement with the defendant acting through its president Grimes, that the stock should be redelivered to certain other persons according to the terms of an agreement designated as Exhibit B hereinafter set forth.

It further appears from the complaint that the officers of the defendant bank and all parties had knowledge of the proposed transaction. A demand was made upon Grimes, and also upon the defendant, to account to the estate of the deceased for the excess value which was paid for said stock by the parties to whom the bank distributed the same.

The allegations of the complaint show that at all the times mentioned herein the president of the defendant bank was acting as the executor of the last will and testament of William Wallace Flatt, deceased, and was instrumental in the execution of the agreement which is attached to the complaint relative to the purchase of the stock in question at the most advantageous price possible, and in the distribution of the same to subscribers therefor at a greatly enhanced price.

[1] The complaint is very lengthy, but in order to set forth the allegations therein, which seem to us to state a cause of action, it is necessary to summarize the different paragraphs contained therein, to wit: Preliminarily, the plaintiffs state that the action is begun for themselves and in behalf of all others who are legatees under the will, or heirs to the said deceased who may thereafter join as plaintiffs or defendants. Then, the following allegations:

First. That the Lamanda Bank, the defendant, is a national banking association;

Second. That William Wallace Flatt, a resident of the county of Los Angeles, died on or about the 6th day of May, 1932, leaving a last will and testament, in which Earl Grimes was named as executor, and who thereafter qualified as the same, and at the time of the filing of the complaint was acting in that capacity;

Third. This paragraph sets forth the relationship of the plaintiffs to William Wallace Flatt, deceased, and their being named in his last will and testament as legatees and devisees;

Fourth. That among the assets of the estate of said deceased were certificates representing 142 shares of the capital stock of the defendant bank, of the par value of $100 each, and that of said shares 137 had been pledged by the deceased to the Citizens Bank to secure certain promissory notes made payable to Earl Grimes, and by him transferred or endorsed to the Citizens Bank. This paragraph also refers to other stock not material to this action;

Fifth. This paragraph relates to the sale of other shares of stock not involved in this action;

Sixth. Sets forth that Earl Grimes had, prior to the death of William Wallace Flatt, been the executive vice president of the defendant bank, and that upon the death of Flatt, Grimes was elected president of the bank, and during all the times hereinafter mentioned has been such officer, acting as such for compensation;

Seventh. So far as material to this action this paragraph is in the following words and figures:

"That Wilton W. Webster, Esq., was one of the attorneys of said Citizens Commercial Trust & Savings Bank of Pasadena; that at all the times herein mentioned said Webster was the attorney of said Grimes, both as executor and individually, and of said defendant, First National Bank of Lamanda Park; that on or about the 17th day of March, 1933, said Citizens Commercial Trust & Savings Bank of Pasadena, in collusion with said Grimes and other officers and agents of defendant-bank, with the aid and assistance of their said attorney, purportedly sold, without notice to anyone except said Grimes and said defendant-bank and their said attorney, said 137 shares of the capital stock of First National Bank of Lamanda Park, belonging to said estate, at private sale, at a price theretofore agreed upon among them, to-wit: for the sum of $3,425.00, to one Jos. Schweikert, as an ostensible purchaser thereof; that said Schweikert was at that time a member of the Board of Directors of said defendant First National Bank of Lamanda Park, and was then and there the agent of said Grimes and of said bank, selected and appointed by them to bid for and purchase said stock at the most advantageous price obtainable to, for, and on behalf of said bank; that a copy of his said appointment as the agent of said defendant-bank for that purpose is hereto attached, made a part hereof, and marked 'B'; that he paid therefor said sum of $3,425.00, which sum of money had immediately theretofore been without consideration advanced and delivered to him by said Grimes, for that purpose, which sum of $3,425.00 was by said Citizens Commercial Trust & Savings Bank of Pasadena, credited as follows:

"$2,500.00 on the claim for $7,538.75; and
"$ 925.00 on the claim for $3,538.75;

"that said Schweikert received from said Citizens Commercial Trust & Savings Bank of Pasadena said certificates representing said 137 shares of the capital stock of said First National Bank of Lamanda Park, and delivered the same to one R. D. Hart, cashier of said defendant-bank; that immediately thereafter said bank, acting by and through said Grimes as president, and said Hart, as cashier, delivered said 137 shares of stock to divers and sundry persons who had, prior to said purported sale and purchase, and on or about the 16th day of March, 1933, subscribed to said bank therefor, at the price of $250.00 per share, and said defendant-bank immediately thereafter received therefor the total sum of $34,250.00 in cash, a sum exceeding the price credited to said estate by $30,825.00, which last named sum was wrongfully converted to the use of said defendant-bank and its stockholders."

Paragraph 8 is in the following words and figures:

"That plaintiffs are informed and believe, and upon such information and belief allege, that at all times herein mentioned, and particularly at the time of the purported sale and purchase and of the resale of said 137 shares of the capital stock of said First National Bank of Lamanda Park, the officers, directors and attorney of said First National Bank of Lamanda well knew, and they each had full notice and knowledge of the following facts: that said 137 shares of stock belonged to the estate of said decedent; that said Earl Grimes was at the same time the executor of said estate and a stockholder, director and president and executive officer of said bank for compensation; that said stock was being sold by said Citizens Commercial Trust & Savings Bank of Pasadena with the full knowledge, acquiescence and approval of said Grimes, at private sale, without court approval; that said Grimes was furnishing the money to said Schweikert, as the agent of said bank for the purchase thereof, with instructions to purchase the same at the most advantageous price obtainable; that said stock was being so purchased at $25.00 per share and being resold for the benefit of said bank at $250.00 per share, of which only said sum of $25.00 per share was to be credited to said estate; that said Grimes, as executor or otherwise, had made and intended to make no effort to prevent or postpone said sale, or to have said sale made by himself as executor, subject to approval of court, rather than by said Citizens Commercial Trust & Savings Bank of Pasadena, as pledgee, nor to find a purchaser thereof, other than said bank, or to have said stock bring a higher price at said sale than the amount that he and said bank had determined in advance, to-wit: $25.00 per share; that in all of said transactions the said Grimes occupied and held antagonistic positions, to-wit: (a) as executor of said estate and trustee of plaintiffs as legatees; (b) as a director and as president and executive officer of said bank; and (c) as a stockholder of said bank, interested in said purchase and furnishing the purchase price. That the officers, directors and attorney of said bank in said transaction wrongfully conspired and colluded with said Grimes and with said Citizens Commercial Trust & Savings Bank of Pasadena to acquire said stock for $3425, with the intention and purpose of immediately delivering the same to subscribers therefor, obtained in advance at a great profit to said defendant-bank and to its stockholders."

Paragraph 9 alleges a demand upon the defendant to pay over to the estate of the deceased the excess profit alleged to have been obtained by it in the sum of $30,825;

Paragraph 10 does not appear to us to be material in support of the plaintiffs' present cause of action, nor as pleaded does it constitute any bar, being a proceeding having for its purpose the removal of Grimes as executor of the last will and testament of the deceased;

Paragraph 11 sets forth that without the recovery of the sum from the defendant bank, the estate of William Wallace Flatt is insolvent, and the legatees and devisees will receive nothing under the last will and testament of said deceased.

Exhibit B heretofore referred to is in the following words and figures, to-wit:

"This Agreement, made and executed this 17th day of March, 1933, by and between The First National Bank of Lamanda Park, a corporation, as first party, and Jos. Schweikert, as second party,

"Witnesseth: That Whereas, the second party proposes to acquire certain capital stock of first party now owned by the estate of William Wallace Flatt, deceased, and held in pledge by Citizens Commercial Trust & Savings Bank of Pasadena, at the most advantageous price obtainable:

"Now, Therefore, the second party, in consideration of one dollar and other good and valuable considerations, the receipt of which are hereby acknowledged, does hereby undertake and agree with the first party that in the event that he obtains any of said stock as aforesaid, he will cause the same to be resold to such persons only as the Board of Directors of said first party shall designate, and for such price as may be determined by said Board of Directors; and that any sum or sums received from such sale shall be delivered to the first party as and for voluntary contribution made by the respective purchasers of such stock, which voluntary contribution shall be added to the capital resources of said bank, and for no other purpose.

"In Witness Whereof, the first party has caused this instrument to be executed by its officers thereunto duly authorized, and the second party has hereunto set his hand, the day and year first above written.

"[Seal of First National Bank of Lamanda Park.]

"First National Bank of Lamanda Park
"By E. Grimes, President
"And R. D. Hart, Cashier,
"First Party.
"Joe Schweikert,
"Second party."

To this complaint the defendant interposed a general and special demurrer. As we have stated, the demurrer was sustained without leave to the plaintiffs to amend, and also that their motion for leave to file a second amended complaint was denied.

It is the contention of the respondent that the complaint does not state facts sufficient to constitute a cause of action; that it cannot be amended to state a cause of action; and that the plaintiffs had no capacity to sue. These objections do not appear to us to be well taken.

The complaint shows that all the parties had knowledge of the entire transaction, the proposition to buy the stock at the best obtainable figure; that the money was being advanced by the president of the defendant bank; that an arrangement had been made to dispose of the stock to subscribers at a greatly increased price; that the purchase was being made at private sale without any notice thereof to others than the parties interested in the defendant bank.

[2] In dealing with the demurrer and with the complaint as presented to us,

every item well pleaded must be considered as true. This being the case, it shows that Earl Grimes not only acting as executor of the estate of William Wallace Flatt, deceased, but as president of the defendant bank and as agent of the bank, became a party to the plan to buy the stock at the most advantageous price, under an agreement by which the purchaser was obligated to distribute the stock according to the wishes and directions of the board of directors of the bank, and that it was to be distributed to certain individuals who had previously agreed to pay $250 a share, notwithstanding the purchase price was only $25 a share. This certainly calls for an explanation. We are not passing upon the good faith of what was done, but simply upon the question of whether the complaint, including Exhibit B, shows facts which, if unexplained, would lead to the conclusion that there had been a betrayal of trust.

Section 2228 of the Civil Code reads: "In all matters connected with his trust, a trustee is bound to act in the highest good faith towards his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind." On the face of it there was an advantage obtained as against the estate of which Earl Grimes was the executor, and to which he occupied a trust relation.

Section 2229, supra, reads: "A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner." Again, on the face of the complaint and Exhibit B, it appears that the executor of the estate, Earl Grimes, did deal with trust property for the benefit of the bank of which he was president and an executive officer.

Section 2234 of the same Code provides as follows: "Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust." While the complaint does not use any number of adjectives in setting forth the cause of action, it does set forth all the acts alleged to have been taken, which shows upon its face that the parties connected with the defendant bank were using trust property for the benefit of the bank of which they were members.

[3] There is no allegation in the complaint that a demand was made upon Earl Grimes to prosecute this action as against the defendant bank, but the facts set forth in the complaint show beyond controversy, if true, the uselessness of any such demand. It is apparent from the allegations, accepted as true upon demurrer, that any action prosecuted by Earl Grimes as against the defendant bank of which he was president, would not and could not have been prosecuted in good faith. A restatement of the facts are not necessary to establish the foregoing statement.

[4] As stated by the respondent, the general rule is that beneficiaries may not prosecute actions for the recovery of property belonging to the estate, and that it is the duty of the executor or personal representative to do so. This rule has its exceptions. In 23 Corpus Juris, p. 1193, § 426, we find the rule thus stated: "While the personal representative is the proper person to proceed for the recovery of assets of the estate, it is held that the beneficiary may prosecute claims where the personal representative cannot or will not act, or where the personal representative himself, by collusion with the debtor, or otherwise, obstructs the natural course which the law establishes for the transmission of the estate to the heirs." The latter portion of this rule apparently has been overlooked by the respondent in its citation of authorities.

[5] Our attention has been called to the case of Holland v. McCarthy, 177 Cal. 507, 171 P. 421. We may add, In re Estate of Clark, 190 Cal. 354, 212 P. 622; also, Hall v. Southern Pacific Company, 40 Cal. App. 39, 180 P. 20; likewise, the case of Little v. Caldwell, 101 Cal. 553, 36 P. 107, 40 Am.St.Rep. 89. In all of those cases the exception which we note as mentioned in the excerpt which we have taken from Corpus Juris, supra, is mentioned, and each case as to the exceptions must rest upon its own peculiar facts. Thus, it appears where the executor of the estate or representative of the deceased is himself one of the moving parties in removing the assets of the estate from the estate and into the hands of other parties, facts are shown which entitle the heirs or legatees to maintain an action for the recovery of such assets.

[6] It is true that the certificates representing 137 shares of stock mentioned herein had been pledged to secure the payment of an indebtedness contracted by the deceased, yet at the same time, subject to

the lien of the pledge, that property constituted part of the assets of the estate, and the executor thereof, or personal representative of the deceased, was required to act in relation thereto with the utmost good faith and instead of endeavoring to buy it, or arranging to have it bought for the benefit of the bank, of which he was president, at the best obtainable price, it was his duty to have that stock sold for the highest possible obtainable price.

Taken as true, the facts pleaded show that the act of the executor of the last will and testament of William Wallace Flatt, deceased, tended to obstruct the natural course of the administration of the estate of the deceased, and to transmit to the heirs thereof, or the legatees under the last will and testament of said deceased, the proceeds of the estate.

[7] We do not need to cite authorities that Earl Grimes, as the executor of the last will and testament of William Wallace Flatt, deceased, occupied a trust relation in connection with the estate, and also as to all beneficiaries under the last will of said deceased.

The agreement known as Exhibit B sets forth on its face that they were dealing with certificates of stock owned by the estate of William Wallace Flatt, deceased; that after obtaining said stock at the most advantageous price, it was to be "resold to such persons only as the Board of Directors of the first party" (respondent) "shall designate, and for such price as may be determined by said Board of Directors, and that any sum or sums received for such sale shall be delivered to first party" (respondent). The agreement then provides that such sum shall be added to the capital resources of the bank, and for no other purpose. This latter statement, of course, is surplusage, as the price for which the stock was to be resold and turned over to the bank would necessarily constitute a portion of the resources of the bank, irrespective of the language just quoted from the agreement.

In addition to the authorities we have cited showing the right of heirs or legatees to maintain the action, we may refer to 11 Ruling Case Law, p. 262.

[8] Again, it is alleged by the respondent that the complaint fails to show that the estate has been damaged. In so many words, the complaint contains no such allegation, but it does set forth facts showing that the certificates of stock belonging to the estate of the deceased were sold for the aggregate sum of $3,450, while the defendant bank received therefor the aggregate sum of $34,250. Accepted upon the demurrer as true, it is only a matter of calculation to show that the estate has been damaged in the sum of $30,324, or thereabouts. This is the dealing with the property of the estate by the president of the defendant bank, as shown by the complaint. In this connection we may very well call attention to sections 2228 to section 2239 of the Civil Code relative to the duties, obligations, and liabilities of trustees. According to the facts set forth in the complaint, the defendant bank stands in the same shoes with Earl Grimes in relation to the transactions concerning the trust property. Citation of authorities on the question of damages in view of the foregoing appears to us unnecessary.

It appears that the demurrer to the amended complaint was sustained without leave to amend, and the application of the plaintiffs to further amend their complaint was denied on the ground of incapacity of the plaintiffs to maintain this action. The foregoing facts and the authorities cited we think show clearly the right of the plaintiffs to maintain this action and prosecute the same to final conclusion. For this reason it seems to us unnecessary to consider whether the statement made by plaintiffs' counsel and the petition filed for leave to further amend is sufficient to show grounds for reversal.

[9] A further objection is urged by the respondent, that the trustee, being Earl Grimes in this instance, had a right to purchase the trust property. There is a line of cases holding that where the trustee acts in good faith and goes into the market openly and without any prearranged plan to purchase the trust property, and bids for the same just as others would, the sale or purchase will be upheld. The general rule, however, is that a trustee may not buy trust property for his own benefit. The rule is thus stated as a headnote to the collection of authorities on this subject found in 77 A.L.R. p. 1514, to-wit: "In most of the cases in which the question has been presented, it has been held that the rule which prohibits a fiduciary from purchasing at his own sale, applies also where the sale is brought about by another." In the case at bar it appears that the sale was arranged for at private sale, at which the agent of the defendant bank was to appear and buy cer-

tificates of stock at the most advantageous price possible, using money furnished by the executor of the estate of William Wallace Flatt, deceased. It may be true that such an arrangement likewise obtained for the stock at the sale referred to the highest possible price which the pledgee could obtain therefor. That is for the court to determine upon the trial of the action. On the face of the complaint it appears to be a plan which did away entirely with competitive bidding and enabled the bank to obtain the certificates of stock at what would otherwise be called the lowest possible price, and resold to the bank's advantage, at what is shown to be a greatly enhanced price.

Being of the opinion that the second amended complaint states a cause of action, it is unnecessary for us to go into the question as to the discretion of the trial court in permitting amendments thereto, or to further consider any of the objections urged by the respondent.

The judgment is reversed with directions to the trial court to overrule the defendant's demurrer to the amended complaint, permitting the plaintiffs, however, to file amendments thereto if so advised, and also giving the defendant such reasonable time as may appear to be proper to answer the complaint in this action.

We concur: PULLEN, P. J.; THOMPSON, J.

19 Cal.App.2d 493

TRAYLOR v. LOS ANGELES MOUNTAIN PARK CO. et al.

Civ. 10223.

District Court of Appeal, Second District, Division 1, California.

April 7, 1937.

Hearing Denied by Supreme Court May 10, 1937.

Contracts 🔑227

Under contract for exploitation of limestone deposits which provided that agreement should terminate if necessary permit were not obtained prior to designated date, which was extended, acting with reference to contract as binding during period of extension would not waive provision for termination nor estop party from thereafter denying that he had waived such provision beyond extension.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

On petition for rehearing.

Petition denied.

Prior opinion, 65 P.(2d) 921.

Overton, Lyman & Plumb, Irving H. Prince, and Donald H. Ford, all of Los Angeles, for appellants.

Charles L. Nichols, William G. Bonelli, Carleton B. Wood and Schell & Delamer, all of Los Angeles, for respondent.

PER CURIAM.

In his petition for a rehearing, respondent argues that the effect of our opinion is to declare that no acts or conduct of defendants prior to April 15, 1931, could create or be considered as creating a waiver or estoppel or thereby to extend the operation of Exhibit C beyond that date. We do not believe that our opinion is susceptible of such an interpretation, but to put the matter beyond dispute we add that we were not considering what could have been the result but what was found to be the result of defendants' acts and conduct. The evidence would have supported findings that the plaintiff was in no position to rely on an estoppel in any particular respecting the life of Exhibit C. We need not, therefore, in such a situation, if we ever should, enlarge upon the trial court's finding. What the trial court found was that the defendants and all the parties treated the contract (Exhibit C) as a valid and subsisting legal obligation and the defendants so represented it to be. By virtue of the written extension, obviously effective as to all those interested, the contract was valid and subsisting up until April 15, 1931. Speaking of it or acting with reference to it as a binding contract during this period, of itself, may not be said to constitute a waiver of the provision for termination, nor is it conduct which would estop one from thereafter denying that he had waived the provision beyond the existing extension. There was no evidence which justified the finding that during the period after April 15, the parties treated the contract as a valid or a subsisting legal obligation with the effect that they thereby waived the termination provision or were estopped to deny that it was waived beyond April 15.

The petition for rehearing is denied.

19 Cal.App.2d 745

SAN JOAQUIN LIGHT & POWER CORPORATION v. SUPERIOR COURT IN AND FOR STANISLAUS COUNTY et al

Civ. 5793.

District Court of Appeal, Third District, California.

March 18, 1937.

Rehearing Denied April 17, 1937.

Hearing Denied by Supreme Court May 17, 1937.

Judges 🔑51(1)

Unsuccessful party who did not join in statement of disqualification against judge filed by other unsuccessful parties, which application appeared on its face not to have been filed at earliest practicable opportunity after discovering bias and prejudice relied on, as required by statute, *held* not entitled to assert judge's disqualification.

◆

Application for writ of application and to annul an order granting new trial in a pending case, by San Joaquin Light & Power Corporation against the Superior Court of the state of California in and for Stanislaus County and Hon. A. Caminetti, Jr., judge presiding therein.

Writ of prohibition and prayer to annul order denied.

Thomas J. Straub and W. R. Dunn, both of San Francisco, for petitioner.

Theodore M. Stuart, of San Francisco, for respondents.

PER CURIAM.

In this matter petitioner seeks by a writ of prohibition to restrain Judge Caminetti from further acting in regard to this petitioner in the case of Vandervort v. Southern California Edison Company, a corporation, et al., and to annul an order heretofore made purporting to grant a new trial as to petitioner, one of the defendants therein.

This proceeding is very similar to, and based upon practically the same charges of bias or prejudice as is set forth in Woolley et al. v. Superior Court (Miller & Lux Incorporated v. Superior Court) (Cal.App.) 66 P.(2d) 680. The only difference in the position of petitioner herein is that this petitioner did not join in the statement of disqualification originally filed in those proceedings, and was granted the right to argue its motion for a new trial in the case of Vandervort v. Southern California Edison Company, a corporation, et al., and to file a brief in support thereof.

We have, in an opinion in the case of Woolley et al. v. Superior Court (Miller & Lux Incorporated v. Superior Court), supra, passed upon all of the essential questions here presented, and upon the authority of those cases, the writ of prohibition herein prayed for is denied, as well as the prayer to annul the order granting a new trial.

On Rehearing.

PER CURIAM.

The petition for rehearing is hereby denied.

However, petitioner, San Joaquin Light & Power Company, calls to our attention certain inaccuracies in the opinion which should be corrected. In Woolley v. Superior Court (Miller & Lux Incorporated v. Superior Court) (Cal.App.) 66 P.(2d) 680, referred to in the instant case, we purported to quote from the main opinion in Lindsay-Strathmore Irrigation District v. Superior Court, 182 Cal. 315, 187 P. 1056. Our quotation from that case was from the concurring opinion of Mr. Justice Olney and not from the main opinion, which was rendered by Mr. Justice Shaw and concurred in by Chief Justice Angelotti and Justices Lennon, Wilbur, and Lawlor. The quotation is also inaccurate in that we caused the first line thereof to read, "It would seem to *be* intolerable * * *" whereas it should have read, "It would seem to *me* intolerable * * *."

We also wish to make it clear that petitioner herein, San Joaquin Light & Power Company, and its counsel are before this court in this one proceeding only, they having taken no part in any other effort to disqualify the judge of the trial court. Petitioner herein and its counsel declined to join with counsel in the other motions, but upon the assertion of disqualification of bias or prejudice, assumed a neutral position.

In our opinion in the case of Miller & Lux Incorporated v. Superior Court, Nos. 5799 and 5800, counsel for petitioner herein were noted as attorneys therein, and in the body of our opinion (66 P.(2d) 680) we refer to "defendants" without excluding petitioner from such statement.

In order that there may be no misunderstanding we now wish to correct that implication and state that petitioner herein never joined in any statement of disqualification, and never argued before this court that Judge Caminetti was biased or prejudiced other than as may appear in the present proceeding.

With these corrections the petition for rehearing is denied.

20 Cal.App.2d 293

ELLIS v. ELLIS et al.

Civ. S. C. 7.

District Court of Appeal, Second District, Division 1, California.

April 10, 1937.

Hearing Denied by Supreme Court June 3, 1937.

1. Trusts ⟹61(1)

Trust consisting of fund contributed by two brothers and their father for purpose of investment by father at high interest rates was properly terminated, where fund was invested in real estate after foreclosure of mortgages in which fund had been invested and purchase of lands subject to such mortgages at foreclosure sale, and there was no opportunity to make investments at high interest rates (Civ.Code, § 2279).

2. Trusts ⟹375(1)

On termination of trust consisting of fund contributed by two brothers and their father and invested by father with approval of brothers in real estate mortgages which had been foreclosed by father, who purchased real estate at foreclosure sale, personal judgment against father for interest of one brother in real estate was not justified on ground that father purchased real estate with commingled funds, in absence of fraud.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Jesse B. Ellis against J. S. Ellis and George M. Ellis. From the judgment, the defendants appeal.

Remanded with instructions to modify, and affirmed as so modified.

James W. Bell, of Los Angeles, for appellants.

Paul C. Jones, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

The appellants in this case, J. S. Ellis and George M. Ellis, are respectively father and brother of the plaintiff, who obtained a judgment terminating a trust in which all three were interested as cash contributors. The judgment ordered sold a sufficient amount of the res, practically all real estate, to pay plaintiff the sum to which he was found entitled and imposed a lien upon the property in favor of plaintiff pending payment of said sum. The money judgment runs against the father J. S. Ellis in person and as trustee.

Appellants claim that no sufficient ground existed for termination of the trust; that the order to sell was inequitable as being detrimental to the interest of George, as truly a beneficiary as plaintiff; that the personal judgment against the father cannot stand, since as trustee he was not in default; finally, that the only proper judgment would be a sale and a final balance to be distributed as the interests appear. The case is before us on the judgment roll and the briefs disclose little disagreement as to facts. The two brothers, in their twenties, each contributed $4,000, which they had saved, to a fund which their father increased by adding $13,500 of his own money. The purpose of the sons turning their money over to their father was for him to loan it at high interest rates. The first investment, except for a few small loans that brought in $85 income, was in a $3,500 mortgage October 22, 1927; the second, a $17,500 mortgage January 27, 1928. It will be noted that these two investments, $21,000 in amount, absorbed all the money contributed by the three parties except $500. A building and loan certificate valued at the time of trial at $150 had also been acquired and that certificate, with the two parcels of real estate upon which the loans had been made, constituted the entire trust property affected by the judgment. The real estate had been taken in by foreclosure and each parcel is free and clear of encumbrances.

[1] In terminating the trust, the court found "that the duration of said trust was left to the option of the parties and the ability of the trustee to invest the funds at the high rates of interest." By reason of default under the mortgages and ensuing foreclosure and purchase by trustee at the sales, the money of the trust was no longer invested in loans at a high rate of interest, but in real estate, nor does it appear that there was any opportunity to so invest it; therefore, one of the principal objects of the trust was impossible of fulfillment. The court said in its findings on this point:

"That the original intentions of the parties to said trust can no longer be carried out. That there are no longer any trust funds available to make loans, no method is known whereby additional funds may be secured to make loans, and no high rates of 10% and 12% interest are now being offered for money to finance new construction." Having in mind the provisions of section 2279 of the Civil Code, "A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful," we are of the opinion that the trust was properly terminated.

[2] The contention of appellant J. S. Ellis that a personal judgment against him is not warranted by the evidence, we consider well grounded. Having in mind the contributions to the trust fund made by the father and his two sons, and the net value of the estate at the time of trial, found to be $11,420.69, the court decreed that the father had a 27/43 interest in the res and each of the sons an 8/43 interest, valued at $2,124.72. Judgment in this amount was entered against "J. S. Ellis and J. S. Ellis Trustee," the court further decreeing that the trustee "within a period of sixty days from the date of entry of judgment herein, sell a sufficient amount of the real and personal property which he now holds in trust in order to pay plaintiff the amount of his judgment, as ordered herein, and that he apply the proceeds of such sale or sales in the payment of said judgment.

"It is Further Ordered, Adjudged and Decreed that the judgment of the plaintiff, Jesse B. Ellis, as ordered herein, shall be a lien upon the real property. * * *"

Respondent urges that the personal judgment is justified because the property of the trust was purchased with commingled funds and while the trial judge found that all of the funds were commingled by J. S. Ellis, it is very apparent from a statement signed by both sons and appearing in the record as an exhibit, that the sons were fully cognizant of and approved the manner in which the father invested the common fund. And the claim that the property was purchased with commingled funds cannot be sustained for the simple reason that the money was not used to effect a purchase but a loan, the property being bid in at the foreclosure sale. This is not a case of negligent or unjust commingling of funds which, because of inability to trace the investment through various business ramifications, warrants a court in entering a personal judgment against a faithless or careless trustee, for on the evidence produced the court experienced no difficulty in identifying the res and found "that there was no money lost to the trust estate by the said J. S. Ellis in his management, control and operation of said trust estate, and that the depreciation of the assets of said trust was due to economic conditions."

Under these circumstances, no fraud being shown, and applying the rule mentioned in Title Insurance & Trust Co. v. Ingersoll, 158 Cal. 474, 111 P. 360, we feel that liability of appellant J. S. Ellis should have been limited to his holdings as trustee. That case is not altogether like the one before us, but the language as to this particular point appearing on page 481 of 158 Cal., 111 P. 360, 363, is apropos:

"The beneficiary of a trust, of course, cannot have a judgment declaring the defendant a trustee of specific property bought with trust funds, and decreeing such property to be the property of the beneficiary, and also a personal judgment for the money invested by the defendant in that property." We have already indicated that the amount $2,124.72, which by the judgment appellant J. S. Ellis was held to pay respondent both individually and as trustee was arrived at by determining that he was the owner of a specific 8/23 of the trust property all of which is listed in the judgment.

For the reasons stated, we feel that the judgment should be modified by eliminating the language by which J. S. Ellis is held personally responsible, fixing liability under the judgment solely upon J. S. Ellis, as such trustee.

Since all interest of plaintiff in the trust property was declared terminated as of February 5, 1935, and the money judgment of $2,124.72 was fixed as the value of an 8/43 interest in the trust property determined on that date, equity demands a further modification because of the possibility that a change in real estate values has taken place since then. The cause, therefore, is remanded to the trial court, with instructions to modify the judgment by striking out the paragraph granting to plaintiff recovery of the sum of $2,124.72, with costs and interest, from J. S. Ellis and J. S. Ellis, trustee; and further to modify the judgment by ordering the trust property sold by the trustee within a reasonable time to be fixed by the court, plaintiff to be entitled to costs of suit in the superior court and to 8/43 of the net proceeds realized from such sale, his beneficial interest not to be terminated as of February 5, 1935, but to continue to the time of sale. All portions of the original judgment contrary to these suggested modifications to be stricken, and, as so modified, the judgment is affirmed, each party to bear his own costs of this appeal.

We concur: YORK, Acting P. J.; DORAN, J.

20 Cal.App.2d 311

DAVIDSON v. DE SOUSA.

Civ. 11108.

District Court of Appeal, Second District, Division 1, California.

April 12, 1937.

Hearing Denied by Supreme Court June 10, 1937.

1. Malicious prosecution 🔑21(1, 2)

Where defendant either knowingly misrepresented material facts or was altogether mistaken in regard to the determinative facts, advice of counsel did not support defense of probable cause for institution of criminal prosecution.

2. Malicious prosecution 🔑21(2)

In order that defense of probable cause founded upon legal advice may be availing in action for malicious prosecution, advice must have been based on the entire good faith of defendant in presentation of his statement of facts, and the attorney must have been furnished a statement of all the facts and the statement must have been true, at least with respect to the material and determinative details.

3. Malicious prosecution 🔑32

Though probable cause for instituting criminal action may tend to show lack of malice, existence of probable cause based upon advice of counsel would not necessarily be conclusive that malice was not underlying cause of prosecution.

4. Malicious prosecution 🔑32

Absence of probable cause affords rather clear indication in itself that malice was activating agent in institution of criminal prosecution.

5. Appeal and error 🔑931(5)

Appellate court must assume that in reaching its ultimate conclusion with respect to the facts, the trial court made use of that evidence only which would support its findings and judgment.

6. Malicious prosecution 🔑69

Judgment for $2,500 for malicious prosecution was not so excessive as to shock the sense of justice, where plaintiff incurred liability for $500 in attorney's fees, spent a week in jail with attendant humiliation and disgrace, and suffered numerous and sundry physical ailments from the incarceration.

7. Appeal and error 🔑1170(7)

Exclusion of evidence was not reversible error where it did not appear probable that, had error not been made, result would, or in reason might, have been different (Const. art. 6, § 4½).

◆

Appeal from Superior Court, Los Angeles County; Ben B. Lindsey, Judge.

Action by Glenn Davidson against Alfred A. De Sousa. From a judgment for plaintiff and an order denying a new trial, defendant appeals.

Judgment affirmed, and appeal from order denying new trial dismissed.

Michael Lavelle, and Paul Taylor, both of Los Angeles, for appellant.

Dailey S. Stafford, of Los Angeles, for respondent.

HOUSER, Presiding Justice.

From a judgment that was rendered against him in an action for damages that arose from an alleged malicious criminal prosecution of plaintiff by defendant, the latter has appealed to this court.

The principal complaint of appellant is that the evidence was insufficient to support the judgment; and that especially was the evidence insufficient in regard to the findings that were made by the trial court to the effect that in causing the arrest and prosecution of plaintiff, defendant acted maliciously and without probable cause.

With respect to the evidence generally, it appears that the purported cause of the arrest of plaintiff arose from a dispute that occurred between plaintiff, who at the time was in defendant's employ, and a foreman of a department of defendant's business, in which dispute defendant later joined, with the result that a physical encounter occurred between plaintiff and defendant in which defendant came off "second best"; following which, in the course of about a week next thereafter ensuing, with respect to the incident defendant reported it to the police department, had two separate interviews with his private attorney, consulted a deputy in the office of the district attorney, and thereafter swore to a criminal complaint by reason of which plaintiff was placed under arrest and lodged in jail. But on the preliminary hearing of the action plaintiff was discharged and the action was dismissed. As might be anticipated, on the question of how the fight between plaintiff and defendant started, who provoked the attack, and what each of the interested parties said or did in the course of the happening of the controversy and the resulting combat, were the subjects of much diverse testimony especially by the respective parties thereto; and as to the remaining witnesses, the testimony given by them differed greatly in substance and effect, one from the other, dependent almost entirely upon the "side" in favor of which any witness gave his testimony. Each of the principals charged the other as having been the persistent aggressor throughout. But however that in fact may be, judging from the findings which were made by the trial court, plaintiff's version of the episode was that which was adopted as representing the truth and which reflected the situation as one in which plaintiff was consistently either acting in self-defense of defendant's physical attacks upon him, or in attempting by flight to altogether avoid such attacks. Nothing useful to any one could result from an endeavor to herein set forth even a resume of the evidence; suffice it to say, that after a careful review thereof, this court is satisfied that the conclusion that was reached thereon by the trial court was justifiable.

[1, 2] With reference to the instant action, and particularly as bearing upon the essential element of lack of probable cause for the criminal prosecution of plaintiff, assuming, as in effect was especially found by the trial court, that in order to secure the arrest of plaintiff, the story of the encounter as was related by defendant in the main was not made in good faith, but to the contrary, was willfully untrue, it should follow that appellant has no real ground for here asserting the existence of probable cause for instigating such prosecution. In other words, it appearing that defendant either knowingly misrepresented the material facts, or at least was altogether mistaken with regard to the determinative facts of his narrative, he had no cause, either probable or justifiable, for initiating a criminal action against plaintiff. More briefly and impersonally stated, in an action for malicious prosecution, in order that a defense of probable cause, founded upon legal advice, may be availing, first of all, such advice must have been based on the entire good faith of the defendant in the presentation of his statement of facts; besides which it must appear that before such advice was given, the attorney giving it was furnished not only with a statement of *all* the facts of the case, but as well, that such statement was true, at least with respect to its material and determinative details. Starkweather v. Eddy, 210 Cal. 483, 487, 292 P. 467, and cases cited; Murphy v. Davids, 181 Cal. 706, 186 P. 143; Stone v. Wolfe, 168 Cal. 261, 141 P. 1190; Scrivani v. Dondero, 128 Cal. 31, 60 P. 463; Dunlap v. New Zealand F. & M. Ins. Co., 109 Cal. 365, 42 P. 29.

[3-5] So with the element of malice: Although probable cause for instituting a criminal action may tend to show lack of malice therein, the existence of probable cause (based upon advice of counsel) would not necessarily be conclusive that in fact malice was not the underlying cause of the prosecution. Ball v. Rawles, 93 Cal. 222, 28 P. 937, 27 Am.St.Rep. 174; Green v. Stewart, 106 Cal.App. 518, 289 P. 940; Harkrader v. Moore, 44 Cal. 144. On the other hand, the absence of probable cause affords a rather clear indication in itself that malice was the activating agent in the prosecution. McAfee v. Los Angeles Gas, etc., Corp., 215 Cal. 219, 9 P.(2d) 212; Reinhardt v. Reitz, 176 Cal. 209, 167 P. 865; Runo v. Williams, 162 Cal. 444, 122 P. 1082; McKenna v. Heinlen, 128 Cal. 97, 60 P. 668. See also, 16 Cal.Jur. 746. Hence the trial court's finding of malice, which was justifiable not only upon the lack of probable cause, but also upon additional independent facts which consisted of acts unexplainable except that they were designed by defendant to harrass, vex and annoy plaintiff, from a legal standpoint would seem to be clearly unobjectionable. Considering the entire evidence, and keeping in mind the duty of the trial court to sift the evidence, together with the limitations on the authority of this court which require the assumption that in reaching its ultimate conclusion with respect to the facts, the trial court made use of that evidence only which would support its findings and judgment, as a matter of law it is impossible to declare the existence of probable cause and the lack of malice in the prosecution of which complaint is made.

[6] Appellant further complains that a judgment of $2,500 is excessive. But from the record herein it appears that in his defense of the criminal action that defendant caused to be instituted against plaintiff, the latter either expended or became liable for the payment of $500 for attorney's fees; and since beside spending a week in jail, plaintiff suffered therefrom not only the attendant humiliation and disgrace, but that as well, on account of such incarceration was caused to suffer numerous and sundry physical ailments, the judgment is not such as to "shock the sense of justice." Martin v. Shea, 182 Cal. 130, 187 P. 23; Kelley v. Hodge Transp. System, 197 Cal. 598, 242 P.

76; Ware v. McPherson, 213 Cal. 120, 1 P. (2d) 433.

[7] Finally, appellant urges the point that the trial court erred in its refusal to admit certain evidence which was offered by defendant. But even admitting that the point is meritorious, it does not necessarily follow, nor does it appear probable, that had such error not been made the result either would, or that in reason it might, have been different from that which was actually reached. In such circumstances, the rule is that the judgment should not be reversed. Section 4½, article 6, Const.

The judgment is affirmed. The attempted appeal from the order by which defendant's motion for a new trial was denied is dismissed.

We concur: YORK, J.; DORAN, J.

---

20 Cal.App.2d 150

WESTERN FRUIT GROWERS, Inc., v. SECURITY TITLE INS. & GUARANTEE COMPANY et al.

Civ. 5780.

District Court of Appeal, Third District, California.

April 2, 1937.

1. Mortgages 🔑105

Ordinarily, note and trust deed or mortgage executed contemporaneously to secure payment of existing debt constitute one contract, and must be construed together.

2. Evidence 🔑66

Where first trust deed secured described note and any renewal or extension thereof, and second trust deed was made subject to the first trust deed and recited that it secured payment of an indebtedness evidenced by a promissory note and any renewal or extension thereof, beneficiary of junior trust deed was charged with notice that time for payment of the note secured by the first trust deed might be extended.

3. Mortgages 🔑401(1)

Where trust deed was subject to prior trust deed securing note payable in installments and any renewal or extension thereof, though it required trustor to pay all incumbrances when due and authorized beneficiary to declare indebtedness due for any breach or default, it was too late to declare indebtedness due because of default respecting installments of note secured by first trust deed after time of payment had been regularly extended where there was no showing that delay impaired the lien or diminished its value.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by the Western Fruit Growers, Incorporated, against the Security Title Insurance & Guarantee Company and another. From a judgment for defendants, plaintiff appeals.

Reversed, with directions.

Simpson & Simpson and W. E. Simpson, all of Los Angeles, for appellant.

Swing & Swing, of San Bernardino, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from that portion of a judgment which was rendered against it refusing to enjoin the trustees of two separate trust deeds executed to secure the same indebtedness from selling the property for an alleged default in the payment of installments of the first secured note when they became due. The junior trust deed was executed *subject* to a senior trust deed on the same property to secure another promissory note. The first trust deed provides that it was executed to secure payment of a $10,000 note "according to its terms * * * and *any renewal or extension thereof.*" The beneficiary of the junior trust deed was not a party to that note. After the execution of the second trust deed, the beneficiary of the first trust deed consented in writing to extend the times fixed by the secured note for the payment of two installments thereof. The extension of time for payments was granted and one installment was actually paid before the beneficiary of the second trust deed served notice of the alleged default. The second installment was not then due according to the extended time for payment thereof. The court found that plaintiff was in default, notwithstanding the extension of time, for failure to pay the two installments at the times originally fixed by the first note, and that the beneficiary of the second trust deed was therefore authorized to declare the entire indebtedness due and forclose his lien by sale of the property.

The cause was heard upon stipulated facts. The record shows that plaintiff owns two separate tracts of land in San Bernardino county. The first parcel is a lot in Redlands, which we shall refer to as tract "A." The second consists of four lots in block four of the Henry L. Williams tract of Rancho San Bernardino, which we shall call tract "B." September 18, 1931, for a valuable consideration the plaintiff executed its promissory note for the sum of $42,500, payable to Robert F. Garner, Jr., in specified installments due at designated dates. This note contained the usual condition that upon default of any payment of principal or interest, at the option of the holder of the note, the entire unpaid portion of the note might be declared to be immediately due. This note was secured by a trust deed on tract A above mentioned, which named the Security Title Insurance & Guarantee Company, as trustee, and Robert F. Garner, Jr., as beneficiary thereof.

July 25, 1932, for a valuable consideration, the plaintiff executed its promissory note for the further sum of $10,000, payable to Security-First National Bank of Los Angeles, in specified installments due at designated dates. This note contains the same provision regarding the option of the holder to declare the unpaid balance due upon default of any payment of principal or interest. This note was secured by a trust deed on tract B above mentioned. This trust deed provides that it was executed for the purpose of securing the $10,000 note and interest according to its terms, *"and any renewal or extension thereof."*

December 27, 1932, for a valuable consideration, the plaintiff executed another trust deed for additional security for the payment of the first $42,500 note dated September 18, 1931, upon tract B above mentioned. This trust deed named the Security Title Insurance & Guarantee Company, as trustee, and Robert F. Garner, Jr., as beneficiary thereof. It provides that:

"Said trust deed *is second and subject to* a trust deed of record in the amount of $10,000, *for the purpose of additional security,* for

"First: Payment of the indebtedness evidenced by one promissory note *(and any renewal or extension thereof)* substantially in form as follows: * * *"

It is not contended that the plaintiff was in default of any installments due upon this first $42,500 note. It is, however, asserted the plaintiff was in default of payments of two installments on the second $10,000 note secured primarily by a trust deed on tract B of plaintiff's land. That note provided for the payment of one installment of $2,500 on July 25, 1933, and of another installment of $2,500 July 25, 1934, neither one of which was paid at those dates. However, on September 28, 1934, before notice of default and foreclosure had been served, the Security-First National Bank of Los Angeles, the beneficiary of the trust deed and holder of that $10,000 note, extended in writing the dates of these two payments as follows: $2,500 to be paid by January 25, 1935, which was again extended by letter to May 16, 1935, and the balance of the note, to wit, $7,500 and interest before July, 1936. This first installment of $2,500 and interest was paid on May 16, 1935. The balance was not due under the extended time for its payment until the following July.

On May 25, 1935, after payment of the $2,500 installment, the respondent, Garner, notified the plaintiff of his option to declare the entire indebtedness due which is represented by both promissory notes. He then proceeded to foreclose the trust deeds for the alleged default of payments. This suit to enjoin the sale of property was then instituted. The court adopted findings favorable to the defendants, and rendered judgment denying a permanent injunction as prayed for, but did grant a provisional injunction to preserve the status quo until the cause was finally determined on appeal. The plaintiff then perfected this appeal.

The trust deed which is involved on this appeal was not executed primarily to secure the payment of the $10,000 note, dated July 25, 1932. This trust deed merely creates a junior lien upon tract B "subject to" the senior deed which was executed to secure the $10,000 note. This second trust deed does provide that "Trustor promises and agrees, * * *: 4. To pay * * * (b) *when due,* all incumbrances (including any debt secured by deed of trust) and/or interest thereon, which appear to be liens or charges upon said property or any part thereof prior to this deed of trust * * *." This deed of trust then provides that: "Should breach or default be made by

Trustor in payment of any indebtedness secured hereby and/or in performance of any obligation, covenant, promise or agreement herein, or in said note contained, then Beneficiary may declare all sums secured hereby immediately due by the execution and delivery to Trustee of a written Declaration of Default and Demand for Sale."

The question which is involved in this case is whether the time prescribed for the payment of the installments of the first $10,000 note may be extended by consent of the maker and holder of that note so as to bind the beneficiary of the junior trust deed, without his consent.

The respondents accepted this junior lien in the form of a second trust deed "subject to" and with both constructive and actual knowledge of the terms of the senior trust deed which specifically provides that it was executed "for the purpose of securing * * * according to the terms of the [$10,000] promissory note * * * and *any renewal or extension thereof.*"

[1, 2] It is true that the note, itself, did not contain a clause specifically authorizing the extension of the time for payment of the note or any installment thereof. But ordinarily the note and trust deed or mortgage which are executed contemporaneously to secure payment of an existing debt constitute one contract, which instruments must be construed together. There are exceptions to this rule which do not affect the circumstances which are involved in the present case. We are of the opinion the beneficiary of the junior trust deed in this case should take notice from the language employed in the senior trust deed, above quoted, that the time for payment of the $10,000 note or its installments might be extended. The first deed contemplates that very contingency, for it provides that it is executed as a lien to secure payment of the note according to its expressed terms, or pusuant to "any renewal or extension thereof."

[3] It is true that plaintiff deferred the payment of two installments of the $10,000 note beyond the dates when they originally became due. But the times when these two installments became due were regularly and formally extended in writing, so that they were not actually due or unpaid at the time the beneficiary under the second trust deed gave notice of default. In other words, the defaults were cured by the granting of an extension of time within which to pay them.

Assuming, as we do, that the beneficiary of the first note had a right to extend the time originally designated in the note for payment of installments thereof, without the consent of the beneficiary of the junior trust deed, the plaintiff was not guilty of default. Having waited until after the first installment was actually paid, and the second installment had been regularly extended, it was too late for the beneficiary of the second trust deed to give notice, declaring his option to exercise a right to require the entire indebtedness to be due, and to proceed to sell the property on foreclosure of the trust deed. The note and trust deed were part of the same transaction and must be construed together. The respondents were bound to take notice of the declaration in the first trust deed that the time for paying the note or installments thereof might be extended. In the case of Trinity County Bank v. Haas, 151 Cal. 553, 91 P. 385, 386, the court said:

"The note and mortgage, *being parts of one transaction,* are to be read together, and the plaintiffs may therefore rely on the provision contained in the mortgage, making the principal due for nonpayment of interest at the payees' option, *although the note contains no such provision.* * * *

"If after a default in the payment of interest the holder accepts the overdue interest * * * the right to exercise the option is lost. And we think it is equally lost if, before the option has been in fact exercised, the defaulting debtor pays or offers to pay the overdue interest. Until such option has been exercised, the principal of the note is not due." Stalder v. Riverside Groves & Water Co., 167 Cal. 560, 140 P. 252.

The respondents concede that: "The right to extend the time for payment of a note by subsequent agreement is a privilege which the maker and holder of a note have, as between themselves, *without any previous agreement therefor.* This privilege may be exercised and the due date of any note may be extended by agreement between the maker and the holder so long as such extension does not contravene other promises or agreements made with third persons, or violate intervening rights of third persons."

In other language, it is conceded the beneficiary of the senior trust deed had a perfect right to extend the time for payment of the two installments of the $10,000 note, provided that extension did not violate the rights of the beneficiary of the junior trust deed to his detriment, or impair his lien upon the property as additional security for the payment of the former $42,500 note.

The foreclosure of a trust deed given to secure the payment of a promissory note, like the foreclosure of a mortgage, is equitable in its nature. Conceding that the extension or delay in the payment of the two installments of the $10,000 note did modify the lien created by the second trust deed, the beneficiary may not complain of that fact, unless that delay was detrimental to the respondents' security.

In the case of Hastings v. Wise, 89 Mont. 325, 297 P. 482, 484, it was held that a grantee of real property "subject to existing mortgages and liens of record" took the property "chargeable with knowledge of the existence of the mortgages *and that they might be extended.*"

In the case of Vitt v. Rogers, 81 Mont. 120, 262 P. 164, 167, it was held the right to extend the maturity date of a note secured by mortgage exists even though prior thereto the rights of a third party attach. The court said: "When the subsequent mortgagees took their mortgages in June, 1920, plaintiff's mortgage was valid and subsisting. * * * When the mortgagors and plaintiff extended the maturity of the debt to a date within the eight-year period and plaintiff commenced his action to foreclose the mortgage within two years of the new maturity date, we fail to see how the defendants were injured in any way. We do not see that they are in a worse position than the one they were in when they took their second mortgages. The burden resting upon them now is no heavier than it was then. They are asking an advantage which will come to them if plaintiff's mortgage is wiped out, but they do not show that they have in any manner been placed at any disadvantage. The equities are not with but against them."

The case last cited further states: "Whether, injury being shown to intervening third parties a court of equity will declare the renewal or extension of a mortgage under section 8264 ineffectual as to them, we need not now consider."

The last-quoted paragraph applies to the present case for the reason that there is no evidence in this case that the third party in this transaction was actually injured by the extension of time within which to pay the challenged installments.

The effect of permitting the respondents in this case to take advantage of an extension of time for the payment of installments of a note which was not given for their benefit would appear to be inequitable, in the absence of proof of detriment to the respondents' lien on that account, since the beneficiary and the trustor under the first trust deed were in good faith in agreeing to the extension pursuant to the provisions of their trust deed, believing as they had a right to assume, that the beneficiary of the junior trust deed was bound to take notice of the fact that the extension of time for payment was authorized by their contract and might occur.

The record contains no evidence that the respondents were damaged by the delay in the payment of the two installments on the $10,000 note. They do say in their brief: "The right to insist that the indebtedness secured by the Cowgill trust deed be paid *as and when due* was one of the most important and essential terms contained in Garner's second trust deed *affecting its value as security.* Parcel B is an orange grove property, subject to great fluctuation in value, depending on market conditions for fruit, upon frosts, upon neglect to properly care for, farm, fertilize, fumigate, smudge, etc."

But this record is absolutely devoid of evidence to indicate that the mortgaged premises consist of an orange grove, or that it has been neglected or affected in any manner whatever by the delay in paying the installments of the first note. There is no evidence that the delay impaired the respondents' lien or diminished its value. It would be unjust and inequitable to permit the sale of land under a second deed of trust given as additional security for another debt, merely because the time for payment of two installments of the note secured by the senior trust deed was extended.

The permanent injunction should have been granted restraining the respondents from selling tract B of the San Bernardino land for the alleged default in payment of the promissory notes involved or any installments thereof.

The judgment is reversed, and the court is directed to render judgment for the appellant enjoining the respondents from selling the property, as prayed for.

We concur: PULLEN, P. J.; PLUMMER, J.

20 Cal.App.2d 299

BERRY v. STRUBLE.

Civ. 10217.

District Court of Appeal, First District, Division 1, California.

April 12, 1937.

Hearing Denied by Supreme Court June 10, 1937.

1. Release ⚷16

As respects mistake, public policy, in absence of fraud or duress, does not forbid parties, who are laboring under no disability, from releasing for a consideration all claims arising from accident, whether injuries be known or unknown, and other things being equal, question is one of intent and, if sufficiently expressed, should be conclusive (Civ.Code, § 1542).

2. Release ⚷16

Release of claims for injuries sustained in accident, which release provided that it should apply to "all unknown and unanticipated injuries and damages" resulting from accident, *held* to preclude injured party from rescinding release on ground of mutual mistake as to injuries which were not known at time of release, since under release it was intention of parties to compromise and release all known or unknown claims growing out of accident (Civ.Code, § 1542).

◆

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Action by Mayme Berry against H. P. Struble. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Clifton Hildebrand, Fred J. Bills, and Elwood Murphey, all of Oakland, for appellant.

J. Hampton Hoge and Bronson, Bronson & Slaven, all of San Francisco, for respondent.

PER CURIAM.

Appeal by the plaintiff from a judgment of nonsuit entered in an action to recover damages for personal injuries.

The injuries grew out of a collision between an automobile, in which the plaintiff was riding, and a car driven by the defendant. The accident occurred on November 9, 1934. The question of defendant's negligence is not involved in the appeal. The evidence shows that the plaintiff received a blow on the leg due to the fact that it came in contact with some part of the car in which she was riding. It was treated by a physician, and on December 5, 1934, the injury appeared to have healed. On December 6, 1934, she and her husband executed a release in writing, which reads as follows:

"Release of All Claims.

"Know all men by these presents that the undersigned does hereby acknowledge the receipt of $181.47, which sum is accepted in full compromise settlement and satisfaction of and as a sole consideration for the final release and discharge of all actions, claims and demands whatsoever that now exist or may hereafter accrue against Dr. H. P. Struble, and any other person, corporation, association or partnership charged with responsibility for injuries to the person and property of the undersigned and the treatment thereof, and the consequences flowing therefrom, as the result of the accident, casualty or event which occurred on or about the 9th day of November, 1934, at or near High street and Hopkins street, Oakland, California, and for which the undersigned claims the above-named persons or parties are legally liable in damages, which legal liability and damages are disputed and denied, and the undersigned warrants that no promise or inducement has been offered except as herein set forth; that this release is executed without reliance upon any statement or representation by the person or parties released, or their representatives or physicians, concerning the nature and extent of the injuries and/or damages and/or legal liability therefor; that the undersigned is of legal age, legally competent to execute this release and accepts full responsibility therefor, and

"The Undersigned Agrees, as a further consideration and inducement for this compromise settlement, that it shall apply to all unknown and unanticipated injuries and damages resulting from said accident, casuality or event, as well as to those now disclosed.

"Signed and sealed this 6th day of December, 1934, at Oakland, California."

Shortly after the execution of the writing, the leg began to swell and abscesses formed. Incisions were made at different times to drain the pus, and the plaintiff remained in bed for several months. Later and up to June, 1935, she was compelled to use a wheel chair, crutches, and a cane. During all this period she suffered pain, and at the time of the trial, which was held

14½ months after the collision, her leg, including the ankle, was stiff and hard. She also testified that on account of this condition she is unable to do an ordinary day's work and that standing for any length of time causes the leg to swell. Previous to the accident the leg was normal, and physicians testified that she will be permanently disabled.

She sought to rescind the release on the ground of mistake, namely, that at the time of its execution she was suffering from an unknown injury. No claim is made that its execution was induced by fraud or undue influence, or that she was wanting in mental capacity.

The defendants pleaded the release as a defense to the action, and a motion for nonsuit was made and granted on the ground that, regardless of the attempted rescission, the release was binding and barred recovery.

Plaintiff contends that section 1542 of the Civil Code applies to the facts, and that therefore the release did not extend to the physical conditions which subsequently appeared and of which she was ignorant at the time of its execution.

In O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A.L.R. 1381, according to the evidence the cause of death of the injured person was an abscess of the spleen which resulted from a bruise over the abdomen. The injury was apparently superficial, and the attending physician was of the opinion that the injured person had recovered. A general release was executed in this belief. It was held that the release was not a bar as neither party contracted with such an injury in mind and that they acted under a mutual mistake of fact. The release there in question did not, as here, contain a provision that it should apply to "all unknown and unanticipated injuries and damages" resulting from the accident. In Hudgins v. Standard Oil Co., 136 Cal.App. 44, 28 P.(2d) 433, 434, the release contained the following provision: "* * * this release extends to all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, and all rights under Section 1542 of the Civil Code of California are hereby expressly waived." Although it was held that the releases were executed by mutual mistake as to the seriousness and extent of the injury, and that this justified their rescission, it is clear from the decision that the effect of the above clause was not considered.

So in Gambrel v. Duensing, 127 Cal.App. 593, 16 P.(2d) 284, 288, a release from "any and all claims or demands of any nature whatsoever accruing prior to this date, and particularly from all claims and demands arising out of accident" was declared to be within section 1542 of the Civil Code, and one ground for upholding an attempted rescission was a mutual mistake as to the extent of the injuries.

[1, 2] In O'Meara v. Haiden, supra, the court, apparently with approval, cited Richardson v. Chicago, etc., Ry. Co., 157 Minn. 474, 196 N.W. 643, wherein it was held that if the injury is known at the time of the settlement the release is binding upon the parties even if unknown and unanticipated consequences result therefrom; but if the injury is unknown, and the parties purport to settle for all injuries sustained, then the release will not be held binding as to the injury which was unknown to the parties at the time of its execution, but that unknown or unexpected consequences resulting from known injuries are not sufficient. Neither in the O'Meara nor the Richardson Case did the release expressly mention unknown injuries. There does not appear to be any principle of public policy which, in the absence of fraud or duress, would forbid parties who are laboring under no disability from releasing for a consideration all claims arising from a particular accident, whether the injuries be known or unknown. 2 Pomeroy, Equity Jurisprudence, §§ 849, 855; 13 Cor.Jur., Contracts, § 399, p. 458. Other things being equal, it would seem to be merely a question of intent, and this, if sufficiently expressed, should be conclusive. Such is the view expressed in the following cases: Anderson v. Oregon Short Line R. Co., 47 Utah, 614, 155 P. 446; Brush v. Lehigh Valley Coal Co., 290 Pa. 322, 138 A. 860; Althoff v. Torrison, 140 Minn. 8, 167 N.W. 119; Houston v. Trower (C.C.A.) 297 F. 558; and section 1542 does not attempt to limit the right. While there is evidence in the record which, as the defendant claims, tends to show that plaintiff was not suffering from an unknown injury when the release was executed, we prefer to place our decision on the ground that the clear intention of the parties was to compromise and release all claims, known or unknown, growing out of the accident; and this being true, no ground for rescission was shown.

The judgment is affirmed.

20 Cal.App.2d 289

KIERNAN v. HERBERT M. BARUCH CORPORATION et al.

Civ. 10112.

District Court of Appeal, First District, Division 1, California.

April 9, 1937.

Hearing Denied by Supreme Court June 3, 1937.

1. Negligence ⚷121(3)

Where helper in setting of marble was injured when elevator operated in hoist shaft, for purpose of hauling material to upper floors of building under construction, dropped one floor causing marble to strike helper, and evidence of negligence was disputed and left a doubt as to the cause, res ipsa loquitur doctrine applied.

2. Master and servant ⚷332(1)

In action by subcontractor's employee against contractor for injuries sustained when elevator in hoist shaft dropped one floor, whether person who operated elevator was agent of contractor or of subcontractor *held* for jury under conflicting evidence.

3. Master and servant ⚷315

That person who operated elevator in hoist shaft in construction of building followed subcontractor's instructions to "take it easy" did not make elevator operator servant of subcontractor, so as to preclude subcontractor's employee from recovering from contractor for injuries sustained when elevator dropped one floor.

4. Master and servant ⚷333

Judgment against contractor, for injuries sustained when elevator in which subcontractor's employee was riding dropped one floor, would not be reversed because jury failed to find verdict against elevator operator, where operator did not appear in action which proceeded against contractor alone.

5. Appeal and error ⚷216(1)

Contractor which made no request to have jury find on question of negligence of elevator operator could not raise such point for first time on appeal.

◆

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by William Kiernan against the Herbert M. Baruch Corporation and others. From a judgment for plaintiff, named defendant appeals.

Affirmed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant.

Reisner & Deming, of San Francisco, for respondent.

TYLER, Presiding Justice.

Action for personal injuries. The case was tried before a jury which rendered a verdict for plaintiff in the sum of $3,000 against one of the defendants, Herbert M. Baruch Corporation, alone. The Baruch company was the general contractor in the construction of the Fort Miley Hospital. Affixed to the exterior building during its construction was a hoist shaft in which elevators were operated for the purpose of hauling material to the upper floors. M. J. Reid, the codefendant, was a master mechanic, having general charge of the men operating mechanical equipment for the company, and was upon its pay roll. He also operated the hoist on occasions and was so operating it at the time of the accident in question. Plaintiff was a helper in the setting of marble. He was an employee of one J. E. Back who had a subcontract for the marble to be installed in the building. At the time of the accident in question plaintiff rode upon one of the elevators, holding a piece of marble in position, while the elevator ascended the shaft. When the elevator reached the fourth floor, which was its destination, it dropped a distance of approximately one floor and the plaintiff was struck upon the jaw by the slab of marble which was being carried in the elevator and received the injuries complained of. The complaint charged negligence in general terms in the operation of the elevator by Reid. The answer raised the issue as to the status of Reid as a servant of the defendant corporation at the time of the accident and further denied any negligence upon his part.

[1] There were two versions of the cause of the accident. One version, presented by testimony offered by the plaintiff, was that a safety lock, known as a "dog," designed to hold the elevator at the place of destination did not fit into a notch, known as a "cog," on this particular occasion, and that the elevator dropped until Reid could stop it with his brake. The version offered by the defense was

that Reid was slipping the clutch in order to move the elevator slowly; that he felt a jerk indicating to him that the marble had caught on the timber of the shaft; and that the elevator had dropped before it could be stopped with the brake. It is appellant's contention that under either theory there is no basis for the conclusion that there was negligence upon the part of the operator. It is true that there was no direct evidence to show just what caused the accident except that it happened in one of the two ways mentioned. The apparatus may have failed or the operator may have been negligent in handling the apparatus. Suffice it to say that the evidence leaves the exact cause in doubt. Under these circumstances the court applied the doctrine of res ipsa loquitur, and properly so. The doctrine has been applied in similar cases. Meyer v. Tobin, 214 Cal. 135, 4 P.(2d) 542; Brumhall v. Sutherland, 110 Cal.App. 10, 293 P. 672. Where, as here, the evidence of negligence is disputed, and leaves a doubt as to the cause, the doctrine is properly applied. Horney v. Dillingham, 81 Cal.App. 443, 446, 253 P. 970; Kilgore v. Brown, 90 Cal. App. 555, 266 P. 297.

[2, 3] Appellant makes the further contention that the evidence fails to show Reid was acting for the defendant company. In this connection it is claimed that as Back, the subcontractor, had hired the hoist and had the entire right of direction and control over its operation for the period for which he engaged it, Reid for the time being was Back's servant. There was testimony on the part of the company's superintendent to the effect that he informed Back the elevator would be under his control, and there was also evidence to show that Back gave certain directions to Reid when hoisting to "take it easy." There was, however, other testimony to show that the hoist was owned and operated by defendant corporation. It furnished the hoist, the operator, fuel, and repairs and sent Back a bill for the services designated as "hoisting charges." It further appeared that at the very time of the accident defendant corporation was using the adjacent elevator, operated by Reid with the same machinery, to carry material of its own to an upper floor. The question of whether Reid was the agent of the corporation or of Back under the circumstances was one for the jury. Brumhall v. Sutherland, supra; Madsen v. LeClair, 125 Cal.App. 393, 13 P.(2d) 939. The fact that Reid had followed Back's instructions to go slow did not make Reid the servant of Back. Moss v. Chronicle Publishing Co., 201 Cal. 610, 258 P. 88, 55 A.L.R. 1258.

[4, 5] And finally appellant contends that the case must be reversed because the jury failed to find a verdict against Reid, the operator. Reid did not appear in the action as he was not served with summons. As to him, therefore, there was no verdict either way. The action proceeded against his employer alone. The rule contended for by appellant does not apply in such a case. Benson v. Southern Pacific Co., 177 Cal. 777, 171 P. 948. Moreover, the point cannot be raised for the first time on appeal. No request was made by appellant to have the jury find on the question of Reid's negligence. Lloyd v. Boulevard Express, 79 Cal.App. 406, 249 P. 837.

The judgment is affirmed.

We concur: CASHIN, J.; KNIGHT, J.

---

20 Cal.App.2d 240

WHICKER v. CRESCENT AUTO CO. et al.

Civ. 10233.

District Court of Appeal, First District, Division 1, California.

April 7, 1937.

Rehearing Denied May 7, 1937.

Hearing Denied by Supreme Court May 27, 1937.

1. Automobiles 🔑245(72)
Evidence 🔑89

Where pedestrian injured by automobile called driver as her witness under statute, jury could consider driver's testimony, though such testimony did not of itself destroy probative weight of presumption that pedestrian acted as prudent person; question whether driver's testimony overcame presumption being for jury (Code Civ.Proc. § 2055).

2. Evidence 🔑89, 591

Presumption that injured person, such as pedestrian struck by automobile, acted as prudent person loses its evidentiary weight only where facts admitted or established by proof are irreconcilable with presumption, and mere calling of adversary as injured person's witness under statute does not destroy presumption (Code Civ.Proc. §§ 1824, 2055).

3. Evidence 🔑591

Party, such as pedestrian injured by automobile, who is merely telling how events appeared to him, rather than making admission or testifying to facts peculiarly within his own knowledge, is not bound by his own testimony as against circumstantial or other evidence which jury might fairly believe.

4. Automobiles 🔑246(60)

Giving instruction that, in absence of contrary evidence, presumption was that pedestrian injured by automobile acted as prudent person *held* proper where pedestrian's recollection of details of accident was not clear, and testimony of driver, called as pedestrian's witness under statute, created conflict in certain particulars and testimony of third witness differed in some respects from both (Code Civ.Proc. §§ 1824, 2055).

5. Automobiles 🔑246(31)

In action by pedestrian who was from twenty-five to thirty feet from corner when struck by automobile as she stepped from safety zone in attempt to reach sidewalk, instructions that pedestrian, using ordinary care, might cross from safety zone to adjacent curb, but must use higher degree of care than at established cross-walk, and that pedestrian using such degree of care has equal right with motorist to use such portion of street, *held* fairly to state duty of pedestrian making necessary use of street as permitted by ordinance, where it appeared that cross-walk was about 104 feet from point of accident (St.1931, p. 2127, § 131½ (c).

6. Automobiles 🔑160(4)

Although both motorist and pedestrian, who was from twenty-five to thirty feet from street corner when struck by automobile as she stepped from safety zone, were bound to use ordinary care, fact that motorist was operating automobile obligated him to use greater amount of care.

7. Negligence 🔑4

Although requisite degree of care is ordinary care under circumstances, care to be exercised in use of any instrumentality is proportionate to possibilities arising from its careless use.

8. Automobiles 🔑217(5)

Pedestrian who was from twenty-five to thirty feet from street corner when struck by automobile as she stepped from safety zone in attempt to reach sidewalk *held* bound to use ordinary care but not to look continuously for approaching automobiles.

9. Trial 🔑133(6)

In automobile accident case, where witness, in response to juror's question, referred to request for a statement made by person supposedly representing insurance company, prompt instruction that no insurance company was party to suit, and that answer should be disregarded, *held* sufficient to remove any prejudicial impression.

10. New trial 🔑162(1)

Where trial court in personal injury action denied new trial on condition that portion of award be remitted, court's statement that otherwise new trial would be granted on all statutory grounds *held* not to indicate, as contended, that court was dissatisfied with verdict on facts and on other grounds urged for new trial, and that therefore court was bound to grant new trial irrespective of amount of award.

◆

Appeal from Superior Court, San Francisco County; James G. Conlan, Judge.

Action by Jennie Whicker against the Crescent Auto Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Charles V. Barfield, of San Francisco, for appellants.

Edmund Gerald Brown and Harold C. Brown, both of San Francisco, for respondent.

PER CURIAM.

The plaintiff was injured by an automobile driven by defendant Basil Vaughn, an employee of the corporations named. A jury awarded her as damages the sum of $7,500 as against all the defendants. Following a motion for a new trial the amount was reduced to $5,000 and judgment was entered accordingly.

The defendants, who have appealed, urge that the trial court erred to their prejudice in certain of its instructions and rulings, and also by its denial of their motion for a new trial.

[1-4] Vaughn's negligence is not disputed. The jury was instructed that in the absence of evidence to the contrary it would be presumed that the plaintiff did everything that a prudent person would

have done under the circumstances for her own safety. Defendants contend that, plaintiff and Vaughn—who was called as her witness under section 2055 of the Code of Civil Procedure—having testified with respect to her conduct at the time of the accident, the instruction was improper.

The automobile driven by Vaughn rounded a corner of Powell and Market streets in San Francisco and turned into the latter street at a speed estimated at 30 miles an hour. The distance from this corner to the place where plaintiff was injured was between 25 and 30 feet. The plaintiff was struck as she stepped from a safety zone on Market street in an attempt to reach the north sidewalk. Due apparently to the confusion attending such a casualty, her recollection of the precise details of the accident was far from clear; that of Vaughn created a conflict in certain particulars, and the testimony of a third witness to the occurrence differed in some respects from both. Vaughn's testimony, though evidence in the case which the jury might consider, did not of itself destroy the probative weight of the fact presumed, the question whether his testimony proved facts sufficient to overcome the presumption being one for the jury. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; Tuttle v. Crawford (Cal. Sup.) 63 P.(2d) 1128. According to numerous cases, it is only where facts are admitted or established by proof (the effect of evidence, Code Civ.Proc. § 1824) which are irreconcilable with the presumption that it loses its evidentiary weight. Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, 210 P. 269; Smellie v. Southern Pacific Co., supra; 10 Cal.Jur., Evidence, § 64, p. 747. As held in the Smellie Case, the calling of an adverse party under the Code section does not have that effect, nor in cases of this character is a party who is merely giving a narration as to how events appeared to him rather than making an admission or testifying to a fact peculiarly within his own knowledge, bound by his own testimony as against circumstantial or other evidence which the jury might fairly believe. Kanopka v. Kanopka, 113 Conn. 30, 154 A. 144, 80 A.L.R. 619; Whiteacre v. Boston Elevated Ry. Co., 241 Mass. 163, 134 N.E. 640; Hill v. West End Street Ry. Co., 158 Mass. 458, 33 N.E. 582.

In Johnson v. Johnson, 137 Cal.App. 701, 31 P.(2d) 237, 239, a negligence case, it was urged that the plaintiff's testimony supported the theory of the defendant as to how the accident happened, and that the former was bound thereby; but the court, in holding that she was not so bound, said: "It is well known that honest witnesses do not always see the same thing or get a correct impression of the happening and relation of a series of events which take place almost simultaneously." So here the evidence of the occurrence was not so clear or certain as to enable us to say that facts were proved which made the presumption of no weight, or should preclude the jury from determining the question from a consideration of all the evidence, including the presumption (Mar See v. Maryland Assur. Corp., supra; Tuttle v. Crawford, supra; Tanaka v. Granelli, 107 Cal.App. 547, 290 P. 515), nor does Paulsen v. McDuffie, 4 Cal.(2d) 111, 47 P.(2d) 709, hold to the contrary.

[5] Defendants complain of certain instructions, stating in substance that a pedestrian might cross from a safety zone to the near adjacent curb, but must use ordinary care for his own safety in doing so, and a higher degree of care than at an established crosswalk; also that a pedestrian using that degree of care has an equal right with a motorist to the use of that portion of the street. An ordinance of the City and County of San Francisco (No. 7681, § 10) provided, with respect to the district in which the accident happened, that no pedestrian should cross a roadway other than by a crosswalk, or be in any roadway other than in a safety zone or crosswalk, but that it should not be construed "to prevent the necessary use of the roadway by a pedestrian." Section 131½ (c) of the California Vehicle Act (St.1923, p. 517, as added by St.1931, p. 2127) required pedestrians crossing a roadway at any point other than within a marked or unmarked crossway to yield the right of way to vehicles, the driver of such a vehicle, however, being charged with the duty of exercising due care. Plaintiff's right to cross at a place other than at a crosswalk, which it appears was approximately 104 feet from where she was standing, was, at the request of the defendants, submitted to the jury on the issue whether her act was a necessary use of the highway. We are satisfied that the instructions complained of fairly stated the duty of a pedestrian making such use of the street; and the implied finding that this was the case is reasonably supported by the evidence.

[6, 7] The court also instructed the jury that although the plaintiff and the driver are both charged with the use of ordinary care, from the fact that the driver was operating an automobile at the time of the accident, he was bound to use a greater amount of care. A similar instruction was approved in Vedder v. Bireley, 92 Cal. App. 52, 267 P. 724, and is in accord with the rule that the care to be exercised in the use of any instrumentality is proportionate to the possibilities arising from its careless use, the degree of care required being ordinary care under the circumstances. 5 Am.Jur., Automobiles, § 12, p. 524. See, also, Pinello v. Taylor, 128 Cal.App. 508, 17 P.(2d) 1039; Anderson v. Walters, 135 Cal.App. 380, 27 P.(2d) 100. This instruction was criticized in Warnke v. Griffith Co., 133 Cal.App. 481, 496, 24 P.(2d) 583; but there by a proposed instruction the jury would have been charged, contrary to the weight of authority, that an automobile is a dangerous instrumentality. 5 Am. Jur., Automobiles, § 11, p. 522.

[8] The jury was also charged in substance that, although it was plaintiff's duty to use ordinary care at all times, she was not required to look continuously for approaching cars. That such is the rule was held in Filson v. Balkins, 206 Cal. 209, 273 P. 578; Maggart v. Bell, 116 Cal. App. 306, 2 P.(2d) 516; Lincoln v. Williams, 119 Cal.App. 498, 6 P.(2d) 563; Crooks v. Doeg, 4 Cal.App.(2d) 21, 40 P. (2d) 590; Pinello v. Taylor, supra.

[9] During the trial, in response to a question by a juror, a witness referred to a request for a statement made by a person whom he supposed to be a representative of an insurance company. The court immediately instructed that no insurance company was a party to the suit, and that the answer of the witness should be disregarded. This was sufficient to remove any prejudicial impression from the testimony in this respect.

[10] The trial court required, as a condition to its order denying a new trial, that a portion of the award be remitted. In so doing, it was stated that a new trial otherwise would be granted on all the statutory grounds. Defendants urge that the order indicates that the trial court was dissatisfied with the verdict on the facts and on the other grounds urged by the defendants in support of their motion; and that it was therefore the duty of the court to grant a new trial irrespective of the amount of the award. That such is not the rule was held in Dreyer v. Cyriacks, 112 Cal.App. 279, 297 P. 35; Muench v. Gerske, 139 Cal.App. 438, 34 P.(2d) 198.

We are satisfied from an examination of the entire record that the evidence reasonably supports the verdict, and that no error was committed which would warrant the conclusion that there was a miscarriage of justice.

The judgment is affirmed.

---

20 Cal.App.2d 220

CAULFIELD v. MARKET ST. RY. CO. et al.

Civ. 10205.

District Court of Appeal, First District,
Division 1, California.

April 6, 1937.

Rehearing Denied May 6, 1937.

Hearing Denied by Supreme Court
May 27, 1937.

1. Damages 🔑191

In personal injury action, amounts agreed to be paid for medical service are evidence of reasonable value, but such evidence is not conclusive.

2. Evidence 🔑571(7)

Expert opinions as to value of medical services furnished plaintiff in personal injury action are evidence of reasonable value, but such evidence is not conclusive.

3. Evidence 🔑589

In passenger's action against street car company for injuries received when she fell from moving street car, jury was not compelled to conclude from passenger's testimony as to time lost from employment, that such loss of time was necessary result of her injuries (Code Civ.Proc. § 2061).

4. Damages 🔑130(1)

$400 *held* not excessive for injuries received by street car passenger in fall from moving street car.

5. Appeal and error 🔑933(4)

In action against street railway company by passenger for injuries received when she fell from moving street car, order denying plaintiff's motion for new trial after verdict was returned in amount of $400 did not establish that trial court was of opinion that evidence was insufficient to prove negligence.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Catherine M. Caulfield against Market Street Railway Company and others. From an adverse judgment, the plaintiff appeals.

Affirmed.

Vincent W. Hallinan, F. Bruce McMullen, William F. Herron and John K. Hagopian, all of San Francisco, for appellant.

William M. Abbott, Walter H. Linforth, and William M. Cannon, all of San Francisco, for respondents.

PER CURIAM.

Appeal by the plaintiff in an action for personal injuries from a judgment entered in her favor in the sum of $400.

The trial court denied her motion for a new trial, one of the grounds of which was the inadequacy of the award.

She alleged that she fell from a moving street car which was negligently operated by defendant company, and suffered certain physical injuries.

There was a conflict in the testimony as to the nature and extent of her injuries; and from that adduced by the defendant the jury was justified in finding that they were not serious or permanent.

[1-3] It was testified that she lost time from her employment and incurred liability for hospital care and the services of physicians and nurses, the aggregate of the amounts claimed exceeding the judgment. While amounts agreed to be paid for services are some evidence of their reasonable value (Dewhirst v. Leopold, 194 Cal. 424, 229 P. 30; Davis v. Fyfe, 107 Cal.App. 281, 290 P. 468), this is not conclusive (Zimmer v. Kilborn, 165 Cal. 523, 132 P. 1026, Ann.Cas.1914D, 368), and the same rule applies as to expert opinion as to value. (10 Cal.Jur., Evidence, sec. 125, p. 842; Nichols Applied Evidence, vol. 5, p. 4584.) Nor was the jury compelled to conclude from plaintiff's testimony as to the time lost from her employment that this was the necessary result of her injuries. Code Civ. Proc., § 2061.

[4, 5] In view of all the testimony, we cannot say that the award was inadequate. Nor, as urged by the defendants, does it follow from the order denying the motion for a new trial that the trial court was of the opinion that the evidence was insufficient to prove negligence. Dreyer v. Cyriacks, 112 Cal.App. 279, 297 P. 35; Muench v. Gerske, 139 Cal.App. 438, 34 P.(2d) 198. There was sufficient evidence on the latter issue to go to the jury and their conclusion is fairly supported.

The judgment is affirmed.

---

20 Cal.App.2d 268

MEYERS v. GUARDIAN LIFE INS. CO. OF AMERICA.

Civ. 11302.

District Court of Appeal, Second District, Division 2, California.

April 8, 1937.

Hearing Denied by Supreme Court June 3, 1937.

Limitation of actions 🔑28(1)

Action to enforce wife's community rights in life policy issued to her husband on which premiums had been paid from community fund *held* not based on "contract in writing" within statute applying four-year period of limitations thereto, but to be governed by statute applying two-year period of limitations to action on obligations not founded on written instrument (Code Civ.Proc. § 337, subd. 1, as amended by St. 1933, p. 2116; Code Civ.Proc. § 339, subd. 1).

[Ed. Note.—For other definitions of "Written Contract or Agreement," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Ada Meyers against the Guardian Life Insurance Company of America. From a judgment in favor of the defendant, the plaintiff appeals.

Affirmed.

Wendell P. Hubbard, of Los Angeles, for appellant.

Harry B. Ellison, of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal by plaintiff from a judgment in favor of defendant after trial by the court without a jury.

Viewing the evidence most favorable to the defendant, the facts are:

In 1886 plaintiff and Robert Meyers were married in New York City. They separated in 1900, and in 1910 Robert Meyers obtained a divorce from plaintiff. In 1932 at plaintiff's instance this decree was vacated. Immediately after obtaining the divorce, Robert Meyers married Roseabel Meyers. Thereafter in 1913 they came to California and lived here as husband and wife continuously until his death in 1931.

Defendant issued two life insurance policies with Robert Meyers as the assured and Roseabel Meyers as the beneficiary, one in 1923 in the amount of $25,000 and the other in 1928 in the amount of $100,000. The premiums on these policies were paid with community funds of plaintiff and Robert Meyers. Subsequent to assured's death the named beneficiary's claim under the policies was settled with her.

October 16, 1931, plaintiff made demand upon defendant that it pay one-half of the face value of each policy to her, claiming that the same constituted her community interest in them. The present action was commenced November 8, 1934.

This is the sole question presented for determination: *Is a suit by the surviving spouse to enforce her community rights in a life insurance policy, wherein her husband is named as assured, and the premiums on which have been paid from community funds, based on a contract in writing, thus making applicable the four-year statute of limitations? Subdivision 1, § 337, Code Civ.Proc., as amended by St. 1933, p. 2116.*

This question must be answered in the negative. A suit is not upon a contract in writing unless the obligation which it is sought to enforce is found in the written agreement. McCarthy v. Mt. Tecarte L. & W. Co., 111 Cal. 328, 340, 43 P. 956. Mr. Justice McFarland in McCarthy v. Mt. Tecarte L. & W. Co., supra, 111 Cal. 328, at page 340, 43 P. 956, 959, thus accurately states the rule: "But a cause of action is not upon a contract founded upon an instrument in writing, within the meaning of the Code, merely because it is in some way remotely or indirectly connected with such an instrument, or because the instrument would be a link in the chain of evidence establishing the cause of action. In order to be founded upon an instrument in writing, the instrument must itself contain a contract to do the thing for the nonperformance of which the action is brought."

In the instant case plaintiff's causes of action against defendant arose from her marital status as the wife of the assured plus the fact that the premiums upon the policies had been paid with community funds. Her rights of action were not based upon the policies of insurance issued by defendant. Her causes of action were based upon the facts that certain funds, which belonged to her but which under the law were exclusively in the possession and under the control of her husband, had been invested by him and had become of great value; and that she had a right to trace such funds, including the profits for the purpose of impressing her ownership upon them. There was no mutuality of contract between plaintiff and defendant created by the insurance policies. Defendant could not have required plaintiff to pay the premiums. Her claim was founded primarily upon the claim that she was the owner of the funds, and against defendant, because it was in possession of them. The policies of insurance were a mere link in the chain of evidence establishing her causes of action. Hence, since her causes of action were not founded upon an instrument in writing, subdivision 1, section 337, of the Code of Civil Procedure did not apply; but subdivision 1, section 339, of the Code of Civil Procedure, providing that an action upon an obligation not founded upon a written instrument must be brought within two years from the date the cause of action arises, is applicable. Therefore, in the present case, as more than two years had elapsed from the date plaintiff's causes of action arose before the filing of the complaint, they were barred by the statute of limitations.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

MILLER v. HART et al.*

Civ. 5783.

District Court of Appeal, Third District, California.

April 13, 1937.

Hearing Granted June 10, 1937.

Mortgages 🔑559(2)

Statute requiring the appointment of an appraiser in foreclosure of trust deeds, in so far as it affects right to a deficiency judgment *held* unconstitutional as applied to trust deed made prior to effective date of statute (Code Civ.Proc. § 725a, as added by St.1933, p. 1673; § 726, as amended by St. 1933, p. 2118).

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Suit by Margaret M. Miller against Alfred E. Hart, Beatrice O. Hart and others. From a portion of a trust deed foreclosure decree ordering a deficiency judgment against named defendants, they appeal.

Affirmed.

Byron J. Walters, of Los Angeles, for appellants.

V. A. Morgan, of Alhambra, for respondent.

PER CURIAM.

This is an appeal from that portion of a decree of foreclosure of a trust deed ordering a deficiency judgment against these defendants after the sale of the property described in the deed of trust.

Appellants maintain that the trial court erred in ordering such deficiency judgment without the appointment of an appraiser in accordance with section 726 of the Code of Civil Procedure (as amended by St. 1933, p. 2118), in an action to foreclose a deed of trust made prior to the effective date of that section.

In Wilson v. Superior Court, 8 Cal.App. (2d) 14, 47 P.(2d) 331, the court there passed upon this question, and there held that as to a note and deed of trust made prior to the passage of sections 725a and 726 of the Code of Civil Procedure as it now exists (St.1933, pp. 1673, 2118) requiring the appointment of an appraiser, at least so far as it affects the right of a deficiency judgment, is unconstitutional.

Upon the authority of that case, the judgment from which this appeal is taken is affirmed.

20 Cal.App.2d 142

HOLLYFIELD v. GEIBEL et al.

Civ. 5777.

District Court of Appeal, Third District, California.

April 2, 1937.

1. Appeal and error 🔑518(4)

Original pleading in a particular suit on trial may be a part of the judgment roll for certain purposes, even though it has been superseded by an amended pleading (Code Civ.Proc. § 670, as amended by St.1933, p. 1883).

2. Appeal and error 🔑837(2)

Amended complaint in former action to quiet title which had not been incorporated in bill of exceptions on appeal from judgment of foreclosure in action based on judgment rendered in quiet title action, but which was filed in accordance with order for diminution of the record was incompetent for any purpose (Code Civ.Proc. § 670, as amended by St.1933, p. 1883).

3. Judgment 🔑518

On appeal from judgment foreclosing a lien on certain realty, to satisfy a judgment rendered in quiet title action, amended complaint in quiet title action could not be used to show admissions in conflict with judgment of foreclosure, since its use for that purpose would amount to a collateral attack on the judgment in the quiet title action which had become final.

4. Courts 🔑475(2)

Superior court *held* to have jurisdiction to entertain and determine action to quiet title to both realty and money in bank brought by person claiming a one-fourth interest in estate of a decedent against decedent's executor and his widow who was sole devisee where such property was claimed to belong to estate.

5. Courts 🔑475(2)

Person claiming an undivided one-fourth interest in certain realty and money in bank claimed to be part of a decedent's estate *held* entitled to bring an independent suit in superior court to quiet title to both realty and money in bank against either executor of the estate or decedent's heirs or both under statute (Probate Code, § 573, as amended by St.1935, p. 857).

6. Judgment 🔑688

Judgment in suit to quiet title to an undivided one-fourth interest in realty and in money in bank was binding on both executor in his representative capacity and the sole devisee and surviving widow of deceased, where both were parties to the quiet title action (Probate Code, § 573, as amended by St.1935, p. 857).

---

*For subsequent opinion see 81 P.2d 923.

7. Executors and administrators ⟹113, 453(1)

Judgment by default or by confession on part of an administrator or executor is binding on the estate.

8. Courts ⟹475(2)

Judgment of superior court in action against executor and sole devisee to quiet title to an undivided interest in realty and in money in bank in which court found that money did not belong to decedent's estate and in which plaintiff was granted a lien on the realty to secure payment of specified sum found to belong to plaintiff *held* authorized as against contention that money should be paid out only in due course of administration (Probate Code, § 730).

9. Judgment ⟹479, 688

Judgment in former action to quiet title to an undivided one-fourth interest in realty and in money in bank brought by plaintiff against executor and sole devisee *held* binding on both estate and devisee and not subject to collateral attack in proceeding to foreclose lien granted in quiet title action.

10. Judgment ⟹713(2)

Generally, a judgment is conclusive, not only as to subject-matter in controversy in the action on which it is based, but also in all other actions involving the same question, and on all matters involved in issues which might have been litigated and decided in case; presumption being that all such issues were really met and decided as to parties and privies to judgment.

◆

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by Susanne Hollyfield against Martin E. Geibel, as executor of the estate of George W. Hollyfield, deceased, and another. From an adverse judgment, the named defendant appeals.

Affirmed.

Porter & Sutton and E. D. Mulford, all of Los Angeles, for appellant.

Howard F. Shepherd and John F. Bender, both of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

Martin E. Geibel, as executor of the estate of George W. Hollyfield, deceased, has appealed from a judgment which was rendered against him in his representative capacity, foreclosing a lien upon specifically described real property, to satisfy a judgment which was rendered in another suit quieting title in this plaintiff, Susanne Hollyfield, to an undivided one-fourth interest in the real property, and to the sum of $1,683.52 held in the possession of this appellant.

It is contended the former judgment which determined this respondent's title to the undivided one-fourth interest in the real property and to said sum of $1,683.52 in the possession of the appellant, and establishing a lien upon the real property to secure the payment of the said sum of money, is void for the reason that the court was without jurisdiction in that cause, and that, in any event, the court exceeded its jurisdiction by creating the lien and failing to provide that said sum should be paid from the assets of the estate only in due course of administration after all debts and expenses of the estate were first paid.

The appeal is presented to this court on a settled bill of exceptions, which shows that George W. Hollyfield died testate in Los Angeles, possessed of real and personal property; that aside from some nominal legacies, his widow was named sole devisee under his will; that upon proceedings duly had the will was admitted to probate and Martin E. Geibel was appointed and qualified August 19, 1930, as executor thereof; that the estate was appraised at the sum of $21,000, including the real property and the sum of $6,734.07 involved in this action, which were claimed as the property of the estate. The bill of exceptions shows that the proceedings of a former suit to quiet title in Susanne Hollyfield to an undivided one-fourth interest in that property were received in evidence in this case over the objections of the appellant. The pleadings in the former suit are not included in the bill of exceptions save that brief summaries thereof do appear. The judgment which was rendered in that case appears in full. After reciting the preliminaries thereof, including the fact that the appellant, "Martin E. Geibel, as executor of the estate of George W. Hollyfield, deceased, by himself in his own proper person" appeared as attorney for the estate, the judgment then provides in part:

"Thereupon the trial of said action proceeded, and evidence both oral and documentary was offered by the respective parties, and said parties having filed herein a written stipulation relating to the judgment that might be entered herein; thereupon * * *

"It is ordered, adjudged and decreed as follows:

"1. That the plaintiff Susanne Hollyfield is the owner and entitled to the possession of an undivided one-fourth interest in and to the following described real property * * * (describing the property hereinbefore referred to).

"2. That Susanne Hollyfield was the owner and was entitled to be paid at the date of the death of George W. Hollyfield * * * one-fourth of moneys on deposit in the First Trust & Savings Bank of Pasadena, California, in an account in the name of * * * Mary Jane Fleming Hollyfield, * * * which said moneys on deposit in said account amounted at said time to the sum of $6,734.07, of which one-fourth herein found to belong to the plaintiff, amounted to the sum of $1,683.52.

"3. * * * That the said plaintiff, Susanne Hollyfield, was at that time of the commencement of this action, and now is the owner absolute and in fee simple of an undivided one-fourth interest in and to real property above described, and the owner of the above mentioned sum of money amounting to $1,683.52. * * *"

The judgment in the former action then determines that Martin E. Geibel, as executor of the estate of George W. Hollyfield, deceased, is entitled to the custody of said undivided three-fourths of the real property and three-fourths of the money in bank "for the purpose of administration." That judgment further determines, pursuant to the allegations of her cross-complaint which was filed in that action, that the fee in said undivided three-fourths of the real property and of three-fourths of the money in bank belongs to Mary Jane Fleming Hollyfield, subject to a lien on her share of the real property to secure the payment to Susanne Hollyfield of said sum of $1,683.52, found to be her property. The paragraph in the decree which creates the lien is worded as follows:

"Subject, however, to a lien upon the above described undivided three-fourths interest in said property in favor of the plaintiff herein, Susanne Hollyfield, and to secure the payment of said sum of $1683.52, per provisions heretofore made."

The bill of exceptions also shows that after the introduction of oral and documentary evidence in the former suit to quiet title, the following stipulation of respective parties, including the attorney for the estate, with regard to the rendering of judgment and the conclusiveness thereof, was filed in the following language:

"That without further proof being offered by any parties to said action that the above entitled court may, if it is so advised, enter a judgment in the above entitled action in accordance with copy of said judgment hereunto attached to this stipulation.

"With reference to the plaintiff Susanne Hollyfield, it is understood and agreed that her attorney, Howard F. Shepherd, does not have authority to settle or compromise the above entitled action for his client, but does stipulate that the facts brought forth at the trial of the action will support a judgment in the form hereunto attached.

"It is further stipulated by all parties hereto that findings of fact and conclusions of law in connection with the judgment to be entered in the above entitled action, are hereby waived.

"It is further understood and agreed by all parties to this stipulation that the right of any party to said action to move for new trial, or to vacate the above mentioned judgment and enter a different judgment, or to appeal therefrom, is, in consideration of the mutual agreements hereto, expressly waived."

[1-3] To show certain alleged admissions of the plaintiff as to the nature of her claim of title to the real and personal property which is involved herein, the appellant procured an order of court for diminution of the record and filed in accordance therewith a certified copy of the amended complaint in the former suit to quiet title. It is true that an original pleading in a particular suit on trial, under the provisions of section 670 of the Code of Civil Procedure (as amended by St.1933, p. 1883), has been deemed to be a part of the judgment roll, even though

it has been superseded by an amended pleading, at least for certain purposes, such as the determination of whether the action is barred by the statute of limitations. 2 Cal.Jur. 514, § 254. That rule, however, has no bearing on the present case. It may not be said the original pleadings in a former action, or any of the pleadings thereof, are a part of the judgment roll in the present suit. Since the amended complaint in the suit to quiet title was not incorporated in the bill of exceptions, and is not a part of the judgment roll in this case, we may not be permitted to resort to it on this appeal to support any alleged admissions or omissions of testimony which are not included in the bill of exceptions. We are of the opinion that pleading is incompetent for any purpose on this appeal and it must be disregarded. Moreover, if it contains admissions in conflict with the decision in this case, its use for that purpose would amount to a collateral attack upon the judgment in the former action which became final, since no appeal was taken therefrom. In truth, the right of appeal from that judgment was specifically waived by this appellant.

[4-6] There is no doubt the superior court had jurisdiction to entertain and determine the suit to quiet title to both the real property and the money in bank and the plaintiff was specifically authorized to bring an independent suit for that purpose against either the executor of the estate of the decedent, or his heirs, or both. Section 573, Probate Code (as amended by St.1935, p. 857); 11b Cal.Jur. 423, § 991; Schwarz v. Bohle, 47 Cal. App. 445, 190 P. 819. The judgment which was rendered in the suit to quiet title is binding on both the executor, in his representative capacity, and against Mary Jane Fleming Hollyfield, as the devisee and surviving widow of the deceased, since both were parties to that action.

[7] The judgment which was rendered in the suit to quiet title was not a judgment by confession or stipulation. The suit was heard on oral and documentary evidence which was adduced. The stipulation which was filed therein merely agreed that "without further proof the above-entitled court may, if it is so advised, enter a judgment." The executor waived his right to move for a new trial and to appeal therefrom. It has been held a judgment by default or by confession on the part of an administrator or executor is binding on the estate. 11b Cal.Jur. 344, § 927; Chase v. Swain, 9 Cal. 130.

[8] It is true that a judgment which is rendered against an executor upon a mere claim for money against the estate of a decedent does not establish a lien for the satisfaction of the judgment against the property of the estate. Section 730, Probate Code; 11b Cal.Jur. 353, § 934. In the present case, however, the judgment which was rendered in the suit to quiet title was not founded on a claim for a mere money judgment against the estate. It was a suit to establish title to a sum of money which the court specifically found did not belong to the estate. In that suit the court granted the plaintiff a lien on the real property in the custody of the executor of the estate to secure payment of the specified sum of money belonging to plaintiff to which the estate had no title or right of possession. Under such circumstances, the court of equity had a right to require the payment of that sum of money to the owner thereof, without providing that it should be paid to her "in due course of administration of the estate." An executor has no right to administer on property which does not belong to the estate.

[9, 10] The court, having acquired jurisdiction of the parties and of the subject-matter which were involved in the suit to quiet title, was authorized to render the judgment quieting title in plaintiff to the undivided one-fourth interest in both the real and the personal property belonging to her. That judgment is binding on both the estate and Mary Jane Fleming Hollyfield, and may not be collaterally attacked in this proceeding.

In the case of Crew v. Pratt, 119 Cal. 139, at page 149, 51 P. 38, 42, it is said:

"It may be stated as a general proposition that a judgment is conclusive, not only as to the subject-matter in controversy in the action upon which it is based but also in all other actions involving the same question, and upon all matters involved in the issues which might have been litigated and decided in the case; the presumption being that all such issues were really met and decided."

In 1 Freeman on Judgments (5th Ed.) page 603, § 305, it is said regarding the rule prohibiting collateral attacks upon judgments that:

"If he (the judgment debtor) omits or neglects to test the soundness of the judgment by * * * direct methods available for that purpose, he is in no position to urge its defective or erroneous character when it is pleaded or produced in evidence against him in subsequent proceedings. * * * This rule of inhibition against collateral attempts to avoid the judgment may be expressed in the following manner: Judgments of a legally organized judicial tribunal, proceeding within the scope of its allotted powers, and possessing the requisite jurisdiction over the subject matter of the suit and the parties thereto, whether correct or erroneous, cannot be called in question by the parties or privies in any collateral action or proceeding."

The judgment is affirmed.

We concur: PLUMMER, J.; PULLEN, P. J.

---

20 Cal.App.2d 222

Ex parte SERVAES.

Cr. 1554.

District Court of Appeal, Third District, California.

April 6, 1937.

1. **Habeas corpus** 🔑21

Habeas corpus is proper remedy for discharge of prisoner who is illegally restrained of his liberty, pursuant to commitment by magistrate, where preliminary examination fails to disclose sufficient cause to believe prisoner guilty of a public offense (Pen. Code, § 871).

2. **Habeas corpus** 🔑85(1)

Evidence adduced at preliminary hearing *held* to disclose no sufficient cause to believe defendant guilty of second-degree murder, or any public offense, thus entitling defendant to writ of habeas corpus and discharge from custody (Pen.Code, § 871).

Proceeding in the matter of the application of Ted Servaes for a writ of habeas corpus.

Writ granted and prisoner discharged.

Ranse R. Sischo, of Merced, for petitioner.

U. S. Webb, Atty. Gen., Wilmer W. Morse, Deputy Atty. Gen., and F. A. Silveira, Dist. Atty., of Merced, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

By means of a writ of habeas corpus the petitioner seeks to obtain a discharge from custody on the ground that the evidence which was adduced at the preliminary hearing fails to show there is a reasonable probability that he is guilty of murder of the second degree, or of any public offense whatever.

[1] Habeas corpus is the proper remedy for the discharge of a prisoner who is illegally restrained of his liberty pursuant to a commitment by a magistrate when the preliminary examination fails to disclose "sufficient cause to believe the defendant guilty of a public offense." Section 871, Pen.Code; 13 Cal.Jur. 230, § 12.

[2] The record of the proceedings upon the preliminary examination of the defendant discloses no sufficient cause to believe he is guilty of murder of the second degree, or of any public offense, and he should therefore be discharged from custody. It does not appear that an information has been filed in this case.

All that the evidence discloses is that the petitioner and his wife and children were living in the same cottage with Mr. and Mrs. Albert Galpin in a country district several miles from the scene where the body of the deceased was found. It appears that the petitioner owned a revolver and one or two other guns which were kept about the house and with which he sometimes hunted. It also appears that Albert Galpin owned a gun which he, too, kept in the cottage, and that he sometimes hunted with Servaes. The deceased was a boy by the name of Paul Fragulia. It appears that the petitioner and Galpin knew Fragulia slightly, but there is no evidence they ever associated with him, or that there was any enmity between them. It must be assumed their association was of a friendly nature. Absolutely no motive for the commission of the alleged homicide appears in the record.

The Gurr road is a country highway about five miles distant from Merced. This roadway crossed an arm of a swamp which was overgrown with bulrushes. This depression was spanned by a bridge. On the night of October 4, 1933, three years before the preliminary hearing was held, at about 7 o'clock in the evening, after dark, Mr. Miolano was driving in his automobile along that Gurr road. He saw the prostrate body of a boy lying face down on the bridge beside a bicycle. Supposing the boy had been struck and injured by a passing machine, he got out and examining the body he discovered that it was Paul Fragulia, whom he knew. The body was still lax and warm. Rolling the body over, Miolano found lacerations on his face, indicating that he had probably fallen on his face. Miolano had previously seen no machine or person in that vicinity, nor had he heard the firing of a gun. He failed to discover the gunshot wound in the boy's forehead, which caused his death, and he looked for no weapon in the vicinity of his body, although there is no reason to believe it was a case of suicide. The body was placed in his automobile and taken to the hospital, where a surgeon found a ragged bullet wound penetrating the skull at a point about one inch above the left eye. The boy was dead when he reached the hospital. A post mortem examination disclosed the fact that the bullet ranged downward and lodged at the base of the skull. The ragged nature of the wound and the fact that the bullet did not pass through the head of Fragulia indicate that it was either a ricocheted or a spent bullet fired from considerable distance.

There is evidence that as Miolano left the bridge after picking up the body of Fragulia he passed an old machine in which one unidentified individual was riding. Also a pig ran from the bulrushes by the roadside into the bumper of his machine, and then rushed back into the swamp. Mrs. Rose Silva, the sister-in-law of the petitioner, who was living in the cottage where the petitioner and Galpin resided, testified that Servaes and Galpin "left the house after dark; * * * they said they were going hunting." The evidence fails to indicate whether one or both of them took guns with them. It does not appear where they were hunting, or whether they were in the vicinity of the place where the body of Fragulia was found on the bridge. Mrs. Silva testified that sometime later they returned, and that the petitioner "had his pants rolled (up) and no shoes on," and that he said "they would have to go after those shoes." She also said "they claimed there was some shooting going on there also. * * * Both of them was thinking someone was firing toward them and one of them fired in the air, and then they came home. * * * One of them said it looked like there was something in the ditch, along side the ditch. * * * I heard them say there was other people there, hunters out there." It appears that later Servaes and Galpin, accompanied by Mrs. Servaes, took a Chevrolet machine and went for the shoes. When they returned, the witness had gone to bed.

Some time later an officer went to their home and was given a Colt revolver which belonged to the petitioner. It was a 32-20 caliber revolver. There is evidence that the bullet which was found in Fragulia's head "looked as though it might be a 32-20 caliber bullet." It contained marks of right-hand rifling. The evidence in the record is that the barrel of the revolver was grooved in the opposite direction.

It will be observed the evidence does not show where Servaes and Galpin went hunting. There is no evidence they were in the vicinity of the swamp or near the bridge where the body of Fragulia was found. The only evidence regarding that subject is that they said other hunters were near them, and were firing in their direction, and "one of them fired in the air" and they then came home. Mrs. Silva testified they did say "it looked like there was something in the ditch." It is apparent that if they were in the vicinity of the slough, it was not the body of the boy which they saw "in the ditch," for his body was lying on the bridge.

There is absolutely no evidence that the boy was willfully or unlawfully killed. Certainly there is no evidence which may reasonably be said to indicate that the petitioner fired the shot that killed him, either willfully or accidentally. The two men were hunting together. The evidence does not indicate which one fired the shot "up in the air." It is just as probable that it was Galpin who did so as that the petitioner fired that shot. Or it might have been "the other hunters" who were shooting in the vicinity where Servaes and Galpin were hunting. Judging from the late hour at which they started hunting, it would seem impossible for them to have arrived at or near the bridge prior to 7 o'clock. Miolano who discovered the wounded boy at 7 o'clock heard no shot fired. The only machine which he saw contained but one individual and it was traveling toward the bridge after the body had been discovered. The petitioner and his family made no effort to leave that vicinity after the death of Fragulia. There was absolutely no motive shown for the shooting. The petitioner was not arrested until three years after the shooting occurred. The record discloses no evidence warranting a presumption that he fired the fatal shot. Nothing but sheer suspicion and vague speculation prompts the conclusion that he fired the shot. A reading of the entire record convinces one that Paul Fragulia was accidentally shot by a stray bullet just as he reached the bridge while he was riding on his bicycle along the highway. There is no evidence that either Galpin or Servaes fired the shot. But if either of them did so it must have been a spent bullet fired from a long distance which just happened to hit the boy. At least there is no substantial evidence that the petitioner either deliberately or accidentally shot Fragulia.

The evidence falls far short of furnishing "sufficient cause" to believe the petitioner guilty of either a deliberate or an accidental homicide. Under such circumstances, the magistrate had no jurisdiction to hold the petitioner for trial in the superior court on a charge of murder of the second degree, or for any other offense. No man should be forced to trial upon a serious charge of murder, or for any public offense, upon such flimsy and unsatisfactory proof.

The writ is granted and the prisoner is discharged.

We concur: PLUMMER, J.; PULLEN, P. J.

---

22 Cal.App.2d Supp. 747

MEDICAL FINANCE ASS'N v. ALLUM et ux.

Civ. A 3554.

Appellate Department, Superior Court, Los Angeles County, California.

March 31, 1937.

1. Husband and wife 🔑19(15)

Obligation to pay for medical services rendered to wife while she was living with prior husband, without any agreement upon her part assuming personal liability, became primarily, if not exclusively, the debt of such husband, and not the debt of subsequent husband whom wife married after divorcing first husband (Civ.Code, § 171, as amended by St.1915, p. 920).

2. Husband and wife 🔑18

If debt for medical services rendered to wife constituted an antenuptial debt or obligation for which wife was personally liable, then second husband was liable for such debt, notwithstanding debt was contracted while wife was married to former husband (Civ.Code, § 171, as amended by St.1915, p. 920).

3. Husband and wife 🔑18

In view of limited and conditional statutory liability which personally affects wife for services rendered, which liability reaches wife through her property rather than her property through wife, court will not ascribe to such narrowly circumscribed property liability, status, and concomitants of an "antenuptial debt" upon her contracting a subsequent marriage so as to render subsequent husband liable for such alleged debt (Civ. Code, § 171, as amended by St.1915, p. 920).

4. Husband and wife 🔑240

Decree ordering judgment for medical services rendered to wife while she was living with prior husband, satisfied out of "any" separate property possessed by wife, *held* error, since liability of judgment could only be imposed upon such separate property of wife as was acquired by her by gift from former husband after her marriage to him (Civ.Code, § 168; § 171, as amended by St. 1915, p. 920).

5. Husband and wife 🔑18

Husband *held* not liable for medical services rendered to his wife while she was married to former husband whom she later divorced, and which services were not rendered upon wife's personal contract (Civ. Code, § 168; § 171, as amended by St.1915, p. 920).

◆

Appeal from Municipal Court of Long Beach; Oscar E. Houston, Judge.

Action by the Medical Finance Association against Arthur E. Allum and wife, for medical services rendered by plaintiff's assignor to the wife before her marriage to the defendant husband. From a judgment of the municipal court for plaintiff, defendants appeal.

Reversed and remanded.

J. S. LePage, of Long Beach, for appellants.

Marshall & Farnham, of Long Beach, for respondent.

SCHAUER, Judge.

[1] Defendants, husband and wife, have appealed from a judgment against them in an action on a book account for medical services rendered by plaintiff's assignor to the defendant Ada P. Allum before her marriage to the defendant Arthur E. Allum, and while she was the wife of one C. W. Osborne, from whom she later obtained a divorce. Such services, in part at least, were performed while defendant Ada and her then husband, Osborne, were living together, without any agreement upon her part assuming personal liability, and consequently to that extent the obligation to pay for the same became primarily, if not exclusively, the debt of the said Osborne. Chaffee v. Browne (1895) 109 Cal. 211, 219, 41 P. 1028; Lane v. McAlpine (1931) 115 Cal.App. 607, 610, 2 P.(2d) 184, 185. As stated in the case last cited: "The general rule is that upon the husband is imposed the duty to maintain his wife and children, and, where the wife living with her husband obtains on credit shelter or supplies needed in the conduct of this common domestic enterprise, she is his agent and incurs no personal liability."

[2] In this action, however, plaintiff seeks to recover from the defendants here sued upon the theory that defendant Ada P. Allum, while she was the wife of Osborne, became personally liable for the debt under the provisions of section 171 of the Civil Code, hereinafter quoted, and that defendant Arthur E. Allum upon marriage to Ada became liable for her antenuptial debts. If the Osborne debt for the services rendered does constitute an antenuptial debt of the wife—that is, an obligation for which she is personally liable—then the judgment against the present husband must be sustained, Van Maren v. Johnson (1860) 15 Cal. 308, 312; Vlautin v. Bumpus (1868) 35 Cal. 214, even though such debt was contracted by the wife while married to the former husband, Johnson v. Taylor (1931) 120 Cal.App.(Supp.) 771, 4 P.(2d) 999; 30 Corpus Juris, 585, but if such debt is not a personal obligation of the wife her present husband is in no way responsible therefor. We think the answer to the obvious problem may be found within the terms of the statute and the cases construing it.

As first enacted (in 1872) and as it existed at the time of the decision in Chaffee v. Browne, supra (1895) 109 Cal. 211, 41 P. 1028, said section 171 of the Civil Code merely provided that "The separate property of the wife is not liable for the debts of her husband, but is liable for her own debts, contracted before or after marriage." In that form it did not purport to, and did not, impose upon either the wife or her property any liability not created by her own contract. Under that state of the law the Supreme Court, in Chaffee v. Browne, supra (1895) 109 Cal. 211, at page 219, 41 P. 1028, 1030, said: "The law justly imposes upon the husband the duty to maintain his wife and children, and does not absolve him of this duty save under exceptional circumstances. The evidence here shows only the ordinary case where the wife living with the husband obtains on his credit the supplies needed in the conduct of their common domestic establishment. For such purposes she is his agent and incurs no personal liability. * * * When persons furnishing to families supplies of the character appearing here expect to charge the wife therefor, they must take care that they have a contract for her personal credit." That such general rule still obtains is evidenced by the excerpt from Lane v. McAlpine (1931) 115 Cal.App. 607, 2 P.(2d) 184, hereinbefore quoted.

In 1905 (Stats.1905, p. 206) said section 171 was amended to read: "The separate property of the wife is liable for her own debts contracted before or after her marriage, but is not liable for her husband's debts; provided, that such property is liable for the payment of debts contracted by the husband or wife for the necessaries of life furnished to them or either of them while they are living together. Provided that the provisions of this act shall not apply to the separate property of the wife held by her at the time of her marriage or acquired by her by devise or succession after marriage." This amendment introduced the imposition of liability for necessaries of life upon the wife's separate property to the extent provided, and as limited in the statute, and, since the wife's property could not be taken without due process of law, it has been held to mean that she must be made a party defendant in any action seeking to impress liability for necessaries upon her property and that in such an action a judgment may be rendered determining certain issues, to wit: "(1) Was the debt to recover which the action is instituted contracted for *necessaries of life*? and if so (2) Were such necessaries furnished either to her husband or herself or both *while they were living together?* * * * She [the wife] is entitled to an opportunity, before her separate property capable of being so taken shall be seized in execution * * * to show, if she can show, that the conditions prescribed by the statute upon which such property may be so taken do not in fact exist. * * * On the other hand, the creditor would be entitled to have the wife's liability fixed by the judgment—that is to say, an adjudication that her separate property which may be taken for that purpose, if any such she has, is subject to execution under such judgment." Evans v. Noonan (1912) 20 Cal.App. 288, 295, 296, 128 P. 794, 796.

In 1915 (St.1915, p. 920) said section 171 was amended to its present form, which is as follows: "The separate property of the wife is liable for her own debts contracted before or after her marriage, but is not liable for her husband's debts; provided, that the separate property of the wife is liable for the payment of debts contracted by the husband or wife for the necessaries of life furnished to them or either of them while they are living together; provided, that the provisions of the foregoing proviso shall not apply to the separate property of the wife held by her at the time of her marriage or acquired by her by devise, succession, or gift, other than by gift from the husband, after marriage."

[3] To correctly interpret said section and the decisions relating to the same, it is necessary to bear constantly in mind appreciation of the fact that nowhere in the common law can there be found any basis for imposing personal liability upon the wife for necessaries furnished to her or her husband while they are living together and that said section 171 (either as originally enacted or later amended) does not purport in terms to impose liability *personally* upon the *wife* as distinguished from her *property.* Such decisions, therefore, as Evans v. Noonan, supra (1912) 20 Cal.App. 288, 128 P. 794, and Ackley v. Maggi (1927) 86 Cal.App. 631, 261 P. 311, in their references to so-called personal liability of the wife under said section, must be understood as dealing with the liability placed on her property by the statute. Aside from significance pertaining to debts contracted upon her personal credit, which present an entirely different matter not involved here, the words used by the courts in certain of the decisions cited, to the effect that the wife is made "personally responsible" and that such statute imposes "a personal liability," should be regarded as a convenient means of expressing the result attained in the particular cases in which they were used but not as generally enlarging that very limited liability which is created by, and exists only by virtue of, the statute, and which by that statute is imposed upon certain of the wife's property specifically and not upon her or her property generally. If such liability (for necessaries furnished the spouses, or either of them, while living together) were imposed upon the wife's property generally, then it is possible that a general liability for such debts might be said to have been impliedly placed upon *her,* but since the only liability created by said section 171 which personally affects the wife is a limited and conditional one which reaches *her through her property rather than her property through her,* we cannot subscribe to any doctrine which would ascribe to such a narrowly circumscribed property liability the status and concomitants of an antenuptial debt upon her contracting a subsequent marriage.

The two divisions of the District Court of Appeal of the First Appellate District are not in entire accord in construing said section 171. Division 1, in Turner v. Talmadge (1919) 42 Cal.App. 794, at page 796, 187 P. 969, 970, holds: "Section 171, Civil Code, * * * recognizes such debt [for necessaries furnished the husband] as the debt of the husband, and does not make the wife personally liable therefor, but merely provides that, when the husband's property has been transferred to the wife without consideration, this property may be regarded as the property of the husband for the purpose of satisfying any debts of his incurred for necessities furnished to both the husband and wife while living together. The effect of this section is to regard such property as though it had not been transferred." Such ruling would seem to be in harmony with the theory of the decision of the Supreme Court in Chaffee v. Browne, supra (1895) 109 Cal. 211, 41 P. 1028, and the statute as amended in 1905 and 1915, but we find that in Ackley v. Maggi (1927) 86 Cal. App. 631, at page 635, 261 P. 311, 312, Division 2 of the said District Court of Appeal, First District, said: "We think the result of the section [section 171, Civ.Code] is to permit an action to be brought directly against the wife for necessaries of life furnished as described in the section; and whether the wife has, or in the future may obtain, property legally liable for the satisfaction of the judgment so obtained, is a matter which may or may not be considered in the form of the judgment, but must in any event be considered at the time of an attempted satisfaction of the judgment out of her property."

Even if we were to give to the decision last cited [Ackley v. Maggi (1927) 86 Cal. App. 631, 261 P. 311] the effect of overruling the earlier decision [Turner v. Talmadge (1919) 42 Cal.App. 794, 187 P. 969], although such earlier decision seems sounder in reason and less likely to result in unnecessary multiplicity of actions, we still could not uphold the judgment now before us. The most that respondent can glean from any of the cases cited is a doctrine that a judgment against a wife predicated upon the theory of liability created or implied by section 171 of the Civil Code may be general in terms, deferring until levy of execution judicial pronouncement of its circumscription, thereby imposing upon the apparent judgment debtor the burden of establishing, through possible further litigation, the true character and limits of the statutory liability upon which the judgment is based, or such judgment may within its own terms declare the limitations which encompass the liability imposed by the statute. In neither event can the judgment be satisfied out of any property not covered by such statute, and if in the judgment the court undertakes to declare the property out of which it may be satisfied the limitations of the statute may not be exceeded.

[4] Here the court did assume to make such declaration in the judgment, decreeing, after awarding plaintiff the principal sum sued for and costs: "Said Sums of money to be paid out of the seperate property of Ada P. Allum and out of the common property of Arthur E. Allum and Ada P. Allum husband and wife." The obvious meaning of such decree, in so far as it concerns the separate property of the wife, is to order the judgment satisfied out of *any* separate property possessed by defendant Ada P. Allum; under said section 171 of the Civil Code, hereinabove quoted, and section 168 of the same Code declaring that, "The earnings of the wife are not liable for the debts of the husband," the court could properly impose the liability of the judgment only upon such separate property of the said Ada P. Allum, if any, as was acquired by her by gift from her former husband, Osborne, after her marriage to him. Hence the judgment as to Ada P. Allum must be and is reversed and as to her the cause is remanded to the Municipal Court of the City of Long Beach for a new trial.

As to Arthur E. Allum, we think no obligation has been established and that none can be in any event superimposed upon him through the medium of the liability possibly devolving by virtue of the provisions of section 171 of the Civil Code upon certain apparently nonexistent separate property belonging (?) to his wife. To see how any such liability could reach him under any theory applicable to the facts of this case, even assuming the existence of property subject to operation of the statute, would require a perception as keen as the eyesight attributed to Lewis Carroll's character Alice, who in her adventures *Through the Looking Glass,* when asked by the King whether she could see anybody coming down the road, replied that she could see *nobody* and was immediately congratulated upon her eyesight by the King who said: "I only wish I had such eyes. * * * To be able to see Nobody! And at that distance too! Why, it's as much as I can do to see real people, by this light!" Lewis Carroll's *Through the Looking Glass,* Rand McNally, 1932 Ed., p. 194.

[5] The very limited liability imposed by the Code section here involved, which reaches the wife only through her possession of property acquired as a gift after a certain event and from a special source, which does not reach such property by reason of any personal obligation of the wife, which subjects only such property to payment of the debt and which debt is primarily that of another person (the first husband) who is generally liable therefor, is not a full personal liability, and we think it is not within the rule that a husband marries not only his wife but also her debts.

The judgment against Arthur E. Allum is reversed, and since it may be that upon a new trial plaintiff can establish that part of the services were rendered not only to Ada P. Allum but upon her personal contract, liability for which would be incurred by the husband of a subsequent marriage, the cause as to said Arthur E. Allum is also remanded to the municipal court of the City of Long Beach for a new trial. Appellants are awarded their costs of appeal.

I concur: SHAW, P. J.

8 Cal.2d 555

DUDNEY v. STATE BAR OF CALIFORNIA (two cases).

MACKAY v. SAME.

L. A. 16028, 16030.

Supreme Court of California.
March 30, 1937.

1. Attorney and client ⚿53(2)

Evidence *held* to authorize finding that attorneys engaged in practice of law with ex-convict who was not licensed to practice law, and aided ex-convict in fleeing from justice, justifying disbarment (Code Civ.Proc. §§ 282, 287; St.1927, p. 45, § 49).

2. Attorney and client ⚿53(1)

Attorney's previous record of reprimand and suspension for unethical conduct may be considered in connection with proceedings to disbar attorney and his partner on subsequently arising grounds (Code Civ.Proc. § 287).

3. Attorney and client ⚿49

Purpose of disbarment proceeding is not to punish individual, but to determine whether attorney should continue as attorney, in order to protect public, legal profession, and court from attorneys who are recreant to their trust (Code Civ.Proc. §§ 282, 287).

◆

In Bank.

Proceedings for disbarment of attorneys, wherein Olin N. Mackay and William E. Dudney, petitioners, seek to review recommendation of the Board of Governors of the State Bar of California that each petitioner be disbarred.

Attorneys disbarred.

Swaffield & Swaffield, of Los Angeles, and William E. Dudney, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

Olin N. Mackay and William E. Dudney are petitioners in two separate proceedings to review recommendations of the Board of Governors of the State Bar that each of them be disbarred from the practice of the law in the State of California.

In July, 1935, the State Bar in its proceeding, L. A. No. 785, issued a notice directing Dudney to show cause why he should not be disciplined for professional misconduct. This notice alleges that Dudney, well knowing that one A. Lee Graham was in fact an ex-convict, and was not and had never been a member of the State Bar of California nor entitled to practice law, caused the name of Graham to be signed to a petition for a writ of mandate filed by Dudney in the District Court of Appeal, and that thereafter Dudney appeared before the District Court of Appeal with Graham and represented to the court that Graham was entitled to practice law.

Within a few days thereafter, the State Bar commenced its proceeding L. A. No. 786 and issued a notice directing the petitioners to show cause why each of them should not be disciplined for professional misconduct. In this proceeding it is charged that subsequent to February, 1935, Dudney and Mackay and each of them were well aware that A. Lee Graham was an ex-convict and was not a member of the State Bar of California nor entitled to practice law but that he did practice law from offices maintained by them and with the knowledge, aid and consent of each of them. It is also alleged that while so associated in the offices of the petitioners and practicing law therein, Graham was arrested upon a charge of violating section 49 of the State Bar Act of California (St. 1927, p. 45), and that thereupon Dudney and Mackay aided and abetted Graham in fleeing to San Francisco.

In the following month the State Bar initiated a third proceeding, L. A. No. 796, in which Mackay was directed to show cause why he should not be disciplined for professional misconduct. The charges in this proceeding are that Mackay, knowing that A. Lee Graham was an ex-convict and not a member of the State Bar of California nor entitled to practice law, associated Graham in a case pending in the superior court of Imperial county and that he represented to the court that Graham was an attorney at law. It is also alleged that Mackay had Graham appear in a case pending in the municipal court of Los Angeles in which Mackay was the attorney of record and make certain motions; that Graham did appear before the court and did practice law there with the knowledge and consent of Mackay; and that on these and other occasions Mackay paid Graham part of his fees.

Each of the notices to show cause alleges that the acts of Dudney and Mackay which are charged as misconduct involved moral turpitude and dishonesty. Also it is alleged that by these acts the petitioners violated certain of the Rules of Professional Conduct of the State Bar and also the provisions of section 287 of the Code of Civil Procedure. In case L. A. No. 786 the violation of section 282, Code of Civil Procedure, is also charged.

The three proceedings were heard separately by local administrative committee No. 13 of Los Angeles county. The recommendation of the committee in proceeding L. A. No. 785 was that Dudney be suspended for a period of six months. In proceeding L. A. No. 796 the committee recommended that Mackay be suspended for a period of one year. In proceeding L. A. No. 796 disbarment of both Dudney and Mackay was recommended.

When the reports and determinations of the committee came before the Board of Governors of the State Bar, the three proceedings were consolidated. The board approved and adopted the findings of fact of the committee and recommended to this court that Dudney and Mackay be disbarred.

The charges against the petitioners relate almost entirely to the association of each of them with Graham. In view of the consolidation of the cases by the State Bar the two proceedings before us will be considered together.

Dudney was admitted to the bar in 1929. Mackay was admitted in 1924. In 1934 and for a period of time thereafter, they shared offices as attorneys at law. In the same suite of offices were others, including one Edward A. Wilson, an investigator, and Graham, an ex-convict on parole. During a greater portion of the time when the acts charged as misconduct occurred, Mackay and Dudney had offices together. The offices were moved at one time to another location in the building, but the association of these persons continued.

In May, 1934, Mackay was representing a defendant in a criminal case being heard in the superior court of Los Angeles county. Graham was sitting at the counsel table with Mackay and the judge, in the course of the trial, asked Mackay if Graham was an attorney. Mackay replied that Graham was not an attorney but was a clerk who was assisting him in the case.

About that same month Wilson informed both Mackay and Dudney that Graham had been in trouble and that because of the regulations governing licensed investigators he could not be associated in the same office with him. In the summer of that same year Mackay, Wilson, and Dudney and others who had offices in the suite discussed the character of Graham.

In October, 1934, Dudney filed a petition for a writ of mandate in the District Court of Appeal. The names of Dudney and Graham were signed as attorneys for the petitioner. Dudney and Graham appeared at the hearing on the alternative writ which had been issued and Graham presented the argument.

In January, 1935, Mackay and Graham went to Imperial county, where they appeared in the superior court on the hearing of a motion in a case in which Mackay was the attorney of record. They had previously made a trip together to Imperial county in connection with the case. At that time they called upon the judge and discussed further proceedings they anticipated taking in the case. There is some evidence that when the motion was heard in open court Graham, in the presence of Mackay, presented some of the argument. Mackay admits that he paid Graham part of the fee he received for his services in this case.

On February 6th Graham, at the request and with the knowledge of Mackay, appeared before Judge A. A. Scott, of the municipal court of the city of Los Angeles, in a criminal case in which Mackay was the attorney of record. The matter before the court was the hearing of the defendant's application for probation. Graham, at the request of Mackay, made certain representations to the court. According to Judge Scott, Graham stated at that time that he appeared for Mackay, who was out of town and engaged in trial. The court refused a continuance and sentenced the defendant.

On February 9th Graham was arrested charged with a violation of rule 49 of the State Bar Act. He immediately got in touch with Mackay, who was then at a bail bond office, and was released on bail immediately. In the evening of that same day, Graham appeared before Judge Scott for arraignment. Mackay, who was representing Graham, talked to Judge Scott in chambers about the case. Afterward in open court Mackay stated that Graham was from his office; that he had known him for some period of time; that if he were released on his own recognizance that certain bail bond fees would not have to be paid; and that if Graham were released Mackay would personally guarantee his appearance. Judge Scott recognized Graham as the man who had appeared before him a few days before. As Graham was charged under several different names, Judge Scott asked him which was his true name. Graham replied, "W. S. Graham." Graham was then released on his own recognizance and the trial was set for February 21st.

There is evidence tending to show that on previous occasions the name of "W. S. Graham" had been used by A. Lee Graham; also that Mackay was aware of this use, although Mackay had known him as A. Lee Graham. Mackay did not tell Judge Scott either that Graham was an ex-convict or that Mackay had reason to believe that he was, or that for a long period of time he had known him as A. Lee Graham, but not W. S. Graham.

The Los Angeles papers of February 12th carried the story of Graham's arrest. These papers were read by Mackay. Graham on this same day decided to leave Los Angeles. He asked Mackay for money. Mackay collected some money from a client and gave it to Graham at Graham's apartment that same evening. It had been arranged that Wilson was to take Mr. and Mrs. Graham to Wilmington the afternoon of February 13, 1935. This he failed to do. Dudney then procured other means of transportation for them. Dudney and Mr. and Mrs. Graham went to Wilmington in an automobile driven by a friend of Dudney. The plan was for the Grahams to take a boat to San Francisco. They missed the boat. In a conference between the Grahams and Dudney, a part of which at least Dudney's friend overheard, it was decided that it would be best for the Grahams to stay away from Los Angeles for the present. The entire party then proceeded to Long Beach, where the Grahams registered at a hotel in the presence of Dudney. They used an assumed name. Two days later they sailed for San Francisco.

When Graham's case was called for trial he was not present. Mackay appeared, and upon questioning by Judge Scott as to the present whereabouts of Graham, he stated that he did not know where Graham was and that he was holding Graham's mail at the office. Mackay also informed Judge Scott that he first learned of Graham's leaving Los Angeles on or about February 19th. Upon being asked why the court was not informed of this, Mackay's answer was that he did not know why, or that he thought the court knew of it. Judge Scott told Mackay that as an officer of the court he should make a diligent search for Graham and ordered him to report the results of his endeavors in the afternoon of the same day. At 2 o'clock Mackay again appeared and stated that he had not found anything new. A bench warrant was then issued and Graham was later apprehended at San Rafael.

The record shows that after the story of Graham's arrest appeared in the papers and before his case was called for trial Mackay told Graham's father that he did not know where Graham was. The father of Graham testified that Mackay told him his son had been taken care of financially.

All of the facts which have been stated stand practically uncontradicted. It appears beyond question that from at least the month of May, 1934, until early in February of the following year Graham and the petitioners were closely associated. He had worked with them and for them on legal matters. He received no regular compensation from either of them, but was paid for his work on the basis of what he did in each particular matter. He worked in the petitioners' offices. He used their telephones, their stationery, their books, and their facilities. The records are voluminous and show a course of dealing over a long period of time which unmistakably shows that Graham worked with each of the petitioners on much of their legal business.

Mackay admitted that after the trip to Imperial county in January he learned that Graham was an ex-convict. Dudney states that after the hearing in the District Court of Appeal some one told him that Graham had been in the penitentiary. It is inconceivable that these two lawyers who were handling criminal business did not know of Graham's record at least from the time Wilson told them that Graham had been in trouble. It is difficult to believe that they did not appreciate the force of Wilson's warning. He told them he could not have anyone in his office "that has any record." However, the evidence clearly shows that after each was told that Graham was an ex-convict, both Dudney and Mackay continued their association with him and allowed him to participate in their legal business.

But aside from Graham's previous record, there can be no question from the evidence that Dudney and Mackay each had a part in getting him released on bail after he was arrested and in helping him to leave Los Angeles. Graham had been given his liberty on his own recognizance upon the representations of Mackay that he had known him for some considerable period of time and would have him in court on February 21st. While the record does not show that Dudney had any part in obtaining Graham's release, it is more than a reasonable inference that Dudney knew of the charges against Graham and his arrest upon them. There is evidence that Dudney told his friend who took the Grahams to Wilmington that Wilson should have taken them but he was yellow. Dudney's actions clearly indicate that what he did was part of a definite plan made by him and others to get Graham out of town.

The findings of the committee in case L. A. No. 785 are that Dudney, knowing that Graham was an ex-convict and was not a member of the State Bar, caused the name of Graham to be signed to the petition for a writ of mandate presented to the District Court of Appeal and thereafter represented to the court that Graham was a licensed attorney. In case L. A. No. 786 the committee found that Dudney and Mackay each knew that Graham was not a member of the State Bar nor entitled to practice law and that he was an ex-convict, but that Graham engaged in the practice of law with the knowledge, aid and consent of the petitioners. It also found that after the arrest of Graham, Dudney and Mackay conspired to aid and abet Graham in his plan to leave the city of Los Angeles and remain hidden in order to avoid prosecution. In case L. A. No. 796 the committee found that Mackay, knowing that Graham had been convicted of a felony and was not entitled to practice law in the State of California, associated Graham in the case pending in the superior court of Imperial county; that he permitted Graham to present this case in open court and led the judge of that court to believe that Graham was an attorney at law, entitled to practice therein.

[1, 2] These findings are amply supported by the evidence. The acts of the petitioners show a course of conduct directly at variance with the standard set for attorneys at law by section 282 of the Code of Civil Procedure. They also show sufficient ground for disbarment under the provisions of section 287, Code of Civil Procedure. Dudney made only an indifferent attempt to defend the charges against him. Possibly this was because of his record, which shows that he was publicly reprimanded by this court in 1931 [Dudney v. State Bar, 214 Cal. 238, 4 P.(2d) 770], and that in 1935 he was suspended for thirty days (In re Suspension of Dudney, No. Misc. 1393.) This record may appropriately be considered in connection with the present proceedings. Mills v. State Bar, 6 Cal.(2d) 565, 58 P.(2d) 1273. While Mackay attempts to clothe all of his conduct with the mantle of innocence, it is impossible to believe that he is as unsophisticated and naive as he claims to be. His acts speak much more positively and accurately than his explanation of them.

[3] The State Bar Act is designed to provide a procedure whereby those attorneys at law who prove recreant to their trust may be removed from the ranks of the profession. The public, as well as the legal profession and the courts, must be protected from those who do not measure up to their responsibilities. Government largely depends upon the stability of the courts and, to a considerable extent, upon the integrity of the members of the legal profession. The purpose of disbarment proceedings is not to punish the individual but to determine whether the attorney should continue in that capacity. Marsh v. State Bar, 2 Cal.(2d) 75, 39 P.(2d) 403. Measured by these principles the action of the board of governors is fully justified by the findings.

It is ordered that William E. Dudney and Olin Ninde Mackay be disbarred from the practice of law in all of the courts of this state and that the name of each be stricken from the roll of attorneys, effective thirty days after this order becomes final.

8 Cal.2d 600

RUDELL v. BOARD OF ADMINISTRATION OF STATE EMPLOYEES' RETIREMENT SYSTEM OF CALIFORNIA et al.

S. F. 15730.

Supreme Court of California.
April 16, 1937.

States ⚷57

Woman who, at time state employee executed certificate naming her beneficiary of any death benefits to become due upon his death as member of State Employees' Retirement System, was living in concubinage with him, *held* to have an "insurable interest" in his life within statute entitling her to receive death benefits, where she was actually, although not legally, dependent upon him for support and their relationship did not constitute public offense (St.1933, p. 1243, § 100; St.1935, p. 636, § 10110, subds. (b, c).

[Ed. Note.—For other definitions of "Insurable Interest," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Mandamus proceeding by Bertha Rose Rudell, also known as Bertha Rose Teberg, and Lillian Nash, as administratrix of the estate of Richard H. Teberg, deceased, against the Board of Administration of the State Employees' Retirement System of the State of California, etc. From a judgment for the first-named petitioner, the second-named petitioner appeals.

Affirmed.

Prior opinion, 58 P.(2d) 953.

Edwin G. Wilcox and Martin Tieberg, both of San Francisco, for respondent Rudell.

Walker & Walker and Herman G. Walker, all of Oakland, for appellant Nash.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for respondent Retirement System.

LANGDON, Justice.

A hearing was granted in this case after decision by the District Court of Appeal, First District, Division 2. Upon further consideration we adopt the following opinion of Mr. Justice Spence as part of the opinion of this court:

"In a proceeding in mandamus, the trial court directed that the sum of $958.40, which became due as a death benefit under the State Employees' Retirement System upon the death of Richard H. Teberg, deceased, be paid to petitioner Bertha Rose Rudell, also known as Bertha Rose Teberg. This appeal is taken solely by petitioner Lillian Nash, as the administratrix of the estate of Richard H. Teberg, deceased.

"On November 19, 1931, said Richard H. Teberg was an employee of the state and so remained until the time of his death. On that date, he executed a certificate naming 'Bertha Rose Teberg * * * who is my wife as the beneficiary' of any benefits to become due upon death as a member of the State Employees' Retirement System. At the time of executing said certificate, the deceased and petitioner Bertha Rose Rudell, also known as Bertha Rose Teberg, were engaged to be married and were living together as husband and wife. No marriage was ever consummated, but the relationship continued until the death of the deceased in 1934. Said petitioner was known as the wife of the deceased and had assumed the name of Bertha Rose Teberg. Both parties were unmarried persons during the entire time that their relationship continued.

"Appellant states several questions in the briefs, but confines the argument solely to the contention that respondent Bertha Rose Rudell, also known as Bertha Rose Teberg, was not entitled to said benefits because of the relationship existing between said respondent and the deceased. We find no merit in this contention. Said respondent was the named beneficiary and she was entitled to the money if she had an 'insurable interest' in the life of the deceased. Section 100, State Employees' Retirement Act, Stats.1933, c. 473, p. 1243. There is a conflict of authority in other jurisdictions as to what constitutes an 'insurable interest' in the life of another person, but in this state, that term is defined by statute. Said respondent had an 'insurable interest' in the life of the deceased if she depended upon him in whole or in part for her support. Subdivision (b), section 10110, Insurance Code (St.1935, p. 636), formerly subdivision 2, section 2763, Civ. Code. The evidence on this subject stands uncontradicted. There is no requirement in the statute that the dependency should result from a legal obligation to support and we are of the opinion that the 'insurable interest' mentioned in said subdivision (b) rests solely upon the fact of dependency. This view finds support in the reading of the entire section. Subdivision (c) of that section specifically requires that a 'legal obligation' must exist, but there is no similar wording found in subdivision (b) which is under consideration here.

"Appellant cites and relies upon Keener v. Grand Lodge, 38 Mo.App. 543, and other similar cases following that decision. We find none of these authorities in point. In each of said cases the deceased had a lawful wife living during the time that he cohabited with the named beneficiary. The holding that the named beneficiary was not a dependent was apparently based upon the fact that the entire relationship was adulterous and was denounced by statute as a public offense. As was said in the cited case, 'I would not restrict dependents to those whom one may be legally bound to support, nor, yet, to those to whom he may be morally bound, but the term should be restricted to those whom it is not unlawful for him to support.' In the present case, it was not unlawful for the deceased to support said respondent. Neither of the parties was married and the statute of this state did not denounce their relationship as a public offense. 1 Cal.Jur. 469. Their relationship may have been contrary to good morals, but that fact alone would not prevent respondent from recovering as the named beneficiary. Waring v. Wilcox, 8 Cal.App. 317, 96 P. 910; Lampkin v. The Travelers' Insurance Company, 11 Colo. App. 249, 52 P. 1040."

In the petition for hearing defendant urges that the cases of Boigneres v. Boulon, 54 Cal. 146, and Hanks v. Naglee, 54 Cal. 51, 52, 35 Am.Rep. 67, are opposed to the conclusion reached above. These cases, however, involved actions for breach of promise of marriage, and it was held therein that a promise on the part of a woman to engage in sexual relations with a man was not a valid consideration for a promise to marry. No such issue is presented here, for the record contains no evidence of such an agreement between petitioner and the deceased, and this is not an action to enforce such an agreement. The only agreement involved herein is the contract between the deceased and the state, admittedly valid and supported by good consideration, in which the deceased, exercising an undoubted right, named petitioner as beneficiary. Any discussion of petitioner's conduct is wholly irrelevant in this connection, for the consideration was given by deceased and not by petitioner. The sole issue here, as recognized by the District Court of Appeal, is dependency, and on this point the trial court's conclusion is in accord with the undisputed evidence.

The judgment is affirmed.

We concur: THOMPSON, J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; SEAWELL, J.

20 Cal.App.2d 320

PEOPLE v. ZADRO.

Cr. 1552.

District Court of Appeal, Third District, California.

April 12, 1937.

1. **Criminal law ⚷94**

Charges of selling alcoholic liquors within prohibited distance from Veterans' Home in township of less than 30,000 population *held* triable in superior court, minimum punishment fixed by statute for such misdemeanors being beyond jurisdiction of class B justices' courts to inflict (Pen.Code, § 172, as amended by St.1933, p. 2615; § 1425, as amended by St.1933, p. 1454; Code Civ.Proc. § 81, as added and amended by St.1933, pp. 1810, 2476; Const. art. 6, § 5).

2. **Criminal law ⚷178**

Order of class B justice's court, dismissing complaint charging sales of alcoholic liquors within prohibited distance from Veterans' Home, *held* not bar to prosecution therefor in superior court, such justice's court having no jurisdiction to try defendant (Pen. Code, § 172, as amended by St.1933, p. 2615; § 1382, as amended by St.1935, p. 1468; §§ 1385, 1387; § 1425, as amended by St.1933, p. 1454; Code Civ.Proc. § 81, as added and amended by St.1933, pp. 1810, 2476; Const. art. 6, § 5).

3. **Intoxicating liquors ⚷132**

Statute denouncing as crime sale of alcoholic liquors within one and one-half miles of Veterans' Home *held* not repealed by Alcoholic Beverage Control Act (Pen.Code, § 172, as amended by St.1933, p. 2615; St. 1935, p. 1152, § 69).

4. Criminal law ⚿167

Legal jeopardy does not arise where court has no jurisdiction.

Appeal from Superior Court, Napa County; Thomas D. Johnston, Judge.

A. P. Zadro was convicted of selling or exposing for sale alcoholic liquors within one and one-half miles of a Veterans' Home, and he appeals.

Affirmed.

Percy E. King and King & King, all of Napa, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The appellant was convicted in the superior court of Napa county upon seven of thirteen counts in an indictment charging violations of section 172 of the Penal Code, as amended by St.1933, p. 2615, which makes it a crime to sell or expose for sale alcoholic liquors within one and one-half miles of the Veterans' Home at Yountville, in said county. From the order denying his motion for a new trial, and the judgment entered upon the verdict of the jury, the defendant appeals.

Two grounds are alleged for reversal: First, that a justice of the peace of Napa township dismissed a complaint filed therein charging the defendant with the commission of a crime under section 172, supra, being the same offense charged in the indictment upon which the defendant was tried and convicted; second, that section 172, supra, was repealed by the Alcoholic Beverage Control Act, Statutes of 1935, pages 1123, 1152, section 69.

[1] Under the provisions of section 81 of the Code of Civil Procedure (as added and amended by St.1933, pp. 1810, 2476) a reference to the last federal census shows the population of Napa township to be 14,056. The same section classifies justices' courts into "Class A" and "Class B," class A being justices' courts in townships or cities having a population of not less than 30,000. All justices' courts in townships having a population of less than 30,000 are designated as belonging to class B.

By section 1425 of the Penal Code (as amended by St.1933, p. 1454) the jurisdiction of class B justices' courts is confined to misdemeanors punishable by a fine not exceeding $1,000, or imprisonment not exceeding six months, or by both such fine and imprisonment.

Section 172, supra, fixes only the minimum punishment for violation of the provisions therein contained, which takes this cause out of the jurisdiction of class B justices' courts.

By the provisions of section 5 of article 6 of the Constitution, the superior court is given original jurisdiction in all cases of misdemeanors not otherwise provided for. Not being otherwise provided for, the offenses charged against the defendant in this cause were triable in the superior court.

[2] The contention of the appellant that the dismissal order of the justices' court is a bar to this action does not appear to be well taken. It appears from the record that no trial was really had in the justices' court; that upon the call of the case the justice, presuming to act under section 1385 of the Penal Code, dismissed the action on the ground that the acts complained of did not constitute a public offense. This order cannot be sustained by anything contained in section 1387 of the Penal Code, upon which the appellant relies as a bar. The very first sentence of that section shows the weakness of the appellant's contention; we quote therefrom: "An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense, if it is a misdemeanor," etc. To understand this language requires a reference to the causes given as authorizing a dismissal. These causes are set forth in section 1382 of the Penal Code (as amended by St.1935, p. 1468). Three causes are there given: "1. When a person has been held to answer for a public offense and an information is not filed against him, within fifteen days thereafter. 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information. 3. If a defendant in a misdemeanor case in a justice's court, whose trial has not been postponed upon his application, is not brought to trial within

thirty days after the defendant is arrested and brought within the jurisdiction of the court." Any other reasons assigned by the justices' courts, if the justices' court had jurisdiction, would, of course, be outside of the provisions of section 1382, supra.

It is clear that the justices' court of Napa township had no jurisdiction to try the appellant for the offenses charged, but only to conduct, if at all, a preliminary examination.

The appellant's plea of "once in jeopardy" is so completely answered in the case of People v. Hrjak, 85 Cal.App. 301, 259 P. 353, where the defendant had been discharged by a justice of the peace upon preliminary examination, that we quote therefrom as follows: "Appellant refers to section 1387 of the Penal Code, and upon it bases a claim that because the justice of the peace of Temescal township made the order above quoted, no further prosecution for the same offense can be maintained. This section has no application to the instant case. It reads: 'An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense, if it is a misdemeanor,' etc. The language is too plain to be mistaken. It limits the application of the section to those orders for dismissal provided in chapter 8, tit. 10, of the Penal Code. Such orders are those enumerated in section 1382 of that Code, and both subdivisions 1 and 2 thereof refer to cases where a person has been held for a public offense. In subdivision 1 it is provided that an action must be dismissed if an indictment is not found or information filed within 30 days after the defendant has been held to answer; and in subdivision 2 it is provided that where a defendant is not brought to trial within 60 days after the finding of an indictment or filing of an information, and a trial has not been postponed upon his own application, the prosecution must be dismissed. These are the only orders for dismissal to which section 1387 applies." See, also, the cases of People v. Tom Nop, 124 Cal. 150, 56 P. 786; People v. Haagen, 139 Cal. 115, 72 P. 836; People v. Anderson, 30 Cal.App. 542, 159 P. 211.

[3] That section 172, supra, was not repealed by the Alcoholic Beverage Control Act has been twice decided, once by this court in Ex parte Zandro, 60 P.(2d) 577, and by the Supreme Court, 60 P.(2d) 986, where the appellant made the identical contention that is here advanced.

A reference to section 69 of the Alcoholic Beverage Control Act, supra, reveals that section 172, supra, is not listed either among the acts of the Legislature or sections of the codes repealed. Not being mentioned among the acts repealed, it follows, as we have heretofore said, that the Legislature intended to leave standing and in full force and effect, section 172, supra. We further said, in consideration of the appellant's application to be discharged on a writ of habeas corpus, 60 P.(2d) 577, 578, supra, that: "In addition to this we may look into the record of the Legislature to determine its intention, its purpose, in enacting the liquor control act and especially section 69. The record shows that the act originally contained a provision repealing section 172, but the Legislature upon further consideration especially provided that that portion of the act be stricken out, which means of course the Legislature intended to leave section 172 standing, as being sufficient to cover all of the subject-matter therein mentioned."

[4] We do not deem it necessary to discuss further the appellant's contention that section 172, supra, has been repealed, but are content to confine ourselves to the two decisions referred to holding that there has been no repeal, as contended by the appellant. We may add it is elementary that legal jeopardy does not arise where the court has no jurisdiction. 1st Wharton Crim. Law (12th Ed.) 560; People v. Hamberg, 84 Cal. 468, 24 P. 298.

The order and judgment appealed from are affirmed.

We concur: **PULLEN, P. J.**; **HELD**, Justice pro tem.

MILLS v. SUPERIOR COURT IN AND FOR FRESNO COUNTY et al.

Civ. 1846.

District Court of Appeal, Fourth District, California.

April 14, 1937.

Rehearing Denied May 11, 1937.

Partnership ⚷322, 325(1), 326

Refusal to permit general partnership creditor to sue permanent receiver appointed in partnership dissolution proceedings, or to intervene in dissolution proceedings or to attach funds in receiver's hands there being no allegation that partnership was not insolvent, *held* not abuse of discretion, where dissolution had been judicially declared when creditor's petition was presented, and receiver had been directed to pay partnership debts or to make pro rata distribution of assets among creditors in the event that the claims could not be paid in full.

◆

Mandamus proceeding by Mrs. O. Mills against the Superior Court of the state of California, in and for Fresno County and the Honorable H. Z. Austin, judge of Department 3 thereof.

Writ denied.

Clyde E. Cate, of Fresno, for petitioner.

Lawrence Kennedy, of Fresno, for respondents.

BARNARD, Presiding Justice.

This is an application for a writ of mandate to compel the respondents to make an order granting to the petitioner herein leave to sue the receiver appointed by the respondent court in an action now pending therein, or, in the alternative, to make an order granting leave to this petitioner to intervene in said action and permitting her to attach the funds in the hands of the receiver.

The petition alleges that on September 4, 1936, one T. J. O'Brien, one of the partners in a firm doing business as Robinson Motors Company, brought an action against his copartners asking for dissolution of the partnership, an accounting and the appointment of a receiver; that on December 23, 1936, judgment was pronounced in that action making the ex parte appointment of the receiver permanent, with power to take possession of the firm property, to wind up the affairs of the partnership, and to pay the partnership debts, and ordering an accounting as between the partners; that on January 21, 1937, the petitioner filed in that action a petition for leave to sue the receiver or to intervene, alleging therein that the partnership was indebted to her in the sum of $400 and that she had demanded payment of the same from the receiver, and requesting leave to sue the receiver or leave to intervene and present her claim for payment and for permission to attach funds in the hands of the receiver; that said petition was heard on February 11, 1937; and that permission to sue or intervene in the other action was denied.

The answer sets forth a copy of the interlocutory judgment entered in the action in which the receiver was appointed. It also sets forth a copy of the order made by the respondent court after hearing this petitioner's application for leave to sue the receiver or to intervene in the other action. This order is as follows:

"1. That said petitioner, Mrs. O. Mills, be, and she is hereby granted leave to present her claim alleged in said petition to the Receiver, Geo. H. Lips, of the Robinson Motors Company heretofore appointed by this court.

"2. That in all other particulars said petition be and it is hereby denied."

The answer alleges that the claim of this petitioner against said partnership for $400 was presented for allowance and approval by the receiver to the respondent court on March 3, 1937, and that the same was, on that date, allowed and approved by the said court, a copy of the order allowing the claim being attached to the answer. The answer further alleges that since September 4, 1936, the copartnership and business conducted under the name of Robinson Motors Company has been and now is insolvent, that the receiver referred to had refused and now refuses to pay the claim of this petitioner for the reason that said copartnership and business has at all times been and now is insolvent, and that the funds in the hands of the receiver are insufficient to pay the claims against said copartnership which have been duly allowed and approved.

No claim is made by the petitioner that she is other than a general creditor of the partnership. She claims, however, that the action now pending in the respondent court presented no question of insolvency, that the rights of creditors were not involved therein, that she had a right to bring another action or to intervene in that action and to attach the property in the hands of the receiver, thereby gaining a preference over other creditors, that this right was absolute, and that the respondent judge had no discretion in the matter except as to whether the permission granted should be for intervention or for a separate action. The petitioner relies particularly on Adams v. Woods, 8 Cal. 152, 68 Am.Dec. 313, and Adams v. Woods, 9 Cal. 24. It was pointed out in the first of these cases that the creditors of a partnership have no interest in a partnership suit or in proceedings for an account and dissolution until after a decree of dissolution has been entered and that, in the meantime, such creditors may pursue their remedies at law and thereby secure a preference or lien upon the partnership assets. The second case is quoted from as follows: "From these cases, it seems to be settled that, until a dissolution has been judicially declared, and a receiver ordered to make a pro rata distribution of the partnership assets among the creditors, they are not prevented from resorting to adverse proceedings; and that, when a creditor does resort to such proceedings, he may thereby gain a preference over those creditors who are less diligent."

The petition filed herein fails to allege that the partnership business in question is not insolvent. The interlocutory judgment entered in the action pending in the respondent court decrees that the partnership be dissolved and that "the affairs and business of said partnership be wound up and terminated by the receiver heretofore appointed in this action, and the debts of said partnership paid or otherwise settled." The receiver presented to the respondent court for allowance and approval a list of claims against the partnership, including the claim of this petitioner, and the same were allowed and approved. The direction to the receiver contained in the interlocutory judgment sufficiently authorizes the payment of the debts of the partnership or the pro rata distribution of the assets among the creditors in the event the claims cannot be paid in full. A dissolution having been judicially declared the cases cited are not controlling and, under the circumstances shown by the record, it cannot be said that the controversy in the action pending in the respondent court was entirely between the copartners, and that the creditors were not involved. It clearly appears that the respondent court has undertaken, in connection with settling the controversy between the partners, to protect the rights of the creditors. The matter before us would seem to fall within the rules set forth in De Forrest v. Coffey, 154 Cal. 444, 98 P. 27. It was undoubtedly within the discretion of the respondent court to reserve to itself the determination of the validity of petitioner's claim. It has already passed upon that claim and approved it. If an intervention had been allowed in so far as appears, the petitioner would have been in no better position. She could not attach the funds in the hands of the receiver, an officer of the court, at least without permission, and the facts are far from sufficient to show a clear duty resting upon the court to grant such a permission. Nothing here appears to indicate that the court abused its discretion in denying to the petitioner a right to intervene or to bring a separate action.

The alternative writ is discharged and the petition, as to a further writ, is denied.

We concur: MARKS, J.; JENNINGS, J.

---

20 Cal.App.2d 445

PEOPLE v. ROSEN.

Cr. 2957.

District Court of Appeal, Second District. Division 2, California.

April 20, 1937.

1. Perjury 🔑34(1)

Evidence *held* sufficient to support conviction for perjury under statute requiring proof by testimony of two witnesses, or one witness and corroborating circumstances (Pen.Code, § 1103a).

2. Perjury 🔑11(2)

On hearing in proceeding to show cause why defendant should not be punished for contempt for failure to pay alimony, his testimony that he purchased two rings on the installment plan for $100 when in fact he paid $150 in cash for them was material so as to support charge of perjury (Pen.Code, §§ 118, 126; Code Civ.Proc. § 1218, as amended by St.1933, p. 1907).

3. Perjury 🔑11(2)

False testimony in proceeding to show cause why defendant should not be punished for contempt for failure to pay alimony was not rendered immaterial as respected charge of perjury based thereon, because defendant had not denied allegations in the affidavit on which the order to show cause was issued (Pen.Code, §§ 118, 126; Code Civ. Proc. § 1218, as amended by St.1933, p. 1907).

4. Perjury 🔑**11(8)**

Defendant testifying falsely in proceeding to show cause why he should not be punished for contempt for failure to pay alimony could not escape responsibility for perjury by showing that other evidence admitted by him was contradictory to the false testimony (Pen.Code, §§ 118, 126; Code Civ. Proc. § 1218, as amended by St.1933, p. 1907).

5. Criminal law 🔑**865(1)**

Remarks of court when jury announced inability to agree in criminal case, that court did not see anything in the evidence of such nature as to make it impossible for jury to decide, that evidence was plain though conflicting, that it was subject to be analyzed by the jurors and it appeared to the court that it should be analyzed to the extent of reaching a decision, that failure to reach decision was expensive to county and taxpayers, but that this was a secondary matter, the matter of determining the guilt or innocence of the accused being first and paramount, that the jury had no right to determine the case on surmise and suspicion, but that court felt they should by honest endeavor and by exerting every reasonable means within their powers of reasoning, reach a verdict if at all possible, *held* not prejudicially erroneous.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Louis Rosen was convicted of perjury, and he appeals.

Affirmed.

Dempster & Dempster and Ralph L. Loeb, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., aand Eugene M. Elson, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendant appeals from a judgment of conviction of perjury after trial by jury.

Viewing the evidence most favorable to the prosecution (People v. Dukes, 90 Cal. App. 657, 659, 266 P. 558), the facts in the instant case are:

March 17, 1936, defendant, after being duly sworn to tell the truth, the whole truth, and nothing but the truth in a proceeding then pending before the superior court to show cause why he should not be punished for contempt of court for failure to comply with an order of said court directing him to pay his former wife certain sums as alimony, testified that he had purchased two rings on the installment plan, paying $100 for both of them. At the conclusion of the hearing defendant was found guilty of contempt and appropriately punished.

Albert I. Kastle testified in the present proceeding that he had sold defendant the two rings above mentioned for the sum of $150 in cash and defendant had requested that he do him a favor, as he was having a little family trouble, by giving him a book to make it appear that he had purchased the rings on the installment plan for $100, $10 down and $5 a month. Such a book in the handwriting of the witness had been prepared and delivered to defendant.

Defendant relies for reversal of the judgment on the following propositions:

First: There is no substantial evidence in accordance with the requirements of section 1103a of the Penal Code to sustain the judgment.

Second: Defendant's testimony at the hearing of the order to show cause why he should not be punished for contempt for failure to comply with the order of the superior court was not as to a material issue in that proceeding.

Third: After the jury returned into open court from their deliberations and stated that they were unable to agree upon a verdict, prejudicial error was committed by the trial court in giving the following instruction:

"I am going to say this to the jury. The evidence that has been produced here before you jurors, I feel the evidence produced has been plain and clear. It is true, of course, there has been some conflict in the evidence, but I do not see anything in the evidence of such a nature as to make it impossible for a jury to decide one way or the other. The court is not attempting to tell you, or even suggesting to you, how you should decide the matter. But, as I say, the evidence is very plain, although conflicting. It is subject to be analyzed by the jurors so long as there is no misunderstanding as to what the evidence is.

And it appears to the court that it should be analyzed to the extent of being able to reach a decision in this case. It is important, both to the People and the defendant, that a decision be reached. When a decision is not reached, and the cause terminated, it means considerable expense to the county. Of course, that is a secondary matter. The matter of determining the guilt or innocence of a person accused of crime, is first and paramount. But, at the same time, if it comes to the matter of trying cases over more than once, it means that the taxpayers have to bear that additional burden. You have no right to determine the case on surmise and suspicion. Your oath as jurors requires you to determine it solely on the evidence produced and the law as given you by the court. I feel you should, by honest endeavor, and by exerting every reasonable means within your powers of reasoning, reach a verdict in this case if it is at all possible. In that connection, I am going to have you retire again and see if you cannot come to some kind of decision and verdict."

[1] Defendant's first proposition is untenable. Perjury must be proved by the testimony of two witnesses or of one witness and corroborating circumstances. Section 1103a, Pen. Code. In the instant case a witness testified that defendant at the hearing on the order to show cause why he should not be punished for contempt, after being duly sworn, stated that he had purchased two rings on the installment plan, paying $100 for both of them. Another witness, Albert I. Kastle, testified that he had sold the two rings to defendant for the sum of $150 cash and had agreed at defendant's request to make it appear that the transaction was on the installment plan at a total cost of $100.

The foregoing testimony was corroborated by reception in evidence of an account book in the handwriting of the witness Kastle purporting to show that the transaction was an installment one with the total purchase price of $100. Further corroboration is found in the testimony of Lieutenant Hudson of the Los Angeles police department to the effect that, when arrested, defendant stated he had purchased the ring, paying $150 cash for it and that the reason he told the court at the contempt proceeding he had purchased it on the installment plan was because his first wife had hounded him since he had married the second time and he did not want her to know that he had $150 in cash.

From the foregoing it is evident that the requirements of section 1103a of the Penal Code have been fully met.

[2-4] Defendant's second proposition is likewise untenable. One of the principal issues before the court on the hearing of the order to show cause why defendant should not be punished for contempt was his ability to comply with the order theretofore made by the superior court requiring him to pay his wife a sum as alimony. It is self-evident that, if he had in his possession $150, he had greater ability to comply with the court's order than if he had only $10. The naïve argument of defendant that his testimony was immaterial, since he failed to deny the allegations in the affidavit on which the order to show cause was issued, is unsound. Under section 1218 of the Code of Civil Procedure, as amended by St. 1933, p. 1907, it is provided that a judgment in a contempt proceeding must be based upon the answer and evidence taken at the hearing. The court, therefore, in compliance with this section properly received defendant's testimony on a material issue. Defendant may not escape the responsibility for his perjury by showing that there was other evidence admitted by him, which was contradictory therewith.

It is time the citizens of this state fully realized that the biblical injunction:

"Thou shalt not bear false witness against
thy neighbor"
Exodus 20:16
Deuteronomy 5:20

has been incorporated into the law of this state and that every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury (section 118, Pen. Code), and is punishable by imprisonment in the state prison for not less than one nor more than fourteen years. Section 126, Pen. Code.

[5] Defendant's final contention is also without merit. The giving of an identical instruction was approved in People v. Riddle (Cal.App.) 60 P.(2d) 899.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

M. G. WEST CO. v. JOHNSON, State Treasurer, et al.

Civ. 5827.

District Court of Appeal, Third District, California.

April 1, 1937.

Hearing Denied by Supreme Court May 17, 1937.

1. Licenses 🔑28

Retail Sales Tax Act imposing tax for privilege of selling tangible personalty imposes a tax on retailer and not on consumer (St.1933, pp. 2599–2602, §§ 3, 5, 8½, 9).

2. Taxation 🔑191
United States 🔑52½

Congress has power to create, or cause to be created, corporations which act as governmental instrumentalities to at least a limited extent, and clothe the instrumentalities with exemption from taxation.

3. Taxation 🔑6

Governmental instrumentalities are not subject to state taxation unless expressly so specified by act of Congress.

4. Licenses 🔑1

Sales tax is an "excise tax" or a "privilege tax."

[Ed. Note.—For other definitions of "Excise" and "Privilege Tax," see Words & Phrases.]

5. Licenses 🔑5

Imposition of tax on retailer under Retail Sales Act for sale of furniture to banks organized under congressional acts, which failed to authorize imposition by states of excise tax or privilege tax, *held* invalid as a limitation on the privilege of governmental instrumentalities in the equipment and preparation for doing business, in view of fact that the act allowed retailer to collect from customer, so far as it could be done, the amount of the tax (St.1933, pp. 2599–2602, §§ 3, 5, 8½, 9; Federal Farm Loan Act of July 17, 1916, § 26 and § 210, added by Act March 4, 1923, 12 U.S.C.A. §§ 931, 1111; 12 U.S.C.A. § 1138c).

6. Taxation 🔑9

Federal Land Bank, Federal Intermediate Credit Bank, Bank of Cooperatives, and Production Credit Corporation, all organized under congressional acts, *held* "governmental instrumentalities" as respects imposition of taxes by state, though major portion of business transacted by them was essentially with private individuals (St.1933, pp. 2599–2602, §§ 3, 5, 8½, 9; Federal Farm Loan Act of July 17, 1916, § 26 and § 210, added by Act March 4, 1923, 12 U.S.C.A. §§ 931, 1111; 12 U.S.C.A. § 1138c).

[Ed. Note.—For other definitions of "Government Instrumentalities," see Words & Phrases.]

7. Licenses 🔑5

Fact that retailer made report and paid retail sales tax to state *held* not to render tax valid as applied to retailer for sale of furniture to governmental instrumentalities, where tax was passed on and became added burden to governmental instrumentalities (St.1933, pp. 2599–2602, §§ 3, 5, 8½, 9).

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by the M. G. West Company against Charles G. Johnson, as Treasurer of the State of California, and John G. Corbett and others, as constituting the State Board of Equalization of the State of California. From a judgment in favor of the plaintiff, the defendants appeal.

Affirmed.

U. S. Webb, Atty. Gen., and H. H. Linney and James J. Arditto, Deputys Atty. Gen., for appellants.

Douglas A. Nye, of San Francisco, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment in an action to recover the amount of sales tax paid under protest. From this judgment the defendants appeal.

Involved in this action is the question of whether the gross receipts of sales made by a retailer of tangible personal property to the Federal Land Bank of Berkeley, to the Federal Intermediate Credit Bank of Berkeley, to the Berkeley Bank of Cooperatives, and to the Production Credit Corporation of Berkeley, are taxable under the Retail Sales Tax Act of 1933 (St.1933, p. 2599).

The plaintiff in this action is a dealer in office furniture and equipment, and during the year 1933, sold to the banks mentioned herein, office furniture and equipment of the total value of $26,508.36, upon which the tax computed according to the Act of 1933, amounted to the sum of $662.70. This tax was paid under protest, and judgment was had for its recovery.

Section 3 of the Retail Sales Act, supra, so far as pertinent here, reads as follows: "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of 2½ per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this state, on and after August 1, 1933, and to and including June 30, 1935."

Section 5 of the act contains the following exemptions, to wit: "The gross receipts from sales of tangible personal property, which this state is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State." Further exemptions are specified, but have no bearing upon the issues here presented.

Section 8½ of the act imposes the tax upon the retailer, but allows the retailer to collect from the consumer, so far as it can be done, the amount of the tax.

Section 9 of the Retail Sales Act, supra, makes the tax a direct obligation upon the retailer.

The plaintiff's position is that the assessment of the tax is contrary to the provisions of section 5, supra, and also violates the Constitution and laws of the United States. The appellants' contention is to the effect that section 5, supra, does not provide for an exemption of the tax on gross receipts from sales made to federal instrumentalities such as the four banks herein mentioned, and that neither the Federal Constitution nor the State Constitution, nor laws, prohibit the imposition of the tax.

[1] The act of the Legislature referred to purports to be an act imposing a tax on retailers for the privilege of selling tangible personal property. Adopting the same theory the courts hold that the tax is upon the retailer and not upon the consumer. People v. Herberts of Los Angeles, 3 Cal. App.(2d) 482, 39 P.(2d) 829; Roth Drug v. Johnson, 13 Cal.App.(2d) 720, 57 P.(2d) 1022. The four banks referred to were organized and established pursuant to different acts of Congress providing for the establishment of such institutions.

Section 931, 12 U.S.C.A., § 26 of the Federal Farm Loan Act of July 17, 1916, which is applicable to all four of the banks herein mentioned, reads, in part, as follows: "Federal land banks, national farm loan associations; mortgages and bonds as instrumentalities of government. * * * Every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom shall be exempt from federal, state, municipal and local taxation, except taxes upon real estate held, purchased or taken by said bank or association under the provisions of Sections 761 and 781 of this Chapter."

Section 1111 of 12 U.S.C.A. provides that "privileges of tax exemption accorded under Section 931 of this chapter shall apply also to each Federal Intermediate Credit Bank, including its capital, reserve or surplus, and the income derived therefrom, and the debentures issued under this subchapter shall be deemed and held to be instrumentalities of the government and shall enjoy the same tax exemptions as are accorded farm loan bonds in said section."

Section 63 of the Act of 1933 (12 U.S.C.A. § 1138c) provides for tax exemptions as to the Central Bank of Cooperatives, Production Credit Corporations, and Banks for Cooperatives, as follows: "Such banks, associations, and corporations, their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the United States, or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such banks, associations, and corporations shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed."

[2, 3] That Congress has the power to create, or cause to be created, corporations which act as governmental instrumentalities to at least a limited extent, and clothe such instrumentalities with exemption from taxation, appears to be well established. The principle apparently goes further and holds that governmental instrumentalities are not subject to state taxation unless expressly so specified by an act of Congress. This doctrine was first enunciated in the case of McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, where it was held that the state of Maryland had no power to tax a national bank. At the date when this question arose and was presented for consideration there was no federal statute permitting such taxation.

While the later cases show that in establishing federal instrumentalities the practice appears to be for Congress to fix certain limits as to immunities from taxation, these cases, however, and the acts of Congress so far as we read them, do not minimize or in any wise limit the effect of the decision in McCulloch v. Maryland, supra. The effect of such limitations and specifications as to what property may be held immune, and what property may be taxed, only definitely prescribes the rights and liabilities of the instrumentalities established under the particular acts of Congress. In other words, if the act is silent both as to immunities and to taxation privileges, the doctrine enunciated in McCulloch v. Maryland, supra, would seem to apply.

[4, 5] The excerpts from the acts of Congress under which the four banks involved in this action were organized and existing contain no mention of any taxation other than what is ordinarily denominated as a "property tax," and we find therein no language which would tend to authorize by the states the imposition of what is termed an "excise tax" or a "privilege tax" upon such institutions for doing business. That a "sales tax" is an "excise tax" or a "privilege tax" has been definitely decided by the Supreme Court of this state. Pacific Gas & Electric Co. v. Roberts, 168 Cal. 420, 143 P. 700. That the act of the Legislature purporting to make this excise tax a direct obligation upon the retailer does not in any wise, in view of section 8½ of the same act, lift the burden imposed upon the purchaser. In other words, by that section the privilege of purchasing tangible personal property is contingent upon payment of the excise tax. In the instant case the imposition of the tax would amount to a limitation upon the privilege of governmental instrumentalities in the equipment and preparation for doing business.

[6, 7] That the four banks involved herein are governmental instrumentalities is settled by the decision of the United States Supreme Court in the case of Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577, even though the major portion of the business transacted by the respective banks is essentially with private individuals, or what might be called a "private business." The fact that the seller and not the purchaser is required to report and make payment to the state has been held to be immaterial. The excise tax, as we have shown, is passed on and becomes an added burden upon the purchaser. That it is immaterial as to who makes the report and pays the tax to the state, we gather from the language of the Supreme Court of the United States in Panhandle Oil Co. v. Mississippi, 277 U.S. 218, 48 S.Ct. 451, 72 L.Ed. 857, 56 A.L.R. 583; Wagner v. Covington, 251 U.S. 95, 104, 40 S.Ct. 93, 64 L.Ed. 157, 168; Indian Motocycle Co. v. U. S., 283 U.S. 570, 572, 51 S.Ct. 601, 75 L.Ed. 1277, 1281. In the Panhandle Case there was involved the selling of gasoline to be used by the United States fleet, and upon which the state of Mississippi purposed to collect an excise tax. The Supreme Court held the exaction valid as a privilege tax; that the sale to the agents of the fleet or officers of the fleet for the use of the fleet was not a tax upon the instrumentalities of the federal government. This holding was reversed by the Supreme Court, and in the decision of the case it was set forth, as we have above stated, that it is immaterial that the seller and not the buyer is required to report and make payment to the state. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests.

A like ruling was held in the case of Indian Motocycle Co. v. U. S., supra, and which case seems to us decisive here. Sale was made of motorcycles by a manufacturing corporation for the police department of the city of Westfield, a municipal corporation. The tax was claimed by the United States under its revenue laws. The Supreme Court pointed out that under our dual system of government the instrumentalities, means, and operations whereby the United States exercises its governmental powers are exempt from taxation by the state, and that by the application of the same principle the exemption applies in favor of states from taxation by the United States. The motorcycles purchased by the city of Westfield were for use in its governmental capacity, and were therefore held to be exempt from the tax. The substance of the decision is that the sale of motorcycles to a state agency, such as a municipal corporation, for use in its police service, is not subject to taxation by the United States. The maintenance of a police service by such a state agency, like the maintenance of a coast guard service by the United States, is a governmental function, and that function extends in one instance as much as in the other to the purchase of equipment and supplies needed to render the particular service efficient. In the case at bar the furniture and office equipment purchased by the banks would come under a like classification, as being necessary for the efficient conduct of their business.

The appellant calls our attention to the cases of South Carolina v. U. S., 199 U.S.

437, 26 S.Ct. 110, 50 L.Ed. 261, 4 Ann.Cas. 737, Helvering v. Powers, 293 U.S. 214, 55 S.Ct. 171, 79 L.Ed. 291, and Ohio v. Helvering, 292 U.S. 360, 54 S.Ct. 725, 78 L.Ed. 1307, where the right of the United States government to collect a tax upon liquor sold through the agency of what we will call dispensaries, was involved. The instrumentalities concerned in these actions, however, are and were in no sense governmental instrumentalities, and are readily distinguishable from cases where governmental powers are being exercised, or are authorized to be exercised, and constitute a part of the business of the instrumentality. In other words, there had been an embarking upon private business, to wit, the sale of intoxicating liquor, and that being the case, the tax was held to be collectible.

We do not find anything in the case of Educational Films Corporation v. Ward, 282 U.S. 379, 51 S.Ct. 170, 75 L.Ed. 400, 71 A.L.R. 1226, which bears upon the issues tendered for our consideration. The tax involved in that case was upon income received from royalties under a United States patent, all of which makes the case readily distinguishable.

In Federal Land Bank v. Priddy, 295 U. S. 229, 55 S.Ct. 705, 79 L.Ed. 1408, there was involved the question of whether certain property of the bank was or was not immune from attachment. The court held that although the bank was a federal instrumentality, it was nevertheless subject to judicial process, and that immunity from attachment was not granted by implication. It was further said: "Federal Land Banks are instrumentalities of the Federal Government, and, so far as they partake of the sovereign character of the United States, are subject to suit and judicial process only as Congress may determine." It is further said in that case that immunity of corporate governmental agencies from suit and judicial process is less readily implied than immunity from taxation. This resulted from what was said in the case of McCulloch v. Maryland, supra, that the power to tax is the power to destroy. Under the acts of Congress relating to the establishment of Federal Land Banks, such institutions, under certain circumstances, are authorized to acquire real estate and dispose of the same in their own right.

One of the latest cases having any bearing upon the questions involved herein is that of the Federal Land Bank of Columbia v. State Highway Department of State of South Carolina, 172 S.C. 174, 173 S.E. 284, 288. In that case the action was to recover money paid under protest on account of the privilege tax levied upon automobiles. These automobiles were used in the business of the bank. Judgment went in favor of the bank. In the opinion in this case we find the following: "As far back as McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579, the Supreme Court of the United States held, and has consistently held ever since, that the instrumentalities of the federal government are exempt from taxation by a state. See also, Educational Films Corporation v. Ward, 282 U.S. 379, 51 S.Ct. 170, 75 L.Ed. 400, 71 A.L.R. 1226, and cases there cited." This opinion also quotes from the opinion in the South Carolina Case, supra, as follows: "It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government."

The case of Willcuts v. Bunn, 282 U.S. 216, 51 S.Ct. 125, 75 L.Ed. 304, 71 A.L.R. 1260, involved income tax upon the profit gained by buying and selling government securities. While it is held that the securities were exempt from the income tax, the profits in the dealing of the same were entirely separate and distinct. We find nothing in that case applicable here. We think the same is true of the earnings of civil engineers mentioned in some of the other cases cited by the appellants.

The impositions involved herein, claimed under the Sales Tax Act, supra, being an excise tax, and therefore a burden placed upon the privilege of doing business or preparing to do business by governmental agencies, constitute, to the extent of the tax, an unauthorized limitation of that privilege. The extent of the burden we think immaterial. We therefore conclude that, so far as the excise tax is concerned, calculated upon the price of office equipment purchased by the four banks, was and is invalid, and that the same having been paid under protest, the plaintiff is entitled to recover same.

The judgment is therefore affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

UNION OIL CO. OF CALIFORNIA v. RECONSTRUCTION OIL CO. et al. (PARKER et al., Interveners).

Civ. 1669.

District Court of Appeal, Fourth District, California.

April 2, 1937.

Hearing Denied by Supreme Court May 27, 1937.

1. Courts 🔑74

In action to enjoin drilling of oil well for subsurface trespass, where defendants' counsel stated that he had no objection on announcement that court would be held and witnesses sworn and heard in another county to view apparatus used in making subsurvey of well, counsel was present during proceedings in such other county and made no objection, and stipulated that court had met and that testimony should be used "for the purpose of illustration," testimony in question was uncontradicted, and no prejudice resulted from its reception, jurisdictional irregularities *held* waived.

2. Equity 🔑39(1)

Where equity once acquires jurisdiction of subject-matter of an action, it will retain it so that complete adjudication of all conflicting rights may be had.

3. Injunction 🔑121

In action to enjoin drilling of oil well for subsurface trespass, where well was not placed on production until after action was instituted, supplemental pleading could be filed after beginning of such production showing amount of damage suffered by plaintiff, in order to obtain money judgment.

4. Equity 🔑54

Equity will not require performance of idle act.

5. Mines and minerals 🔑52

In action to enjoin drilling of oil well for subsurface trespass, where well was not placed on production until after action was instituted, court *held* to have jurisdiction to award money judgment for damage suffered after beginning of production, notwithstanding absence of prayer for such relief in original complaint and absence of supplemental pleading alleging such damage.

6. Mines and minerals 🔑52

In action to enjoin drilling of oil well for subsurface trespass, where well was not placed on production until after action was instituted, measurement of damages would be governed by legal rules, notwithstanding action, as originally instituted, was strictly equitable.

7. Mines and minerals 🔑51(5)

Where invasion of mine is result of honest mistake, measure of damages is value of mineral extracted less cost of mining and milling; but, if trespass is intentional, defendants are chargeable with value of mineral after reduction, without deduction for expenses of mining and milling.

8. Mines and minerals 🔑51(5)

Award of gross value of mineral taken by willful trespasser without deduction for expenses of mining and milling amounts to an assessment of "punitive damages."

[Ed. Note.—For other definitions of "Punitive Damages," see Words & Phrases.]

9. Damages 🔑87(1)

Generally, equity does not award damages by way of punishment.

10. Mines and minerals 🔑52

In action to enjoin drilling of oil well for subsurface trespass, where well was not placed on production until after action was instituted and trespass was intentional, defendants *held* liable for gross value of oil and gas sold without deduction of cost of production, notwithstanding that original complaint alleged purely equitable cause of action and that such damages were "punitive damages," since claim which arose during pendency of action was legal in character (Code Civ.Proc. § 307).

11. Mines and minerals 🔑52

In action to enjoin drilling of oil well for subsurface trespass, under evidence that trespass was intentional as respects officers of corporation which held lease under which well was drilled and contractor engaged by corporation to drill well, such parties *held* liable for gross value of oil and gas sold after well was placed on production during pendency of action, without deduction of cost of production.

12. Jury 🔑13(5)

Right to have issue of fact tried by jury does not exist in causes which are purely equitable in character, but granting or refusing jury trial is discretionary, and, if jury is allowed, verdict is merely advisory.

13. Jury ⚷13(9)

In action to enjoin drilling of oil well for intentional subsurface trespass, where gross value of oil and gas sold from well was stipulated and cause of action for damages did not arise until well was placed on production after institution of action, denying defendants jury trial on issue of damages *held* not error.

14. Appeal and error ⚷1010(1)

Where findings were supported by evidence, decree could not be attacked on appeal, notwithstanding that findings were unnecessarily voluminous.

15. Appeal and error ⚷1008(1)

In action to enjoin drilling of oil well for subsurface trespass, where mechanical apparatus and methods of mathematical calculations used in making subsurface survey showing trespass were exhibited and explained to trial court, inventor of system and other individuals who took part in survey were examined, and evidence disputing accuracy of survey was introduced, question of accuracy of survey *held* for trial court.

16. New trial ⚷159

In action to enjoin drilling of oil well for subsurface trespass, where defendants alleged as ground for new trial newly discovered evidence that well drilled by plaintiff after trial to destroy well operated by defendants failed to affect production or gravity of oil produced by such well, which evidence defendants contended showed that there was no trespass, and plaintiff filed counter affidavits, whether conflicting evidence thus presented required granting of new trial *held* for trial court.

◆

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by the Union Oil Company of California against the Reconstruction Oil Company and others, wherein Louis Elmer Parker and others intervened. From a judgment for plaintiff and interveners, part of defendants appeal.

Affirmed.

See, also, 4 Cal.(2d) 541, 51 P.(2d) 81.

Newby & Newby, of Los Angeles, for appellants Reconstruction Oil Co., Nathan Newby, Jr., Paul D. Newby, and Felix Gillespie.

Hubert L. Rose, of Los Angeles, for appellants Marine Development Corporation, C. C. Campbell, D. L. Mayhew, E. D. Marr, E. J. Evans, and H. L. Rose, Jr.

Eugene H. Blanche, Mortimer A. Kline, Paul M. Gregg, Andrews & Andrews, and Lawler & Degnan, all of Los Angeles, for respondents.

JENNINGS, Justice.

Plaintiff, as lessee of certain land under an oil and gas lease in the Signal Hill Field, instituted this action on July 13, 1934, to enjoin defendants from continuing the drilling of an oil well known as Hines No. 1 well which was alleged to have been located approximately 60 feet west from the southwest corner of plaintiff's lease and which in the process of drilling deviated from the vertical and entered and trespassed upon plaintiff's lease. Plaintiff's lessors were permitted to intervene in the action and complaints in intervention were filed by them whereby substantially the same relief as that sought by plaintiff's complaint was prayed. On August 22, 1934, plaintiff filed with the court wherein the action was pending a petition for permission to conduct a subsurface survey of Hines No. 1 well for the purpose of ascertaining the precise location and course of said well. The petition was granted over the objection of defendants by entry of an order for such survey on August 27, 1934. An appeal from this order was promptly taken by defendants on the date of the issuance of the order. An attempt to conduct a subsurface survey of the well was made on August 28, 1934, but was unsuccessful because of the refusal of those defendants who then had charge of the drilling of the well to permit such survey to be made. On August 30, 1934, on application of the plaintiff, the trial court made an order directing the defendants to show cause on September 7, 1934, why they should not be restrained and enjoined from bringing the well to production or completing the drilling thereof pending trial of the action and further ordering that, pending the hearing of the order to show cause, defendants be restrained and enjoined from completing the well or bringing it to production. This order was served on the defendant, Felix Gillespie, who was then directing the drilling of the well on August 30, 1934, and on certain other persons, including the defendant Nathan Newby, Jr., on the following day. The well was brought to production on August 30, 1934. On September 20, 1934, the order to show cause came on for hearing and on September 22, 1934, the court made its order granting a temporary injunction pending trial of the action. On October 8, 1934, plaintiff filed with the court a second petition for an order directing a subsurface survey of the well to be made, and on October 13, 1934, the court, over the objection and despite the opposition of defendants, made an order granting the petition and directing that such survey be made by two designated surveying companies and instructing the sheriff of Los Angeles county to enforce execution of the order. This order was executed and surveys of the well were conducted by the surveyors appointed by the court between the dates of November 2, 1934, and November 8, 1934. Trial of the action was begun on January 14, 1935, and was submitted for decision on February 6, 1935. On May 22, 1935, the trial court rendered judgment in favor of plaintiff and the interveners herein, whereby it was decreed that the defendants and their employees were permanently enjoined from operating Hines No. 1 well and from pumping or removing petroleum and gas or other hydrocarbon substances from said well. The judgment expressly ordered the defendants Reconstruction Oil Company, a corporation, Nathan Newby, Jr., Paul D. Newby, and Felix Gillespie to plug up and abandon all of said well below a measured length of 1,700 feet from the surface of the ground. The judgment further provided that the plaintiff and interveners should recover from the last-mentioned defendants the sum of $22,557.05 together with interest thereon and the costs of suit. From this judgment the defendants have prosecuted the present appeal.

Before giving consideration to the contentions advanced in support of the appeal herein, it will be proper to mention certain facts which relate to the history of the Hines No. 1 well that were developed during the trial of the action. The drilling of this well was commenced during the month of March, 1934, by the defendant Marine Development Corporation, which was the lessee of the land whereon the well was located. Active control and management of the drilling operations was then in the hands of the defendants, D. L. Mayhew and Carl C. Campbell, who had considerable experience in work of this character. The defendant E. D. Marr was president, D. L. Mayhew, vice president, E. J. Evans, secretary, and the defendants H. L. Rose, Jr., and Carl C. Campbell were directors of the Marine Development Corporation. For the sake of convenience this group of defendants will hereinafter be called the Marine defendants. During the month of February, 1934, the defendant H. L. Rose, Jr., who, in addition to being a director of the Marine Corporation, also acted as attorney for said corporation presented to the commissioner of corporations of the state of California an application by the Marine Corporation for permission to issue certificates of stock in said corporation. At the time this application was filed Rose was advised by the deputy commissioner to whom he presented the application that it was the policy of the state corporation department to require affidavits with respect to directional drilling of oil wells from corporations that were engaged in drilling such wells in certain areas. Subsequently and after investigation of the application, this deputy telephoned Rose and informed him that an affidavit on behalf of the Marine Corporation and its directors stating that it was not the intention of the corporation and its directors to trespass upon or under neighboring premises would be required to be filed before a permit for issuance of stock could be granted. A letter to this effect was addressed to Rose by the deputy commissioner on March 6, 1934, and on March 14, 1934, another letter was sent to Rose referring to the prior communication and containing a quotation from the rules of practice of the department to the effect that failure to file requested additional data might be considered sufficient cause for dropping an application and concluding with the statement that unless the requested affidavit were received on or before March 21, 1934, it might be necessary to abandon the pending application for issuance of stock. No affidavit was filed with the state corporation department and the application for a permit to issue stock was never granted.

In the meantime drilling operations which, as above stated, were begun during the month of March, 1934, by the Marine defendants were being continued. At an early stage in these operations Mayhew and Campbell suspected that the well was deviating from the perpendicular. Some 25 or 30 "single shot" surveys were accordingly run during the time that drilling operations were carried on by the Marine defendants. The purpose of making these surveys was to discover whether or not deviation from the perpendicular was occurring and the direction of such deviation. The results of these surveys were shown by certain photographic discs or buttons which were turned over to Mayhew and Campbell by the persons who made the surveys. On numerous occasions during the progress of the drilling which was performed by the Marine defendants directional or deviational tools consisting of whipstocks, Lucey spud bits, and knuckle joints were employed for the purpose of changing the direction which the well was taking in the course of drilling.

On March 23, 1934, the plaintiff addressed a letter to the Marine Development Corporation stating that plaintiff was informed that the Marine Corporation was drilling an oil well which was located a short distance from the outer boundary line of plaintiff's lease. It was observed that the science of drilling for oil had reached a stage where the making of a hole might be so controlled and directed that the well could be completed under lands that were somewhat distant from the original location of the well. Warning was given that, in view of the location of Hines No. 1 well, the Marine Corporation must not permit its well in the process of drilling to come within the boundary line of plaintiff's lease or to produce oil or gas from the land leased by plaintiff and demand was made that the Marine Corporation should take all necessary steps to prevent such trespass or the conversion of oil or gas. Copies of this communication were served on E. D. Marr, as president of the Marine Corporation and on D. L. Mayhew as vice president of said corporation. On April 17, 1934, a conference was held in the city of Los Angeles between the defendants Marr, Evans, and Rose and certain persons representing the plaintiff. The evidence relating to statements that were then made by certain of the above-mentioned defendants respecting the location at that time of Hines No. 1 well was conflicting but evidence was produced which indicated that the defendant Marr then stated that the Marine defendants had expended considerable time and money and had experimented with various types of tools in an effort to remove the well from the plaintiff's property but that up to that time they had been unsuccessful in the attempt. There was also testimony given by the witness Stokenbury regarding a conversation which he had with the defendant Campbell about April 22 or 23, 1934, in which Campbell stated "that he was under the Union Oil Company property but wanted to get off."

The Marine defendants continued to drill the well until May 4, 1934. Prior to this date the well had been drilled to a depth of 3,995 feet at which time a cement plug was placed in the hole. On June 18, 1934, the Reconstruction Oil Company was incorporated in the state of Nevada for the purpose of taking over the well and completing the drilling of it. The defendant Paul Newby became president and the defendant Nathan Newby, Jr., secretary of this corporation. On June 18, 1934, the Reconstruction Corporation entered into a written contract with the Marine Corporation whereby the latter agreed to assign its leasehold interest in the land whereon the well was located to the former and the Reconstruction Company agreed to continue drilling the well and to use its best efforts to place it on production. In accordance with this contract the Reconstruction Corporation entered into possession of the premises and assumed control of the well on June 18, 1934. On this same date the Reconstruction Oil Company entered into a contract with the defendant Felix Gillespie whereby the company agreed to place Gillespie in possession of the well for the purpose of "drilling and placing the same on production" and that it would furnish to Gillespie all necessary tools and machinery to drill the well to an approximate depth of 5,100 feet and that it would pay him $200 per day for every day that he remained in possession of the well and continued drilling operations. Of the specified daily amount thus agreed to be paid to Gillespie it was provided that $50 should be paid in cash and the remaining $150 should be paid "out of 15% of the oil produced and saved from said well." Gillespie agreed to furnish all necessary labor and mechanical skill required in drilling the well and placing it on production. Gillespie thereupon assumed control of the drilling of the well and continued in charge of such operations until the well was placed on production. The defendants Paul D. Newby, Nathan Newby, Jr., and Felix Gillespie are referred to in the findings as the Reconstruction defendants and will herein be so termed when it is desired to mention this group of defendants.

On July 7, 1934, a letter was sent by plaintiff's counsel to the Reconstruction Oil Company warning said company that, in the drilling operations being carried on at Hines No. 1 well by this company, it must not cause or permit the well to trespass on plaintiff's lease or to produce oil or gas therefrom. On July 10, 1934, the attorneys for the Reconstruction Corporation replied to the above-mentioned letter assuring the plaintiff and its counsel that it was not the intention of the Reconstruction Corporation to infringe upon plaintiff's legal rights. On July 11, 1934, plaintiff's attorneys addressed a reply to the last-mentioned communication suggesting that the course and direction of Hines No. 1 well should be ascertained by subsurface survey which might be accomplished by some mutually acceptable surveyor and expressing willingness to apportion fairly the cost of such survey between plaintiff and the Reconstruction Corporation. Additional correspondence between the attorneys for plaintiff and the Reconstruction Company resulted in a declination by the company to permit the survey to be made. After the commencement of this action the orders providing for subsurface surveys to which reference has heretofore been made were procured from the court wherein the suit was pending. Appeals taken from these orders were dismissed by the Supreme Court on October 30, 1935, on the express ground that said orders were not appealable orders. Union Oil Co. v. Reconstruction Oil Co., 4 Cal. (2d) 541, 51 P.(2d) 81.

The results of the survey which [illegible] made during the month of November, 1934, by the Alexander Anderson, Inc., were received in evidence over the objections of the defendants. These results which obviously constituted evidence most important to plaintiff's case indicated that all of Hines No. 1 well below a depth of 1,700 feet was wholly upon and within the property covered by plaintiff's lease.

The first contention advanced by appellants on this appeal is that there was a serious and fatal irregularity which occurred during the trial of the action which requires reversal of the judgment. This irregularity consists in the fact that after the trial of the suit which was instituted in Los Angeles county and was being heard in a department of the superior court of that county in the city of Long Beach had proceeded for several days, the trial court acceded to a suggestion of attorneys representing respondent that the court and counsel should go to the city of Fullerton in Orange county for the purpose of inspecting the apparatus used by the surveyor in making the subsurface survey of the well and that while the court was in Fullerton for the above-mentioned purpose it should hear the testimony of certain employees of the company which had performed the survey. This course was accordingly pursued and the court proceeded to Fullerton and in addition to making observation of the machinery and equipment used in making the survey the record shows that the trial court then heard the testimony of six witnesses who were called by respondent. All of the witnesses who were there examined were employees of Alexander Anderson, Inc, the corporation which had made the subsurface survey of Hines No. 1 well. These witnesses explained the manner in which they prepared the records and made various calculations and computations from the photographic films that were taken during the course of the survey. The record also shows that, when it was suggested that the court should go to the laboratory of the Alexander Anderson, Inc., in Fullerton, appellants' counsel made the following statement: "We will not raise the objection that it is in Orange County, Your Honor, as far as that is concerned. If the court thinks it would be adding anything to the light, we have no objection." It also appears that appellants' counsel were fully advised that evidence would be offered during the visit to Fullerton since, after the suggestion regarding the trip to Fullerton was made and in objecting to the reception of certain documentary evidence, counsel made the following statement: "I am not urging, as a ground of the objection, that the young ladies and the men of Mr. Anderson's organization have not yet testified as to their part—we take it that they are going to do that later; that is what we are going over there for." It also appears that, prior to the last-quoted statement, appellants' counsel had been apprised that witnesses would be examined at Fullerton by the following statement which was made by the trial court: "The court made an order that, with the consent of the parties, we convene tomorrow morning at 10:00 o'clock at Mr. Anderson's plant in Fullerton, and there make, take the testimony of such witnesses as the counsel may agree upon and view the plant and appliances that Mr. Anderson has at that location." Neither at the time the foregoing statement was made nor later in the same day when, at the time of adjournment, the court said, "At this time we will take a recess until 10 o'clock tomorrow morning and we will convene at Fullerton," did appellants' counsel offer any objection or suggest any reason why the court should not go to Fullerton and there follow the course which it had announced it expected to follow, The record further shows that, on the morning of January 23, 1935, when the court and counsel met at the Anderson plant in Fullerton, appellants' counsel made the following statement: "I am willing to stipulate only that we have met at Fullerton, and that we take the testimony of different witnesses that are present here, the young ladies, as I understand—and my idea was that their work, their methods was the thing you wanted especially illustrated." Respondent's counsel thereupon suggested that the stipulation should also show that, preliminary to the taking of testimony, the court and counsel had inspected the Anderson plant and the various devices used by Anderson in making subsurface surveys. To this suggestion appellants' counsel replied as follows: "No objection to that. The only qualification I was making was that could only be for the purpose of illustration and could not be considered as evidence in this case." The court then said: "Very well. Then let that stand as the stipulation."

Appellants now argue that the court had no jurisdiction to hold a session in Orange county and that the fact that it permitted each of the six witnesses who testified in Fullerton to be sworn by a deputy clerk of Los Angeles county who had no authority to administer an oath outside the county of Los Angeles renders void the entire judgment which is based in part on evidence which it is claimed was thus erroneously received.

It is our opinion that the question thus presented is not a question of jurisdiction. There is no suggestion that the trial court lacked jurisdiction to hear and determine the cause. It is apparently appellants' contention that when the court left the territorial boundaries of Los Angeles county and received the testimony of certain witnesses in another county, it lost the jurisdiction which it admittedly possessed so long as it remained in Los Angeles county and that it had no power to receive evidence in Orange county and the evidence thus erroneously received may not be considered in support of the findings drawn by the court and the judgment finally entered in the action.

The point thus raised is novel and no authority which directly bears upon the question is cited. The nearest factual approach to the situation here presented appears in the case of People v. Pompa, 192 Cal. 412, 221 P. 198. It appears that during the trial of this case wherein the defendant was charged with the commission of first degree murder and was convicted the district attorney moved that the jury be taken to view the premises where the crime was committed. No objection to this procedure was then offered by the defendant. The court thereupon ordered that the jury be taken to view the scene of the crime and remarked that no argument would be permitted during the visit and that no testimony would there be taken. However, during the view of the premises, the individual whom the court had appointed to show the premises was directed by the court to point out and designate various parts of the premises. This he did and in so doing he was asked questions both by the judge and by certain jurors. To the questions thus asked and the procedure thus followed no objection was interposed. It was, however, later during the trial particularly objected that testimony had been received during the view of the premises. The objection was overruled. After a verdict of conviction was returned the defendant moved for a new trial and thereupon renewed his objection theretofore presented. The motion for a new trial being denied the defendant appealed and on appeal insisted that the taking of testimony during the view was prejudicially erroneous and ground for reversal. The contention did not prevail for two reasons. The first reason was that it appeared that during all proceedings attending the view of the premises the court in its completeness was present, the only element absent being the walls and furnishings of the courtroom where the court usually convened. It was remarked "that there is no special sacredness in the atmosphere of a courthouse or the walls or furnishings of a courtroom which requires that sessions of the court shall be held there and not elsewhere, if otherwise the forms of law governing the trial of causes are observed * * *" The second reason given for refusing to sustain the defendants' contention was that the defendant, by his failure to present timely objection to the taking of testimony during the view of the premises and his concurrence in the alleged irregularities, had waived any right that he might have had to object thereto.

[1] It is our conclusion that the acquiescence of appellants and their counsel in the alleged irregularities of which they complain and their concurrence in the commission of such irregularities preclude them from now insisting upon these irregularities as a ground for reversal of the judgment. Appellants had ample opportunity to present timely objection to the court's visit to the Anderson plant in Full-

erton. Not only did they make no objection thereto but their counsel expressly stated, when the visit was first proposed, that he would not raise the objection that the court would be going into another county. Furthermore, it is not denied that the legal representative of appellants was present in Fullerton at the time appointed and not only made no objection to the proceedings that were there taken but specifically stipulated that the court had met in Fullerton and that the testimony of different witnesses who were employed in the Anderson plant should be heard. There was then much more than passive acquiescence by counsel for appellants in the irregularities of which he now complains. There was active participation in such alleged irregularities. This acquiescence and concurrence in such claimed irregularities, in our opinion, constitute a waiver of the right now to raise objection to them. It may further be observed with respect to the evidence which was received in Fullerton that it stands uncontradicted and, so far as appears, no prejudice resulted to appellants from its reception.

The second contention advanced by appellants is that the judgment, in so far as it awards money damages to respondent, is void for the reason that the original complaint filed in the action demanded merely injunctive relief and no supplemental pleading was ever filed which demanded compensation by way of damages. It is urged, therefore, that the trial court was precluded from granting relief outside of the issues framed by the pleadings and that the award of damages was entirely unauthorized and beyond the court's power. The basis for this contention is that a purely equitable action does not warrant a court in granting relief which is strictly legal in character particularly when such relief is entirely outside the issues made by the pleadings. Concededly, this action whereby respondent sought only the issuance of an injunction is purely equitable. The contention presented by appellants therefore merits examination.

[2] In giving consideration to the contention it may first properly be observed that at the time the action was instituted respondent had no cause of action for damages. The well had not then been placed on production and respondent had suffered no actual damage. The only relief for which respondent could then properly pray was that appellants should be restrained from causing damage in the future. This situation continued to exist until the well was placed on production during the pendency of the action. When the well began to produce oil on August 30, 1934, then for the first time a cause of action for damages accrued and admittedly at any time thereafter respondent might properly have brought an action for legal relief by way of damages. However, it is a familiar principle of equitable procedure that equity having once acquired jurisdiction of the subject matter of an action will retain it to the end that a complete adjudication of all conflicting rights may be had and a final determination of all matters in controversy may be accomplished. The damage suffered by respondent occurred after the suit for injunctive relief had been filed and was a matter which grew out of the situation portrayed by the allegations of respondent's complaint. It was therefore purely incidental to the relief which respondent originally sought by its equitable action and a court of equity having properly acquired jurisdiction was justified in retaining it until all issues in the action should be determined. McLaughlin v. Del Re, 64 Cal. 472, 2 P. 244; McCarthy v. Gaston Ridge Mill, etc., Co., 144 Cal. 542, 78 P. 7.

[3-5] With respect to the contention that the award of damages included in the decree is outside any of the issues presented by the pleadings and that therefore the court lacked the power to make the award, it may be observed that a supplemental pleading might have been filed after the evidence produced during the trial of the action had disclosed what amount of damage respondent had suffered. McCarthy v. Gaston Ridge Mill, etc., Co., supra. However, it must be borne in mind that we are here considering an action in equity where the relief administered is such as the nature of the case and the facts as they exist at the termination of the suit demand. In such a situation a supplemental complaint is not required to apprise the court of those facts which have occurred since the filing of the original complaint and which have an evidentiary bearing upon the facts in issue in the action as originally instituted. The allegation of such subsequent facts would be surplusage and not consistent with the familiar equitable maxim which declares that equity will not require the performance of an idle act. Collins v. Sargent, 89 Cal.App. 107, 264 P. 776. We conclude therefore that, under the circumstances here presented, the trial court was not without power to make an award of damages

that were purely incidental to the equitable relief originally sought and that no reversible error was committed in making such award in the absence of a supplemental complaint alleging the existence of facts which occurred subsequent to the filing of the original complaint.

The third contention advanced by appellants also relates to the award of damages. It is pointed out that in making the award the trial court allowed the gross amount received by the appellant, Reconstruction Oil Company, from its sale of oil and gas produced by the well without permitting any deduction for cost of production. It is declared that this procedure amounted to an assessment of punitive damages in an equitable action which is contrary to equitable principles and that such action constituted reversible error.

[6] While it is true that this action as originally instituted was strictly equitable, the award of damages incidental to the equitable remedy of injunction was a legal remedy and legal rules appropriate to the measurement of damages were applicable to this phase of the case. It is apparent that appellants fully appreciate that the award of damages was a remedy of legal rather than equitable cognizance for they demanded that a jury be empaneled to try this issue and the trial court's refusal of such demand is also urged as error requiring reversal of the judgment.

Since the award of damages was a legal remedy and the rules of law relating to the admeasurement of damages were proper to be applied, it may be inquired what was the legal cause of action which rendered the assessment of damages appropriate. It is obvious that this cause of action was trespass. Respondent maintained that appellants by means of Hines No. 1 well had encroached upon respondent's property and that when this well was placed on production the oil and gas underlying respondent's property was severed from the land and converted by appellants to their own use. It was further maintained that the trespass thus committed was not innocent or accomplished under a claim of right but that it was deliberate and was consummated by the intentional drilling of the well in such manner that it deviated from the perpendicular and beneath the surface of respondent's land. Examination of the transcript on appeal discloses that evidence was produced which tended to show that a trespass was committed by appellants and that it was a deliberate and intentional trespass. The trial court's finding to this effect may not successfully be attacked on the ground of evidentiary nonsupport. There remains for consideration the question of whether or not the trial court applied the proper measure of damages in the situation thus presented.

[7-10] In Lightner Mining Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann.Cas.1913C, 1093, which was an action at law by the owner of a mine against the owners of an adjoining mine to recover the value of certain ore alleged to have been extracted by the defendants from the plaintiff's property it was declared that if the invasion of plaintiff's mine by defendants was the result of honest mistake and inadvertence the measure of damages would be the value of the mineral extracted from the ore less the cost of mining and milling but, if the trespass was intentional and with knowledge of plaintiff's rights, defendants would be chargeable with the value of the mineral after reduction without any deduction for expenses of mining and milling. That this is the general rule is indicated by the text of section 13 of the article on oil and gas appearing in 8 California Jurisprudence Supplement at page 610. It is true that it is stated in Lightner Mining Co. v. Lane, supra, that the award of the gross value of mineral taken by a wilful trespasser without deduction for expenses of mining and milling amounts to an assessment of punitive damages and it may be conceded that as a general rule equity does not award damages by way of punishment. United States v. Bernard (C.C.A.) 202 F. 728, 732. Nevertheless, it must be observed that in California there is but one form of action (section 307, Code.Civ.Proc.), and that although this action as originally instituted was purely equitable in nature the claim for damages which arose during the trial and which came into existence through the persistent efforts of the Reconstruction defendants to bring the well to production was legal in character. It is our conclusion, therefore, that in dealing with this phase of the case the trial court correctly applied the above-mentioned legal rule in awarding as damages the gross amount received by the Reconstruction defendants from the sale of oil and gas without permitting any deduction for expenses incurred by them in extracting and marketing such oil and gas.

The fourth contention of appellants is that the money judgment rendered against the individual appellants, Nathan Newby, Jr., Paul D. Newby, and Felix Gillespie, is erroneous. The basis for this contention is that since respondent elected to bring an action in equity and to seek relief based on equitable principles it waived the tort and was not entitled to recover damages from the above-mentioned individuals on the theory that these persons were jointly responsible with the Reconstruction Oil Company for the commission of a tort. It is maintained that in an equitable action the basis for recovery of a money judgment is predicated exclusively on the doctrine of unjust enrichment. It is further declared that, although the trial court expressly found that the Reconstruction defendants, which concededly embraces the above-mentioned individuals as well as the corporation, received the sum of money awarded to respondent as damages, which finding would appear to render irrelevant the contention here advanced, nevertheless this finding is entirely lacking in evidentiary support and must be disregarded.

[11] Assuming that appellants are correct in their statement that the trial court's finding is unsupported by evidence and must therefore be disregarded we are nevertheless not impressed by the contention that the money judgment rendered against the above-named individual defendants is erroneous. Examination of the transcript impels the conclusion that the portion of the judgment which provides for the recovery of a specified sum of money from the Reconstruction defendants amounts to an award of damages in respondent's favor and that the award was made to compensate respondent for the damage which it suffered as a result of an intentional and deliberate trespass commited by the above-named individuals. We have heretofore expressed the opinion that the finding that an intentional trespass was committed is supported by the evidence. It is also our opinion that the evidence was ample to demonstrate that the three individuals were responsible for its commission and that a money judgment rendered against them as joint tort-feasors was justified by the evidence. Manifestly, the corporation itself was incapable of performing the physical acts which constituted an invasion of respondent's property. This could only be done by individuals and the evidence showed that it was done by the officers of the corporation and by the person who was selected by them to drill the well and who did direct and superintend its drilling. If respondent had a cause of action for damages caused by trespass it could have maintained an action at law against those persons who were responsible for the commission of the tort. The assessment of damages in this action originally instituted in equity was incidental to the equitable relief which respondent sought and was legal in nature. It was therefore properly determined by the application of legal rather than equitable principles.

The fifth contention advanced by appellants is that the trial court erroneously refused their demand for a jury to try the issue of damages. Since, as above noted, it is our opinion that the rendition of a money judgment against the Reconstruction defendants amounted to an award of damages and was therefore a remedy legal in character, it is apparent that this contention merits serious consideration. Proper examination of it requires some mention of the factual background against which this problem is projected.

Inspection of the record shows that at various times during the trial of the action respondent demanded that the Reconstruction defendants produce records in their possession which would show the amount of money actually received from the sale of oil and gas recovered by the well. It was agreed that such records would be produced. Finally, on February 5, 1935, after the trial had proceeded for approximately three weeks, respondent called appellant, Nathan Newby, Jr., as a witness for the purpose of proving by him the amount received. During the examination of this witness it appeared that appellants had produced records which showed the amount received from oil and gas sales up to the first part of January, 1935, but that such records were incomplete in that they did not show what amount had been received during the month of January, 1935. Respondent insisted that it was entitled to complete records which would include a report of sales made during the aforesaid month and counsel for appellants, although he objected to the introduction of such evidence on the ground that it was outside the issues of the case, agreed that the additional data would be produced. The transcript shows that on February 6, 1935, an adjournment of the trial was had until February 27, 1935, when the court announced its decision in favor of respondent and ordered that a further hearing be had for the purpose of determining the amount of production of petroleum and gas from Hines No. 1 well and the value thereof. This hearing took place on March 15, 1935, at which time the court announced that the case was being opened "to establish the amount of damage, under the pleadings." Appellants then renewed their objection that the inquiry proposed to be conducted was outside the issues as framed by the pleadings. This objection was overruled. Respondent thereupon offered in evidence a report prepared by a firm of auditors for the Reconstruction Oil Company presumably furnished to respondent by the legal representatives of said corporation which showed that the total amount received by the corporation from sales of oil and gas produced by the well up to 9 o'clock a. m. of March 15, 1935, was $22,557.05. Appellants stipulated that the report was accurate and that the above-stated amount was correct, but continued to object to the reception of the evidence on the ground that the question of damages was outside the issues of the case. A further ground of objection which was then for the first time urged was that appellants were entitled as a matter of right to a jury trial on the issue of damages which had not been waived by reason of the fact that respondent's complaint for an injunction contained no allegation of damage and no prayer for money damages. Appellants thereupon demanded a jury trial on the issue of damages if such issue should be considered by the court. At the conclusion of prolonged argument by counsel the trial court admitted the evidence pursuant to the stipulation as to its correctness and took under submission a motion by appellants to strike it from the record on the grounds originally urged as objections to its reception. Subsequently on May 22, 1935, the court entered judgment whereby it was adjudged that respondent should recover from the Reconstruction defendants the total amount which the evidence showed had been received from the sale of oil and gas produced by the well, viz., $22,557.05.

With respect to the matter now under consideration the trial court evidently concluded that not only were there no issues presented in the case which required a trial by jury, but also that appellants had waived any right they might have possessed to have a jury trial on the issue of damages by their failure sooner to have presented a demand for a jury. This is made clear by an express finding to this effect which the court made. It is obvious that if the court's refusal to submit the issue of damages to a jury is sustainable on either of the above-mentioned grounds no reversible error was committed by such refusal.

It is our conclusion that upon the facts and circumstances of this case as they are disclosed by the record herein appellants were not entitled as a matter of right to a trial by jury of the issue of damages. The action as it was originally instituted was purely equitable in character and the relief which was sought was strictly equitable. Respondent's claim for damages arose after the suit was brought and came into existence as a result of the persistent and determined efforts of the Reconstruction defendants to complete the drilling of the well to the point of production and to continue the production of oil and gas from the well during the pendency of the action. That the trial court was fully justified from the evidence in finding that these appellants were deliberate and intentional trespassers on respondent's property and that the proper measure was applied to the question of damages are matters which, in our opinion, may not be successfully disputed.

[12, 13] It is a settled principle of equity that the right to have an issue of fact tried by a jury does not exist in causes which are purely equitable in character. Koppikus v. State Capitol Commissioners, 16 Cal. 248; Cassidy v. Sullivan, 64 Cal. 266, 28 P. 234; McLaughlin v. Del Re, 64 Cal. 472, 2 P. 244; Pacific Railway Co. v. Wade, 91 Cal. 449, 27 P. 768, 13 L.R.A. 754, 25 Am.St.Rep. 201; Cauhape v. Security Savings Bank, 127 Cal. 197, 59 P. 589; Matter of Coburn, 165 Cal. 202, 219, 131 P. 352. From this principle it follows that the granting or refusing of a demand for a jury trial as to some issue of fact in an action in equity is a matter which is confided to the trial court's discretion and if a jury is allowed in such a case its verdict is merely advisory to the court. La Societe Francaise v. Selheimer, 57 Cal. 623; Sweetser v. Dobbins, 65 Cal. 529, 4 P. 540; Curnow v. Blue Gravel, etc., Co., 68 Cal. 262, 264, 9 P. 149; Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 556, 147 P. 238; Meinecke v. Frasier, 69 Cal.App. 688, 690, 232 P. 499. In conformity with these established principles it would seem proper that, in an action which is admittedly strictly equitable in character wherein the equitable relief of injunction is sought and an issue of damages is raised which is incidental to the principal issue which is whether or not an injunction shall issue, a trial by jury of the issue of damages does not exist as a matter of right and the grant or

denial of a demand for a jury to try such an issue is entirely discretionary with the court. Upon this proposition it must, however, be conceded that the decisions in California are conflicting. The following authorities support the principle as above stated: McLaughlin v. Del Re, supra; Sullivan v. Royer, 72 Cal. 248, 13 P. 655, 1 Am.St.Rep. 51; Churchill v. Baumann, 104 Cal. 369, 36 P. 93, 38 P. 43; Richardson v. City of Eureka, 110 Cal. 441, 42 P. 965; McCarthy v. Gaston Ridge Mill, etc., Co., 144 Cal. 542, 78 P. 7; Bettencourt v. Bank of Italy, etc., Ass'n, 216 Cal. 174, 13 P.(2d) 659. To the opposite effect are the following decisions which hold that in an action of this character the issue of damages is strictly legal in character and that the trial court possesses no discretion to refuse a demand for a trial by jury to determine such issue: Hughes v. Dunlap, 91 Cal. 385, 27 P. 642; Moore v. San Vincente Lumber Co., 175 Cal. 212, 165 P. 687; Farrell v. City of Ontario, 39 Cal.App. 351, 178 P. 740. In the instant action where the facts disclosed by the record indicate that the correct measure of damages was applied by the trial court and that in our opinion a jury properly instructed and properly performing its duty could have returned no other verdict than one favorable to respondent for the precise amount which was here awarded as damages, we are constrained to follow the rule announced in the former of the two above-noted groups of decisions and to declare that no error was committed by the trial court in refusing the demand of appellants for a jury trial on the issue of damages.

The sixth contention presented on this appeal is that the trial court committed numerous errors in the reception of evidence produced by respondent and in its refusal to admit other evidence offered by appellants and that the errors thus committed are sufficiently serious to require reversal of the judgment. In support of this contention appellants have specified 35 alleged errors of this character. We deem it a sufficient answer to the contention thus presented to declare that careful review of the entire record on appeal has failed to produce a conviction that any errors in the reception or rejection of evidence by the trial court resulted in a miscarriage of justice. Analysis of the numerous alleged errors in this respect which are charged against the trial court would unduly lengthen the opinion herein and is not required in view of the above-stated conclusion.

[14] The seventh contention advanced by appellants is that numerous designated findings and portions of findings made by the trial court are lacking in evidentiary support, that certain specified findings are inconsistent and that certain findings contain improper and unnecessary specifications. Analysis of the findings impels the conclusion that they are perhaps unnecessarily voluminous. We find no occasion, however, for indulging in an extended discussion of them since an examination of the entire record warrants the opinion that the trial court was amply justified from the evidence which was placed before it and from inferences fairly deducible from the evidence in finding that the Reconstruction defendants were guilty of an intentional, wilful, and deliberate trespass upon respondent's property. The decree granting an injunction against the continuance of such trespass and awarding damages as incidental relief to the equitable remedy of injunction was therefore proper and may not be successfully attacked on appeal.

[15] It may not be out of place to observe that very considerable effort has been expended on this appeal in attacking the results of the subsurface survey of Hines No. 1 well conducted by the Alexander Anderson, Inc. Appellants' endeavor in this regard is entirely comprehensible since the correctness of the subsurface survey was vital to respondent's case. Unless it could be established to the satisfaction of the trial court that Hines No. 1 well had been so drilled that it penetrated the formation underlying the surface of respondent's property respondent could not hope to be successful in this action. It is obvious, however, that the correctness of the results achieved by the Anderson survey was a question of fact to be determined by the trial tribunal. The mechanical apparatus used in making the survey and the methods employed in the mathematical calculations that formed an important part of the survey were exhibited and explained to the court. The various individuals who took part in the survey, particularly the inventor of the system, were before the court and were subjected to extended examination and searching cross-inquiry. Evidence which disputed the accuracy of the Anderson method and the claimed correctness of the results obtained thereby was submitted by appellants. The trial court having the benefit of all

evidence relating to the Anderson survey arrived at the conclusion that it was a proper method of determining the course and direction underground of the well and that the results obtained thereby were correct. Under such circumstances a reviewing court is not justified in disturbing the trial court's conclusion regarding a matter which is unmistakably one of fact.

[16] The eighth and final contention presented on this appeal is that the trial court abused the concededly wide discretion with which it was invested in refusing a motion for a new trial which was based in part on the ground of newly discovered evidence. The newly discovered evidence which was apparently the principal ground urged in support of the motion consisted of the affidavits of three persons to the effect that after subsurface surveys of Hines No. 1 well had been completed and after the trial of the instant action and after respondent had been informed by the results of the surveys and by the evidence produced during the trial of the alleged subsurface location of Hines No. 1 well respondent drilled a well on its property with the purpose of intersecting and destroying Hines No. 1 well, but that nevertheless neither the amount of production nor the gravity of the oil produced by Hines No. 1 well was affected in the slightest degree by the drilling of the additional well by respondent. The announced inference which it is declared the trial court should have drawn from the above-described evidence was that the subsurface survey conducted by Alexander Anderson, Inc., was inaccurate and the results claimed to have been produced thereby were incorrect. It appears, however, that counteraffidavits in opposition to the affidavits filed by appellants in support of the motion were produced by respondent and that thereby a serious conflict in the evidence was presented. Under these circumstances the trial court's order denying the motion for a new trial may not be disturbed. Kataoka v. Hanselman, 150 Cal. 673, 89 P. 1082; Kellett v. Kellett, 110 Cal.App. 691, 696, 294 P. 755; People v. Frank, 129 Cal.App. 119, 126, 18 P.(2d) 719.

For the reasons stated herein the judgment from which this appeal has been taken is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

---

20 Cal.App.2d 379

McARTHUR v. WELLMAN et al.

Civ. S. C. 15.

District Court of Appeal, Second District, Division 1, California.

April 16, 1937.

Hearing Denied by Supreme Court June 14, 1937.

Mortgages ⚷181

Where, on execution of new note and deed of trust representing and securing same obligation secured by old note and trust deed which were thereupon surrendered for cancellation, there was no agreement that the acceptance of the new obligation should discharge the debt represented by the old and the principal sum had not been paid and intervening judgment creditors or lienholders were not misled to their prejudice, the deed of trust was not subordinate to the intervening claims, though a reconveyance placed of record showed that a request for the reconveyance recited that all sums secured had been paid.

Appeal from Superior Court, Los Angeles County; R. M. Rankin, Judge.

Action by Margaret McArthur against John B. Wellman and others to foreclose a deed of trust. From so much of the judgment as gave priority to the liens of defendants Hayward Lumber & Investment Company and the Home Finance & Mortgage Company, plaintiff appeals.

Modified and affirmed.

C. Malcolm MacKinnon, of Van Nuys, for appellant.

LeRoy B. Lorenz, of Los Angeles, for respondents.

DESMOND, Justice pro tem.

This appeal is taken by the widow of John A. McArthur from a judgment holding that, while she was entitled to foreclose a deed of trust executed by the defendant John B. Wellman, her recovery under such foreclosure would be subject to payment of two liens represented by judgments which had been obtained by the Hayward Lumber & Investment Company in the sum of $788.58, and Home Finance & Mortgage Company in the sum of $687.22. The appeal is, of course, from the portion of the judgment which gives priority to these liens over the trust deed held by appellant, and is grounded upon a claim that the evidence does not support the judgment. The trust deed in question was recorded in the county of Los Angeles on January 28, 1932, and was given to secure payment of a promissory note dated January 21, 1932, in favor of John A. McArthur and Margaret McArthur, husband and wife as joint tenants, in the sum of $2,000. On January 21, 1925, a note in the sum of $1,950, payable three years after date, and a trust deed attaching to the same premises had been executed by Mr. Wellman in favor of Mr. and Mrs. McArthur. The date of maturity of this last-mentioned three-year note was January 21, 1928, and action on the note would be barred by the statute of limitations after the lapse of four years from that date. The four years expired on January 21, 1932, and the court found:

"That on the occasion of the execution of said Request for Reconveyance and the execution and recording of said reconveyance, the principal sum mentioned in the note and trust deed executed in 1925 had not been paid, and the said reconveyance was incidental to the execution by the said John B. Wellman of a new note and trust deed representing and securing the same obligation." The request for reconveyance, according to the reconveyance itself placed of record by the Title Insurance & Trust Company on January 28, 1932. recited: "That all sums secured by said Deed of Trust have been fully paid and that said Deed of Trust and the note or notes secured thereby have been surrendered to said Trustee for cancellation." If, as a matter of fact, the obligation represented by the first trust deed had been paid, of course, the liens held by the judgment creditors became effective, and the judgment of the court, as has been stated, did, in fact, give them full effect over any claim of the appellant under the second trust deed.

We think the point at issue in this case was whether there was an agreement between the parties to the trust deed, that is, the grantor Wellman and Mr. and Mrs. McArthur, that the acceptance of the new obligation should discharge the debt represented by the old. It is quite apparent from the record before us that there was no such agreement, and, as we have stated, the court found specifically that the principal sum had not been paid. In Bridge v. Connecticut Mut. Life Ins. Co., 167 Cal. 774, 141 P. 375, 378, we find a quotation from an earlier case, Welch v. Allington, 23 Cal. 322, as follows: " 'The law will not presume such an agreement [i. e., that the acceptance of a note shall discharge the debt], and it must be proved by the party relying upon it. The taking of the new note operated as an extension of the time of payment of the old note; and, as soon as that extended time had expired, the plaintiff had a right to bring his action upon the old note, if the amount was not then paid.' "

While that case is not on all fours with this one, we feel that the principle there stated, as well as in the case of Bridge v. Connecticut Mut. Life Ins. Co., supra, applies; for in the last-mentioned case it is said (167 Cal. 774, at page 781, 141 P. 375, 378): "The mere fact that the old note was surrendered to the debtor at the time of receiving the new note was held to be insufficient to require a conclusion that there was such an agreement in both the case last cited [Welch v. Allington, 23 Cal. 322] and in Savings & Loan Society v. Burnett, 106 Cal. [514] 529, 530, 39 P. [922] 925. In Sather Banking Co. v. Briggs Co., 138 Cal. [724] 733, 72 P. [352] 355; it was said: 'The general rule is that the renewal of notes does not amount to payment. Savings Bank v. Central Market Co., 122 Cal. [28] 33, 54 P. 273. The presumption is that they were not so taken.' " In Pacific Nat. Agr. Credit Corp. v. Wilbur, 2 Cal.(2d) 576, at page 588, 42 P.(2d) 314, 319, pertinent comments are made in paragraphs 6 and 7 of the opinion and authorities are there cited. We note particularly the following quotation from 33 A.L.R. 149: " 'And where the holder of a senior mortgage *discharges it of record, and contemporaneously therewith takes a new mortgage, he will not, in the absence of paramount equities, be held to have subordinated his security to an intervening lien* unless the circumstances of the transaction indicate this to have been his intention, or such intention upon his part is shown by extrinsic evidence.' " (Italics ours.)

The judgment creditors, or lienholders, in this case were not in any way misled to their prejudice by the transactions between the defendant Wellman and appellant, and for that reason under the authorities above stated, we believe that the appeal is well grounded. The judgment, then, under which a commissioner's sale of the real estate was ordered, should be modified in such manner as to recognize the two judgment liens as attaching to the property but subject and inferior to the lien of the trust deed, and to provide that upon the sale the amount due the plaintiff, appellant here, under the terms of the trust deed shall first be paid, any balance then remaining to be paid to the judgment creditors according to any preferential interest that may exist between them.

As so modified, the judgment is affirmed.

We concur: HOUSER, P. J.; YORK, J.

---

20 Cal.App.2d 248

PEOPLE v. VAN SKANDER.

Cr. 1942.

District Court of Appeal, First District, Division 2, California.

April 7, 1937.

1. Forgery 🔑6

Under evidence that accused forged name of his wife to check on account created on deposit of wife's money, and, under deposit agreement, subject only to spouses' joint order as partners, verdict finding accused guilty of forgery was not contrary to law because money was that of accused.

2. Partnership 🔑132, 139

Partner can enter into contracts in behalf of partnership and sign partnership name, in absence of showing to contrary, but rule is inapplicable where there are articles of copartnership or other special contracts limiting powers of partners.

3. Forgery 🔑6

Where fund is deposited in joint name of partners under express agreement that fund shall only be used for agreed purpose and withdrawn on signature of both partners, implied authority to sign partnership name does not exist, and partner who signs, with criminal intent, other partner's name to check by which fund is withdrawn, to prejudice of other partner, is guilty of forgery.

4. Forgery 🔑6

Where wife's money was deposited in bank under deposit agreement making account subject only to joint order of husband and wife as partners, husband had no implied power as partner which would justify drawing of check, with fraudulent intent, by signing names of both partners.

5. Forgery 🔑44(1)

Evidence that wife's money was deposited in bank under deposit agreement making account subject only to joint order of husband and wife as partners, that husband signed names of both partners to check, and, in so doing, attempted to imitate wife's signature, and hid money so obtained, and testimony of husband that money was used in partnership business *held* to sustain conviction for forgery, where testimony of husband was impeached by admission of prior conviction.

6. Criminal law 🔑1036(2)

Accused *held* not entitled to object for first time on appeal that wife was permitted to testify against him without his consent (Pen.Code, § 1322, as amended by St.1933, p. 565).

7. Criminal law 🔑829(3)

In prosecution for forgery, refusal of instruction regarding fraudulent intent *held* not error, where fraudulent intent was subject-matter of at least four instructions given, and it appeared that instruction offered was embodied in instructions given.

8. Criminal law 🔑823(15)

In prosecution for forgery, concluding instruction requiring verdict of guilty if people made out case against accused, and verdict of not guilty if jury were not satisfied of guilt to moral certainty and beyond all reasonable doubt, *held* not error, in view of other instructions fully and completely instructing on every element involved.

9. Criminal law 🔑1037(1)

Where no objection or assignment of act of misconduct of assistant district attorney during argument was made in trial court, objection could not be raised on appeal.

10. Criminal law 🔑715

In forgery prosecution, conduct of assistant district attorney in displaying exhibits and handing them to jury with statement that jury could take them into jury room *held* not improper, as against contention that exhibits should not have been handed to jury without their request (Pen. Code, § 1137).

11. Criminal law ⚷720(5)

Where accused testified in his own behalf, argument of assistant district attorney regarding previous convictions and made in same manner as if accused were merely witness instead of both accused and witness *held* not improper.

12. Criminal law ⚷730(8)

In forgery prosecution, argument of assistant district attorney charging that accused lied in testifying as to circumstances under which wife executed signature accused was charged with forging, and containing statement, "Now assign that as misconduct," *held* improper, but not prejudicial to accused, where statement was made in battle of words between counsel, and trial court instructed that vituperation of counsel should not weigh with jury.

13. Criminal law ⚷1128(1)

Accused could not rely on fact which was not disclosed by record as ground for reversal.

◆

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Bruce Van Skander was convicted of forgery, and he appeals.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

STURTEVANT, Justice.

The defendant was convicted of the crime of forgery. He made a motion for a new trial, but the motion was denied. He also made a motion for probation, but that motion was also denied. Later sentence was imposed and he appealed from the judgment and the order denying a new trial.

The charging part of the information is as follows: "The said Bruce Van Skander, on or about the 8th day of August, A. D. nineteen hundred and thirty-six, at the City and County of San Francisco, State of California, did then and there willfully, unlawfully, feloniously, falsely, fraudulently and with intent to prejudice, damage and defraud Ellen G. Van Skander, and the San Francisco Bank, a banking corporation, make, alter, forge and counterfeit a certain instrument in writing for the payment of money in the words and figures, following, towit:

"'The San Francisco Bank
"'San Francisco, Calif.,
August 8th, 1936
"'Pay to the order of Cash........$10.00
"'Ten and no/100..............Dollars.
"'Kurola Products Company
"'Ellen G. Van Skander, Bruce H. Van Skander.'

"And he, the said Bruce Van Skander, then and there well knowing the same to be false and forged, did then and there, towit: on or about the 8th day of August, 1936, at the said City and County of San Francisco, willfully, unlawfully, feloniously, falsely, fraudulently and with intent to prejudice, damage and defraud the said Ellen Van Skander and the said The San Francisco Bank, utter, publish and pass the same as true and genuine to said The San Francisco Bank. * * *"

The uncontradicted evidence was to the effect that a few months prior to August 8, 1936, the defendant was engaged in purchasing mineral oil in Utah, transporting it to San Francisco, processing it, bottling it, and selling it for medicinal purposes. The business was conducted under the fictitious names of Kurola Products Company and Unita Sales Company. At that time the defendant was the sole proprietor of both companies. He married Ellen G. Van Skander. On or about his wedding day, the defendant commenced borrowing sums of money from his wife. At the time of the trial she testified that she held notes aggregating $7,300. On a date prior to the month of June, 1936, the defendant took his wife into the business and made her an equal partner. Neither advanced nor agreed to advance any definite sums as capital of the partnership. However, at about the same time, as we understand the record, the defendant and his wife opened two bank accounts with the Fillmore branch of the San Francisco Bank. One account was opened in the name of Kurola Products Company and one in the name of Unita Sales Company. As a part of the transaction, the defendant and his wife signed a contract including a covenant as follows: "The undersigned hereby declare that the undersigned are doing business under said firm name and that the undersigned are co-partners and the sole owners of the said business, which is not incorporated, and hereby authorize any two of the following persons, namely Bruce H. Van Skander, general manager, and Ellen G. Van Skander, treasurer, in said firm name, and on its behalf, to sign checks or orders for the withdrawal of any funds which may be, at any time, on deposit in said account." Both signed said contract. In the account so opened in the name of Kurola Products Company, Mrs. Van Skander deposited of her own moneys $4,300. In the other account, she deposited of her own moneys $500. The said contracts of deposit were never modified, but remained in full force and effect. There was testimony to the effect that in the month of June, 1936, the defendant was planning a sales trip up and down the state and he and his wife executed a contract purporting to vary the terms of the said deposit contract, however, the testimony was distinctly conflicting regarding the June contract and no document evidencing it was produced and offered in evidence. The evidence showed without conflict that the check set forth in the information was drawn on August 8, 1936, that the defendant signed the name Kurola Products Company, that he signed his own name, and that he also signed the name of Ellen G. Van Skander. It also showed that afterwards he negotiated the check and that the check was cashed by the San Francisco Bank. The defendant testified the moneys were received and used in the business of the Kurola Products Company, but he produced no vouchers in support of his testimony.

[1] The defendant contends that the verdict is contrary to law. That contention rests on the assertion that no public offense was committed as the money on deposit in the Fillmore Branch of the San Francisco Bank was the money of the defendant, and in withdrawing it he could be guilty of a breach of contract but not of a public offense. That argument is not sustained by the facts. At no time, prior to the deposit, did the defendant personally have any title to the money. It was formerly the money of Mrs. Van Skander. She deposited the money in the bank in the account of Kurola Products Company. The deposit having been made, the money became the property of the bank. State v. Security Savings Bank, 186 Cal. 419, 423, 199 P. 791. The defendant's rights to draw checks on the account were those expressed in the deposit agreement and not otherwise.

[2-5] In another portion of his brief, the defendant relies on the same facts and contends that as the defendant and his wife were partners the offense of forgery could not be committed by the defendant against the partnership. He cites and relies on Commonwealth v. Brown, 10 Phila. (Pa.) 184. That case is not directly in point. It did not show that there was an outstanding contract limiting the rights of the partners to enter into certain contracts. Whereas in the instant case there was a clear-cut contract. The distinction is material. In the absence of a showing to the contrary, it will be conceded that a partner can enter into contracts in behalf of the partnership and sign the partnership name. When, as here, there are between the partners articles of copartnership and other special contracts limiting their powers the rule in the Brown Case has no application. The plaintiff relies on State v. Sotak, 100 W.Va. 652, 131 S.E. 706, 46 A.L.R. 1523. It is more nearly in point; but, it is not as strong in its facts as the instant case. The contractual limitations on the rights of the partners in this case were set forth in the written deposit contract. In the Sotak Case such limitations rested in the recollection of the witnesses. In other respects the Sotak Case is quite similar in its facts. In that case the Supreme Court of West Virginia cited and reviewed nearly every case in England and America on the contention which this defendant makes. Having done so, it ruled the point in favor of the state. The substance of the ruling is set forth in the headnote: "But if a fund be deposited in the joint name of the two persons who are partners, *under the express understanding and agreement that the fund shall only be used for an agreed purpose, and shall not be withdrawn from the bank's custody except upon the signature of the two, signed personally by themselves,* the implied authority (which one has by reason of the relation of partner to the other to withdraw said fund) does not exist; and, if one signs his own and the other's name to a check by which the fund is withdrawn, to the prejudice of the other, and with criminal intent, he is guilty of forgery." (Italics ours.) In People v. Esrig, 240 App.Div. 300, 270 N.Y.S. 372, the question was again examined with much care and the same conclusion was reached. We are content to rest our ruling in the instant case on the authority of those decisions. In reaching its conclusion, the Supreme Court of West Virginia pointed to certain facts in the record before it showing a fraudulent intent on the part of Sotak. In support of

the judgment of the trial court, it assumed the jury made an implied finding against the defendant on the issue of fraudulent intent. The record before us also contains evidence likewise sustaining the implied finding of the jury in the instant case. Excepting the testimony of the defendant, there was no evidence that the money obtained did not go into his own pocket. When the check in controversy had been paid by the bank and returned to the defendant, he placed it in a locked drawer underneath a lot of other papers where it was hidden. In drawing said checks, he not only signed his wife's name without authority, but he sought to imitate her signature. The last act he attempted to explain by saying he had done so hundreds of times when signing other papers. However, he introduced no documents corroborating that oral testimony. A prior conviction was pleaded against him which he admitted. That impeachment was of such force that we must assume the jury refused to believe the defendant's explanations.

[6] In this court the defendant contends that the testimony of his wife should not have been received in evidence against him except with his consent. Pen.Code, § 1322, as amended by St.1933, p. 565. When the wife was called to the witness stand, the defendant made no objection to her testifying against him and thereafter fully cross-examined her. The defendant did not at any time make the point in the trial court. He may not now present the point for the first time. People v. Rulia Singh, 182 Cal. 457, 482–484, 188 P. 987, But, in view of the facts, we are not to be understood as holding that the point had merit if presented in due time.

[7] The defendant asked and the trial court refused to give an instruction regarding the intention of the defendant to defraud. In refusing to give the instruction, the trial judge wrote thereon, "Given in my instructions." The defendant contends that it was not so given. An examination of the record discloses that he is mistaken and that the fraudulent intent was the subject-matter of at least four different instructions.

[8] The trial court very fully and completely instructed the jury on every element involved in the action on trial. Having done so, the court proceeded to give an instruction as follows: "When, ladies and gentlemen of the jury, if you are satisfied that the People of the State of California have made out a case against the defendant you will so find by returning a verdict of guilty as charged in the information. And if you are not satisfied of his guilt to a moral certainty and beyond all reasonable doubt you will return a verdict finding him not guilty." The defendant contends that in substance the instruction just quoted authorized the jury to determine both questions of law and questions of fact. However, when read in connection with the full set of instructions which preceded it, the criticism has no merit.

[9, 10] The defendant makes several assignments of misconduct on the part of Mr. Garry, the assistant district attorney. During the argument Mr. Garry, among other things, said: "Now here is the situation: This man marries a meal ticket; and, contrary to the general custom, whereby the average groom gives to the average bride a present, she gives him a wedding present of $500." Whether the statement was proper or improper no objection or assignment of misconduct was made in the trial court and it is too late to raise an objection at this time. At another time, holding the exhibits in his hand, Mr. Garry said: "Now you can take these into the jury room; and right now, Mr. Mills, (a juror) I will hand these exhibits to you. And here is the signature of Bruce Van Skander and Ellen Van Skander. Here it is again. And here, at the bottom of this agreement, it is again. And I want to call your attention to that, and you can look it over more carefully in the jury room, along with the other jurors." The defendant contends that the exhibits should not have been handed to the jury until that body made a request for them. But we are not prepared to say an error was committed. Pen.Code, § 1137.

[11] As hereinabove recited, the defendant took the stand as a witness in his own behalf. In making his argument to the jury, Mr. Garry presented all questions regarding the previous convictions of the defendant in the same manner he would have done if the defendant were merely a witness instead of both defendant and witness. In doing so, no error was committed. People v. Granillo, 140 Cal.App. 707, 714–718, 36 P.(2d) 206

[12] Again the defendant assigns as misconduct on the part of the district attorney a passage in his closing argument: "When that man (referring to the defendant) got on the stand and told you that one night in June he took his wife aside and had

a talk about his trip and she signed it and he put it away in a drawer he was a liar by the clock. Now assign that as misconduct." Accepting the suggestion of the district attorney, the defendant did assign the statement as misconduct and at this time he presses the point. The point is well founded and the statement never should have been made in the instant case nor in any other case. Nevertheless we think it was not prejudicial error. The statement was made in a battle of words between opposing counsel. Just as soon as the trial court could do so, it delivered a sweeping admonition informing the jury with much care that vituperation of counsel should not weigh with the jury.

[13] In another point the defendant asserts although he admitted the prior convictions when arraigned that when the jury was impaneled the clerk read to the jury the information in toto. It is sufficient to state that the record does not disclose the fact.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

---

20 Cal.App.2d 441

PEOPLE v. MARION.

Cr. 2974.

District Court of Appeal, Second District, Division 2, California.

April 19, 1937.

Criminal law ⚷1182

Judgment of conviction must be affirmed, on appeal, where defendant filed no briefs and failed to appear on date set for hearing after due notice (Pen.Code, §§ 1252, 1253).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Martin Marion was convicted of grand theft, and he appeals.

Affirmed.

Dorothy Garland, of Los Angeles, for appellant.

The Attorney General, for the People.

CRAIL, Presiding Justice.

This is an appeal from a judgment of conviction of grand theft. The case was set for hearing as required by section 1252 of the Penal Code and notice thereof was duly given. The defendant has not filed any briefs; indeed, he has failed to appear, and for that reason the judgment will be affirmed as provided in section 1253 of the Penal Code.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

---

20 Cal.App.2d 374

LEEK v. WESTERN UNION TELEGRAPH CO.

Civ. 11332.

District Court of Appeal, Second District, Division 2, California.

April 15, 1937.

Hearing Denied by Supreme Court June 14, 1937.

1. Appeal and error ⚷930(1)

On appeal from judgment for plaintiff after trial before jury, evidence would be viewed most favorably to plaintiff.

2. Negligence ⚷6, 82

Violation of statute or ordinance constitutes negligence per se, and violation constitutes contributory negligence if failure to comply with ordinance contributes directly to injury.

3. Municipal corporations ⚷705(10, 11)

Pedestrian who violated provisions of ordinance and statute by attempting to cross street against a stop signal after first bell had rung and before sounding of second bell indicating that traffic was released on street, and who was struck by a bicycle *held* as matter of law guilty of contributory negligence which was one of proximate causes of accident (Civ.Code, § 1714; St.1935, p. 188, § 563(a).

4. Automobiles ⚷160(1), 216

Strict compliance with requirements of Vehicle Code and all traffic regulations is incumbent on both pedestrian and motorist (St.1935, p. 188, § 563(a).

5. Appeal and error ⚷110

Order denying new trial is not appealable.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Marion Leek against the Western Union Telegraph Company. From a judgment for plaintiff, and from an order denying defendant's motion for new trial, defendant appeals.

Appeal from order denying new trial dismissed, and judgment reversed.

Hearing denied by Supreme Court; CURTIS and EDMONDS, JJ., dissent.

Edwin Camack and F. A. Waters, both of Los Angeles (Francis R. Stark, of New York City, of counsel), for appellant.

Harry B. Ellison, of Los Angeles, for respondent.

McCOMB, Justice.

This appeal is from a judgment in favor of plaintiff after trial before a jury. There is also a purported appeal from the order denying defendant's motion for a new trial.

[1] Viewing the evidence most favorable to plaintiff, the facts in the instant case are:

On May 21, 1936, the traffic at the intersection of Fourth street and Pine avenue in the city of Long Beach, Cal., was controlled by semaphores erected on each corner thereof, which operated in the following manner: Each semaphore consisted of arms appearing and disappearing, on which the words "stop" and "go" were painted respectively. Each change of the semaphore was accompanied by one ring of the bell. A "go" sign and a bell would open traffic on one street for twenty-two seconds. Then a bell would sound (called the first bell) and there was a change of a "go" sign to a "stop" sign. All traffic coming into the intersection was then stopped and remained closed for six seconds. Then a bell sounded (known as the second bell) and the change of a "stop" sign to a "go" sign would open traffic on the other street for twenty-two seconds.

At about 5:30 on the above date, plaintiff arrived at the southwest corner of the intersection. The traffic being open on Pine avenue and closed for Fourth street, plaintiff stopped and stood on the sidewalk. Immediately after the first bell rang and the signal changed from "go" to "stop" with respect to the north and south traffic on Pine avenue and before the second bell rang, accompanied by a signal change opening traffic on Fourth street, plaintiff left the sidewalk and started east across Pine avenue in a pedestrian zone.

About this same time defendant's messenger boy was riding a bicycle north on Pine avenue on the easterly side thereof. Simultaneously Don Gates left the southeast corner of the intersection. In so doing he collided with the messenger boy, causing the latter to lose control of his bicycle and deflecting its course so that he struck plaintiff, knocking her down and causing personal injuries.

This is the sole question presented for determination:

Was plaintiff guilty of contributory negligence, as a matter of law, in stepping off of the curb into the street after the first bell had rung and before the second bell had sounded, indicating that traffic was open on Fourth street?

[2] This question must be answered in the affirmative. The law is settled that (1) the violation of a statute or ordinance constitutes negligence per se, and (2) it constitutes contributory negligence if the failure to comply with the statute or ordinance contributes directly to the injury. Hurtel v. Albert Cohn, Inc., 5 Cal.(2d) 145, 147, 52 P.(2d) 922. In the present case at the time of the accident, section 563(a) of the California Vehicle Code (St.1935, p. 188) read:

> "At intersections where traffic is controlled by a traffic control signal device or by police officers, pedestrians shall not cross the roadway against a red or stop signal,"

and an ordinance of the city of Long Beach provided:

> "Pedestrians. Pedestrians to obey signals at intersections where traffic is directed by a stop and go signal. It shall be unlawful for any pedestrian to cross the roadway other than with released traffic."

[3] As plaintiff violated both of the foregoing provisions by attempting to cross Pine avenue against the stop signal after the first bell had rung and before the sounding of the second bell, indicating that traffic was released on Fourth street, she was guilty of negligence per se; and, since the accident would not have occurred, had plaintiff remained on the sidewalk in obedience to the requirements of the California Vehicle Code and city ordinance of Long Beach, her negligence was one of the proximate causes of the accident, and,

therefore, she cannot recover for her injuries. Steinberger v. Calif. Electric, etc., Co., 176 Cal. 386, 394, 168 P. 570; sec. 1714, Civ.Code.

[4] A strict compliance with the requirements of the California Vehicle Code and all traffic regulations is absolutely incumbent upon every citizen of this community, both pedestrian and motorist. The alarming increase in deaths resulting daily from the violation of traffic ordinances has become a matter of public concern demanding the conscious effort of every individual to prevent accidents.

[5] No appeal lies from an order denying a new trial [Luse v. Peters, 219 Cal. 625, 627, 28 P.(2d) 357; 1 Cal.Jur. 10 Yr.Supp. 296], and the purported appeal therefrom is dismissed.

The judgment is reversed.

We concur: CRAIL, P. J., WOOD, J.

CARTER v. MURPHY.*

Civ. 11319.

District Court of Appeal, Second District, Division 2, California.

April 16, 1937.

Hearing Granted by Supreme Court June 15, 1937.

1. Appeal and error 🔑931(1)

On appeal from judgment for plaintiff after trial by court without a jury, reviewing court viewed the evidence in light most favorable to plaintiff.

2. Seduction 🔑1

"Seduction" requires that there be an act of sexual intercourse between seducer and seducee; that at time of act the seducee be "chaste," that is, not have had unlawful sexual intercourse with a male prior thereto; and that consent of seducee to act of intercourse be obtained solely through false promises, artifice, or like conduct of the seducer, mere reluctance on part of the seducee to commit the act being insufficient.

[Ed. Note.—For other definitions of "Chaste" and "Seduce; Seduction," see Words & Phrases.]

3. Seduction 🔑9

Female approximately 18 years of age *held* not entitled to recover for seduction where she had engaged in an unlawful act of sexual intercourse prior to dates on which she had intercourse with alleged seducer, and hence was not "chaste" at that time, and she was not induced to have sexual intercourse with him because of his promises or any artifice on his part, but voluntarily because of his importunities and her love and affection for him.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Mary Carter, by her guardian ad litem, Irene Brooks, against Jerry Murphy. Judgment for the plaintiff, and the defendant appeals.

Reversed.

Ezra Neff and Edwin C. Boehler, both of Los Angeles (Livingston & Livingston, of Los Angeles, of counsel), for appellant.

S. S. Hahn, W. O. Graf, and Stanton Rippey (by Stanton Rippey), all of Los Angeles, for respondent.

McCOMB, Justice.

Defendant appeals from a judgment in favor of plaintiff in an action for seduction after trial by the court without a jury.

[1] Viewing the evidence most favorable to plaintiff (Ah Gett v. Carr, 3 Cal. App. 47, 48, 84 P. 458), the facts in the instant case are:

In 1934 defendant met Mary Carter, a female who was eighteen years of age on October 28, 1935. She, aware of the fact that he was married, became extremely friendly with him and was escorted by him on many occasions to night clubs and other places of amusement, frequently at such times partaking of intoxicating beverages. The trial court found in accordance with the allegations of the complaint that Mary Carter and defendant had sexual intercourse on the following dates: September 8, 1935; September 15, 1935; February 14, 1936; and April 8, 1936. It was also conceded that prior to the dates alleged in the complaint, to wit, in August, 1935, she had engaged in an act of sexual intercourse. The trial court gave judgment in favor of plaintiff in the sum of $10,000.

This is the sole question presented for determination:

---

*For subsequent opinion see 75 P.2d 1072.

Was there substantial evidence to sustain the findings of fact upon which the judgment was necessarily predicated?

[2] This question must be answered in the negative. In order to recover in an action for seduction the following elements must be alleged and proved:

First. There must be an act of sexual intercourse between the seducer and seducee.

Second. At the time of the act of sexual intercourse the seducee must be chaste (Swett v. Gray, 141 Cal. 83, 86, 74 P. 551), that is, one who has not prior thereto had unlawful sexual intercourse with a male. Bailey v. State, 57 Neb. 706, 78 N.W. 284, 285, 73 Am.St.Rep. 540.

Third. The consent of the seducee to commit the act of sexual intercourse must be obtained solely through (a) false promises, (b) artifice, or (c) like conduct of the seducer; mere reluctance on her part to commit the act being insufficient. Marshall v. Taylor, 98 Cal. 55, 60, 32 P. 867, 35 Am. St.Rep. 144.

[3] In the instant case it is conceded that the first element is present, in that, on four separate occasions, Mary Carter and defendant had sexual intercourse.

The second element, however, is absent, for it is also conceded that in August of 1935 Mary Carter had engaged in an unlawful act of sexual intercourse. She, therefore, by her own testimony could not have been chaste on September 8, 1935, the date alleged in her complaint as the time of her seduction by defendant.

The third element is likewise lacking, as it appears from the testimony of the seducee herself that defendant never promised to marry her, and that it was not solely because of false promises or artifice that she submitted to his embraces, but she was induced to have sexual intercourse with him on account of his importunities and because of her love and affection for him. In fact, on one occasion when he was intoxicated and she was sober, the unlawful act was performed.

It therefore appears that the acts of sexual intercourse between them were voluntarily engaged in.

The requirements above set forth as necessary to maintain an action for seduction are thoroughly consonant with good morals and protection of the virtue of the womanhood of this state. Fifty years ago, Judge Thayer of the Supreme Court of the State of Oregon in Breon v. Hinkle, 14 Or. 494, 13 P. 289, 292, said: "The individuality of the female sex has been materially advanced during the past few years. Their knowledge of the world has been greatly improved, and their legal capacity enlarged. The notion that they belong to the weaker sex is only entertained by the credulous and unsophisticated. They are not easily beguiled, and should be held to a reasonable responsibility; and if allowed to maintain an action for their own seduction, and demand a large compensation for their loss of character, should be required to prove something more than mere importunity as the means through which it was accomplished. I have but little faith in the merits of such a law. It will be resorted to much more often by the unscrupulous and wanton than by the more womanly portion of the sex, although the latter should have the better right. The honest ones would be inclined to smother their disappointment, and grieve over the wrong, while the unscrupulous portion would make it a matter of public parade and profit."

It cannot be doubted that with the advent of the radio, moving pictures, and the widespread dissemination of information with reference to the sexual relationship of man and woman, the female of eighteen years today is better informed concerning the course of conduct which she should follow in her association with those of the opposite sex than was her sister of the period when the decision in Breon v. Hinkle, supra, was written.

Our disposition of the points above mentioned makes it unnecessary to pass upon the contention that the judgment will be set aside upon appeal, because it is so excessive as to suggest at the first blush passion, prejudice, or corruption. Corvin v. Hyatt, 10 Cal.App.(2d) 107, 108, 51 P.(2d) 176.

For the foregoing reasons the judgment is reversed.

We concur: CRAIL, P. J.; WOOD, J.

20 Cal.App.2d 442

WESTERN SURETY CO. v. MUNICIPAL COURT, CITY OF LOS ANGELES, LOS ANGELES COUNTY.

Civ. 11327.

District Court of Appeal, Second District, Division 2, California.

April 20, 1937.

Hearing Denied by Supreme Court June 17, 1937.

1. Bail ⚷60

Defects and irregularities in proceedings preliminary to taking bail are considered waived by surety on assuming its obligations as such at time of execution of bond.

2. Bail ⚷61

Approval of bail bond and justification of sureties is not part of bail contract.

3. Bail ⚷61

Surety on forfeited bail bond cannot avoid obligation by contending that it was presented to wrong magistrate and that latter's approval thereof and release of principal were illegal.

4. Prohibition ⚷12

Writ of prohibition to restrain municipal court from entering summary judgment against surety on forfeited bail bond, on ground that approval thereof and release of principal by justice of peace of another township than that of justice issuing warrant for principal's arrest were unauthorized, *held* properly denied; surety not being prejudiced by former justice's approval of bond.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, B. Rey Schauer, and Emmet H. Wilson, Judges.

Proceeding by the Western Surety Company for a writ of prohibition restraining the Municipal Court of the City of Los Angeles, County of Los Angeles, from entering a summary judgment on a forfeited bail bond. From a judgment denying a peremptory writ, petitioner appeals.

Affirmed.

Richard H. Cantillon and John E. Glover, both of Los Angeles (Patrick F. Kirby, of Los Angeles, of counsel), for appellant.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for respondent.

WOOD, Justice.

A petition was filed in the superior court by plaintiff surety company to prevent the Municipal Court of the City of Los Angeles from entering a judgment upon a bail bond which it had executed and which had been declared forfeited. Upon the sustaining of a demurrer to the petition, judgment was rendered denying a peremptory writ, from which judgment this appeal is prosecuted.

From plaintiff's petition it appears that one Riley was arrested on July 5, 1936, upon a warrant issued by the justice of the peace of Malibu township in which he was charged with the crime of rape. There appeared on the warrant the statement: "Defendant is to be admitted to bail in the sum of $2000." Plaintiff executed a bail bond in which it is recited: "An order having been made on the 5th day of July, 1936, by John L. Webster, a Judge of the Justice Court, Township of Malibu, County of Los Angeles, State of California, that said defendant Robert Riley Booking No. * * * be held upon a charge of Rape * * * a felony * * * upon which he has been admitted to bail in the sum of Two Thousand ($2000.00) Dollars in an action now pending against him on behalf of the People of the State of California." The bond was on July 5, 1936, delivered to Myer B. Marion, the justice of the peace of Belvedere township, who was at the time in the city of Los Angeles. The bond was approved by Judge Marion, who issued an order for the release of Riley "to appear Justice's Court Malibu, July 6, 1936 10 a. m." The bond was received and approved by the justice court of Malibu township on July 8, 1936. Riley failed to appear in the justice court of Malibu as required and the court declared the bond forfeited. No application was made within ninety days thereafter for a discharge of the forfeiture.

[1-4] It is contended by appellant that Judge Marion of Belvedere township did not have authority to approve the bond and order the release of Riley and that for this reason the bond is of no binding force. Defects and irregularities, if any, in the proceedings preliminary to the taking of bail are considered as waived by the surety when it assumes its obligations as such at the time of the execution of the bond. It is settled law in California that the approval of a bail bond and the jus-

tification of sureties is not a part of the contract of bail. People v. Penniman, 37 Cal. 271; People v. Shirley, 18 Cal. 121; People v. Fidelity & Deposit Company, 106 Cal.App. 686, 289 P. 896. The bond was executed for the purpose of releasing Riley, who was then in custody. Its purpose was effected when Judge Marion attached his approval and ordered Riley's release. No prejudice has been suffered by plaintiff by reason of the approval of the bond by the justice of Belvedere township rather than the justice of Malibu township. There is some conflict among the authorities, but the better reasoned cases hold that the jurisdiction of the court which approved the bond cannot be questioned by the surety in an action thereon after forfeiture. 6 Cor. Jur. 1004, § 246; People v. Watkins, 19 Ill. 117; People v. Meacham, 74 Ill. 292; Dilley v. State, 3 Idaho, 285, 29 P. 48; Pack v. State, 23 Ark. 235. The surety may not avoid its obligations by contending that the bond was presented to the wrong magistrate and that the approval and release thereby obtained were illegal. The action of the superior court in sustaining the demurrer and denying a writ of prohibition to restrain the entry of a summary judgment in the municipal court was proper.

The judgment is affirmed.

We concur: CRAIL, P. J.; McCOMB, J.

---

20 Cal.App.2d 397

Ex parte ROGERS.

Cr. 1553.

District Court of Appeal, Third District, California.

April 16, 1937.

1. Criminal law 🔑27

Crime which may be punished by imprisonment in state prison, although court in its discretion may impose county jail sentence, is deemed to be a felony unless court actually imposes jail sentence (Pen.Code, § 17).

2. Criminal law 🔑27

Character of offense is not changed from a felony to a misdemeanor by mere imposition of a fine or jail sentence.

3. Criminal law 🔑27

Nature of offense and penalty imposed determine whether it is a misdemeanor or a felony, and not mere name which Legislature may attach to it.

4. Criminal law 🔑27

Offense of unlawful possession of firearms by a felon *held* a felony, notwithstanding that offense was punishable either by imprisonment in state prison or in county jail, and that statute made possession of firearms by ordinary individual a misdemeanor (Gen.Laws 1931, Act 1970, §§ 1, 2, 5; Pen.Code, § 17).

5. Criminal law 🔑1202(3)

Fact that proof of one of petitioner's three prior convictions was necessary to establish offense of unlawful possession of firearms by a felon *held* not to preclude resort to such conviction in determining that petitioner was an habitual criminal and subject to life imprisonment (Gen.Laws 1931, Act 1970, § 2; Pen.Code, § 644).

6. Criminal law 🔑1211

Increased penalty provided by habitual criminal statute is not a cumulative punishment for prior offenses, but mere increase of punishment for last crime which is deemed to have been aggravated by former conviction (Pen.Code, § 644).

Proceeding in the matter of the application of Gordon Rogers for a writ of habeas corpus.

Writ denied, and petitioner remanded.

Gordon Rogers, in pro. per.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

By means of habeas corpus the petitioner seeks to obtain his discharge from Folsom state prison on the ground that he was wrongfully determined to be an habitual criminal and that he has served the maximum term which the law is authorized to impose for the offense of a felon having possession of a revolver capable of being concealed on his person contrary to the provisions of section 2 of an act regulating the possession, use, control or sale of firearms. Stats.1923, p. 695, and amendments, 1 Deering's Gen.Laws of 1931, p. 900, Act 1970.

The petitioner was convicted as a felon of having possession of a revolver, contrary to the provisions of the statute mentioned. He was at the same time charged and found guilty of three prior convictions of felonies, to wit, burglary, robbery, and grand larceny. Pursuant to section 644 of the Penal Code, he was thereupon determined to be an habitual criminal, and sentenced to imprisonment in the state prison at Folsom for the term of his life without the benefit of parole. He has served in excess of three years and seven months of his sentence. He was awarded credits aggregating one year and five months for good behavior. It is conceded that if the petitioner's contention that five years' imprisonment in the state prison is the maximum penalty authorized by law to be imposed for the offense of which he was convicted, then the prisoner is entitled to be discharged.

The petitioner contends that the offense of unlawful possession of firearms by a felon, as prescribed by section 2 of the act referred to, is a mere misdemeanor and that because it was necessary to charge and prove his prior convictions of other felonies as a necessary element of the offense of having possession of firearms by a felon, those prior convictions may not also be used to aggravate the offense and to authorize the court to determine that he was an habitual criminal and therefore sentence him to state prison for life under the provisions of section 644 of the Penal Code, for that procedure would result in punishing him twice for the same offense.

The offense of owning, possessing, or having the custody or control of firearms by a felon, an alien, or an addict of narcotic drugs, under the circumstances recited in the act regulating the possession, use or sale of firearms, above referred to, is a felony and not a mere misdemeanor. Section 2 of that act provides in part: "* * * no person not a citizen of the United States of America and no person who has been convicted of a felony * * * or who is addicted to the use of any narcotic drug or drugs shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person * * * having a barrel less than twelve inches in length. Any person who shall violate the provisions of this section shall be punishable by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both fine and imprisonment."

[1] A crime which may be punished by imprisonment in the state prison although the statute confers a discretion on the court to impose a mere county jail sentence, is deemed to be a felony, unless the court actually exercises that discretion by imposing only a fine or a jail sentence. Section 17, Pen.Code; 7 Cal.Jur. 870, § 27; 16 C.J. 55, § 6; People v. War, 20 Cal. 117; People v. Cornell, 16 Cal. 187; In re Rameriz, 193 Cal. 633, 226 P. 914, 34 A.L.R. 51. In 16 C.J., at page 56, it is said in that regard: "Where an offense is not designated by the statute which creates it, either as a felony or a misdemeanor, *but its punishment is prescribed, then the grade of such offense is determined by the punishment.*"

[2, 3] The only modification of this rule followed the adoption of section 17 of the Penal Code in 1874. By the provisions of that section a felony punishable by either imprisonment in the state prison, or in the county jail, in the discretion of the court, after such *punishment* "other than imprisonment in the state prison," shall be deemed to be a mere misdemeanor. Doble v. Superior Court, 197 Cal. 556, 241 P. 852; In re Miller, 218 Cal. 698, 24 P.(2d) 766; People v. Pryor (Cal.App.) 61 P.(2d) 773. The necessary inference to be drawn from the language of section 17 of the Penal Code that "when a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes *after a judgment imposing a punishment other than imprisonment in the state prison,*" is that *the offense remains a felony* except when the discretion is actually exercised and the prisoner punished only by a fine or imprisonment in a county jail. Moreover, it is clear, and it has been frequently so held, that the character of the offense is not changed from a felony to a misdemeanor by the mere imposition of a fine or a jail sentence. It remains a felony for all purposes except that "*after a judgment* imposing a punishment other than imprisonment in the state prison," it shall thereafter be deemed to be a mere misdemeanor. One of the chief rea-

sons for this change in the nominal character of the offense as a result of imposing a jail sentence is that under such circumstances the offense is not considered to be serious enough to entitle the court to resort to it as a prior conviction of a felony for the purpose of increasing the penalty for a subsequent crime. It is the nature of an offense and the penalty which is imposed by law that determines whether it is a misdemeanor or a felony, and not the mere name which the Legislature may attach to it. It is evident that the inadvertent naming of petit larceny as a felony would not have the effect of transforming a well-known misdemeanor into a felony. In the present proceeding the question of transforming a felony into a misdemeanor *after judgment* is not involved, for the reason that the petitioner was sentenced to state prison and not to the county jail.

[4] The petitioner cites the fact that section 5 of the act in question characterizing the mere possession of firearms by an ordinary individual without a license therefor as a misdemeanor indicates that the legislature could not change the character of that offense from a misdemeanor to that of a felony by merely applying the same circumstances to an addict of narcotic drugs, an alien or a felon. But it is apparent that is exactly what the legislature intended to do for the very good reason that those three classes of individuals are deemed to be more dangerous to society when armed with a deadly weapon than others who are not included in those classes. The act regulating the possession, use and sale of weapons forbids various practices, some of which are specifically termed misdemeanors and some of which are called felonies, while under section 2, which is involved in this proceeding, they are characterized as felonies by the penalty which is provided therefor and by the more serious nature of the offense. Section 1 of that act specifically declares that it is a felony to manufacture, import, sell or offer for sale certain specified weapons or to carry concealed upon one's person deadly explosives, a dirk, or a dagger. The character of the various offenses prohibited by this act must be determined by their nature and by the penalties prescribed therefor. We therefore conclude that the offense of which the petitioner in this proceeding was convicted is a felony.

[5, 6] There is no merit in the contention that because it was necessary to allege and prove at least one prior conviction of the petitioner as a necessary element of the offense prohibited by section 2 of the act to regulate the possession, use, or sale of firearms, that therefore the three prior convictions of which he was also convicted may not be resorted to, under the provisions of section 644 of the Penal Code, to determine that he is also an habitual criminal and therefore subject to be sentenced to state prison for life without the benefit of parole. It may be conceded that result would constitute a harsh penalty in some cases. But it is imposed in the discretion of the Legislature for the protection of society against the menace of habitual criminals who are considered more dangerous, and less susceptible to law and order than a first offender. It has been repeatedly held that section 644 is constitutional and that it does not result in punishing a criminal twice for the same offense. In re Rosencrantz, 205 Cal. 534, 271 P. 902; People v. Vaile, 112 Cal.App. 258, 296 P. 901; 58 A.L.R. 20, note; 82 A.L.R. 345, note. The increased penalty provided by section 644 of the Penal Code for an habitual criminal is not a cumulative punishment for prior offenses. It is a mere increase of punishment for the last crime, which is deemed to have been aggravated by the former convictions. People v. Floth, 8 Cal.App.(2d) 600, 47 P.(2d) 817; People v. Stratton, 136 Cal.App. 201, 28 P.(2d) 695; People v. Coleman, 145 Cal. 609, 79 P. 283.

The proceeding in Re O'Donnell on behalf of Rodgers, 121 Cal.App. 370, 9 P.(2d) 223, upon which the petitioner in this case relies, is not in conflict with what we have previously said regarding the classification of the crime of which this petitioner was convicted or what was said regarding the application of the provisions of section 644 of the Penal Code characterizing him as an habitual criminal. Section 644 was not involved in that case. In that proceeding Roy Rodgers was convicted of the possession of firearms contrary to the provisions of section 2 of the act regulating the possession thereof, and he was also found guilty of certain prior convictions. The question as to whether he became an habitual criminal by virtue of his prior convictions was not involved in that case. There was no evidence that he had been armed with a deadly weapon while he was engaged in the commission of a felony, so as to increase his penalty on that account as provided by section 1168, subdivision (2) (b), of the Penal Code. The state prison board fixed the term of his imprisonment at fifteen years, pursuant to the provisions of section 1168 (as amended by St.1927, p. 1491). Upon habeas corpus this court merely determined that, since the petitioner in that case was not armed with a deadly weapon while he was engaged in committing another felony, neither section 3 regulating the possession and use of firearms, nor section 1168, was involved in his case, and that the prison board was therefore not authorized to fix his term of imprisonment at fifteen years. Since the right to extend his term of imprisonment on account of prior convictions was not considered and since it was not contended that he had been sentenced as an habitual criminal, section 644 of the Penal Code was not involved in that decision and Roy Rodgers was properly discharged, having completed the full term for which he was lawfully sentenced. That case has no bearing on the problems involved in this proceeding.

Nor is the case of In re Boatwright, 216 Cal. 677, 15 P.(2d) 755, 757, upon which the petitioner also relies, in conflict with what we have heretofore said regarding the issues of this proceeding. The court was there merely considering the application of section 667 of the Penal Code, as amended by St.1909, p. 364, as it then existed. That section has been amended to provide for imprisonment in the county jail only upon conviction of an offense under such circumstances. That fact is immaterial in the determination of this proceeding.

The only issue upon which the Boatwright Case was determined was expressed by the court as follows:

> "The question presented is whether or not the conviction of petitioner herein on the charge of petit theft, taking into consideration the prior convictions which he had suffered, amounted to a felony. * * *
>
> "Petit larceny, or petit theft, is not of itself a felony, and becomes such only when it is superadded to some other offense of which the party charged has suffered conviction, and this is done, not to enlarge the scope of the crime, but to add to the punishment of the person who commits it, for his many prior violations of the law."

It will be observed the court was called upon to determine whether the conviction of an offense specifically called "petit theft," which is classified as a misdemeanor by providing for a fine or a county jail penalty therefor (section 490, Pen.Code), may authorize the court to determine that the accused person is an habitual criminal under the provisions of section 644 of the Penal Code, merely because he was also guilty of prior convictions of other felonies. It seems very clear that the court properly determined in the Boatwright Case that he could not be so adjudged an habitual criminal, when the offense of which he is finally convicted is a declared misdemeanor of "petit theft" and not a felony. The language of section 644 definitely settles that problem. The very first line of that section reads as follows: "Every person convicted in this state *of any felony* * * * shall be adjudged an habitual criminal." Of course, the conviction of a mere misdemeanor may not furnish the foundation for declaring one an habitual criminal under section 644.

The Boatwright Case, therefore, furnishes no authority in conflict with what we have formerly said in this proceeding.

This petitioner was not finally convicted of a mere misdemeanor. There is a wide distinction between the misdemeanor of an ordinary person carrying on his person a concealed weapon, contrary to the provisions of section 5 of the regulatory firearms act, and the possession of a revolver by one of the three dangerous classes of persons, viz.: addicts of narcotics, felons and aliens, which latter offense is classified in section 2 of the act as a felony by fixing the possible penalty therefor as imprisonment in the state prison.

The fact that it is necessary to plead and to prove that the accused is a felon, or an alien or an addict of narcotics, in order to complete the crime, does not preclude the right to also plead and prove the prior convictions of former felonies for the additional purpose of determining that the accused person is an habitual criminal. The Boatwright Case makes no statement or intimation to that effect.

The writ is denied and the prisoner is remanded.

We concur: PULLEN, P. J.; PLUMMER, J.

20 Cal.App.2d 406

PEOPLE v. GORHAM.

Cr. 412.

District Court of Appeal, Fourth District, California.

April 16, 1937.

1. Criminal law 🔑1167(2)

Fact that defendant, convicted on first count of indictment for issuing draft without sufficient funds, could have been convicted on second count for grand theft, is of no importance on his appeal from such conviction (Pen.Code, § 476a).

2. Bills and notes 🔑10

Draft drawn on certain person in care of named banking institution sufficiently designated place of payment.

3. False pretenses 🔑49(3)

Evidence that draft, drawn on certain person in care of named bank, was presented at such bank to another than drawee and that bank had no funds belonging to drawee and used reasonable diligence to locate him, but without success, *held* sufficient to sustain conviction of issuing draft without sufficient funds so far as presentation of draft was concerned (Pen.Code, § 476a; Civ.Code, §§ 3153, 3154, 3163, 3168).

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Clarence Fisher Gorham was convicted of issuing a draft without sufficient funds, and he appeals.

Affirmed.

William Roy Ives, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged with the crime of issuing a draft without sufficient funds in violation of section 476a of the Penal Code, and in a second count with grand theft. The two counts arose out of the same general facts. After a trial without a jury, the defendant was found guilty on the first count and not guilty on the second count. From the judgment which followed, this appeal is taken.

[1] The appellant argues that he was convicted of the wrong offense and that the evidence is insufficient to sustain the judgment in that it fails to show that the draft in question was actually presented to the person named as drawee therein. The fact that the appellant could have been convicted on the second count is of no importance here, and the only question requiring consideration is whether the evidence is sufficient with respect to the matter of the presentation of the draft.

[2, 3] The evidence shows, without conflict, that the appellant purchased from Ira D. Putnam three pass books on a building and loan association for $3,078; that in payment therefor he gave to Putnam a sight draft for that amount drawn on "Chas. H. Gorham, c/o Walker's Bro's. Bank & Trust Co., Salt Lake City, Utah"; that he told Mr. Putnam that the draft "is good"; that the draft was presented at said bank and was returned "drawee unknown"; that the said Chas. H. Gorham did not appear at the bank to honor the draft and that he had no funds on deposit with the bank; that Chas. H. Gorham was unknown to the bank; that officers of the bank endeavored to locate him but were unable to do so; that the draft had not been paid; and that the appellant made no attempt to make restitution after he knew the draft had been dishonored. The appellant told the police officers that Chas. H. Gorham was his son. He did not produce his son as a witness and did not himself take the stand.

If appellant's contention was to be sustained, it would be a simple matter to evade the statute in question in all transactions of this kind by the simple device of drawing a draft on a person who would not appear at the place where the draft was payable. However, the statutes governing the presentation of such an instrument do not support the contention thus made. The draft in question was drawn on Chas. H. Gorham in care of a named banking institution. This was a sufficient designation of the place of payment. Section 3154 of the Civil Code provides, among other things, that presentment for payment is made at the proper place when a place of payment is specified in the instrument and it is there presented. Section 3153 of that Code provides that presentment for payment is sufficient when the person primarily liable on the instrument is absent or inaccessible and the instrument is presented to any person found at the place where the presentment is made. Two other sections of the Civil Code are also applicable. Section 3163 provides that presentment for payment is dispensed with where, after the exercise of reasonable diligence, presentment as required by this title of the Code cannot be made. Section 3168 provides that where the instrument is made payable at a bank it is equivalent to an order on the bank to pay the same for the account of the principal debtor.

There is ample evidence that this instrument was presented at the bank which was named as the place of payment, that the bank had no funds belonging to the drawee, and that reasonable diligence was used to locate the drawee, but without success. It not only appears that actual presentment to the drawee named could not be made after the exercise of reasonable diligence, but that the instrument was actually presented to another person found at the place of payment specified in the instrument. We find no insufficiency of the evidence in so far as the presentation of this draft is concerned. Caine v. Foreman, 106 Cal.App. 636, 289 P. 929; Ryan v. State, 60 Fla. 25, 53 So. 448.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

---

20 Cal.App.2d 271

RAPAPORT et al. v. FORER et al.

Civ. 5787.

District Court of Appeal, Third District, California.

April 8, 1937.

1. Quieting title 🔑36

In action to quiet title, interest in particularly designated and described property must be alleged (Code Civ.Proc. § 738).

2. Quieting title 🔑36

In action to quiet title, allegation describing property involved as funds on deposit by named judgment debtor *held* too vague for identification (Code Civ.Proc. § 738).

3. Action 🔑6

In judgment creditor's action for declaratory relief on ground that funds on deposit in name of judgment debtor as guardian belong to judgment debtor, individually, declaratory judgment *held* properly refused, since creditor had adequate remedy at law under statute regarding third party claim (Code Civ.Proc. § 689, as amended by St. 1935, p. 1958).

4. Insane persons 🔑36

In judgment creditor's proceeding for relief on theory that deposit in name of judgment debtor as guardian actually was deposit of debtor individually, and that debtor acted fraudulently in having self-appointed guardian, decree appointing guardian could not be attacked collaterally, and every presumption was required to be indulged in favor of decree appointing guardian.

5. Executors and administrators 🔑119

Generally, estate cannot be held liable for tort committed by executor.

6. Executors and administrators 🔑119

Cause of action for conspiracy could not be stated against executor in his representative capacity.

7. Conspiracy 🔑22

Where plaintiff attempted to sue one defendant in his representative capacity as executor only, which could not be done, charge of conspiracy against other defendant failed, since one cannot be conspirator with himself.

8. Conspiracy 🔑6

In conspiracy, it is wrong done and damage suffered pursuant to conspiracy, rather than conspiracy itself, which is the cause of action.

9. Conspiracy 🔑18

Allegation that certain of defendants acted and were acting to loss and damage of plaintiff, without alleging facts, *held* insufficient.

10. Conspiracy 🔑18

A complaint, which contains nothing more than bare allegations that defendants entered into conspiracy to defraud plaintiff and have committed acts in furtherance thereof, does not state cause of action, unless such facts are shown which, if true, would support charge; it being insufficient to charge generalities, presumptions, and conclusions.

11. Courts ⚷120

Cause of action for damages arising from conspiracy grounded in fraud was an "action in law" over which superior court did not have jurisdiction, where damages claimed were less than jurisdictional minimum.

[Ed. Note.—For other definitions of "Action; Action at Law," see Words & Phrases.]

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny.

Suit by Max Rapaport and another against Earl Forer, doing business under the fictitious firm name and style of the Estate of Louis Forer, by Earl Forer, guardian, and others. From an adverse judgment, Max Rapaport appeals.

Affirmed.

Bertram S. Harris and Joseph Harris Brewer, both of Los Angeles, for appellant.

Horowitz & McCloskey, of Los Angeles, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

By this appeal Max Rapaport, as appellant, is attacking a judgment sustaining a demurrer to his first amended complaint without leave to amend.

To understand the issues it will be necessary to summarize briefly the amended complaint, which is in three separate causes of action. The first cause of action alleges that plaintiff Max Rapaport in July, 1934, recovered a judgment approximating the sum of $400 against Earl Forer, in the municipal court of Los Angeles which, prior to the commencement of the present action, had been assigned to A. Marks, also known as Tillie Marks Rapaport; that Earl Forer, in order to defeat his creditors and to conceal his identity, caused himself to be appointed by the superior court, guardian of the estate of Louis Forer, an incompetent person, and thereafter opened a business under the firm name of Junior Department Store. It is also alleged the guardianship proceedings and the conduct of the department store was a sham and used by Earl Forer to hinder his creditors and to fraudulently prevent execution upon the Rapaport judgment. Following the appointment of Earl Forer as guardian, it is alleged he performed no duties of that office.

That in 1935 plaintiffs caused an execution to be issued out of the municipal court and directed the marshal to levy on all funds on deposit in the Bank of America belonging to Earl Forer, and all of the right, title, and interest that Earl Forer had in the funds in the account carried under the fictitious firm name and style of the "Estate of Louis Forer, by Earl Forer, guardian." The bank refused to deliver said funds to the marshal, although it is alleged that Earl Forer had full control thereof. It is also alleged Louis Forer was dead, and Abe M. Forer had been appointed and qualified as executor of the estate of Louis Forer, deceased, but that Earl Forer continued to operate the department store business without an order of court and without any accounting therefor.

It is further alleged that Abe M. Forer, as executor, claims an interest in said fund and has filed a third party claim, and that the Bank of America and Earl Forer also claim an interest in the funds adverse to plaintiffs, but that said claims are without merit. This first cause of action is in effect an action to quiet title to personal property.

The second cause of action recites, by reference, the foregoing allegations, that a dispute exists as to the validity of third party claims made by defendants thereto, and that plaintiffs are without any legal redress unless the dispute be determined by way of a declaratory judgment.

The third cause of action also adopts by reference all of the allegations of the first cause of action, and in addition thereto, alleges that defendant Earl Forer, as guardian and as an individual, and Abe M. Forer as an executor and as an individual, have acted and are now acting pursuant to a prearranged and preconcerted plan to conceal the property and assets of the defendant Earl Forer, and to prevent the satisfaction of the execution issued out of the municipal court; said cause of action being one for damages for a conspiracy.

[1, 2] While it is true that section 738 of the Code of Civil Procedure provides for an action to quiet title to personal property, as is attempted to be set up in the first cause of action, certain essential facts and allegations are necessary, the first of which being an interest in a particularly designated and described proper-

ty. In this action no attempt is made to identify or point out the amount of money in which plaintiffs claim an interest or whether there is any money in fact on deposit, but merely describe the property as "funds on deposit." In Aalwyn's Law Institute v. Martin, 173 Cal. 21, 159 P. 158, the property in the action to quiet title was described as "that real property situated in the city and county of San Francisco * * * and * * * 'more particularly described as follows, to-wit: Rights of way, terminal lands, and all the property known as the "Ocean Shore Railway property," more particularly described in the public records * * * in Liber 62 of Mortgages.'" This description was held insufficient and vulnerable to attack by general demurrer. We are likewise of the opinion in the instant case that the description of the property here in question, to wit, "funds on deposit by Earl Forer," is too vague for identification. Such funds, if they were deposited in said account, have now become a part of the funds and moneys of the bank and are not susceptible of distinct identification. The only claim that Forer may have upon said funds is such right as he has by reason of the relationship of debtor and creditor which arose between himself and the bank by reason of the deposit. He has no claim to any specific personal property. Nor do we find any allegation that the money in the bank account sought to be levied upon was deposited by Forer as an individual, or that it was his money, or that he is a creditor of the bank, or that there are any funds or indebtedness existing. The demurrer was properly sustained.

[3] As to the second count, being in effect an action for declaratory relief, the demurrer was also properly sustained. This count was a cause of action for declaratory relief under section 1060 of the Code of Civil Procedure. Section 1061 of the Code of Civil Procedure provides, "the court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." A remedy is provided under section 689 of the Code of Civil Procedure, as amended by St.1935, p. 1958, having to do with third party claims, and that would be a sufficient reason for the trial court to refuse to pass upon the issues here involved. In the case of Stenzel v. Kronick, 102 Cal.App. 507, 283 P. 93, 94, a money judgment had been obtained and a lien created thereby upon all real property of the judgment debtor, situated in the county where the judgment was obtained. Plaintiff filed an action containing the usual allegations of an ordinary suit to quiet title and alleged the existence of a controversy regarding a valid judgment lien. A demurrer to the complaint was sustained without leave to amend. Plaintiff there contended that his lien gave him a vested interest in the real property and authorized the maintenance of a suit to quiet title and that the complaint stated a cause of action entitling him to declaratory relief. The court held: "Nor will a suit for declaratory relief necessarily lie under such circumstances. * * * Since the appellant has a speedy and adequate remedy for the satisfaction of his judgment by means of levying an execution, upon which proceeding the validity of the lien may be tested if it should then be questioned, the court had a discretion to refuse to accept jurisdiction under section 1060 of the Code of Civil Procedure on the ground that it was unnecessary."

As far as appears from the record, plaintiff has an adequate and speedy remedy to determine the ownership of the subject-matter of the purported levy, as provided in section 689 of the Code of Civil Procedure as amended. In Hamburger & Sons v. Kice, 129 Cal.App. 68, 18 P.(2d) 115, the amended complaint was in two counts, one upon a stockholder's liability growing out of a promissory note, and the second cause of action sought declaratory relief. Demurrers were sustained and judgment for defendants followed. The court there refused to intervene in the action seeking declaratory relief on the ground, as here, that the amount was within the jurisdiction of the municipal court, and therefore the superior court had a discretionary authority to decline to exercise the power by statute concerning declaratory judgments.

An examination of the allegations of this cause of action show that an execution has been issued and directed to be levied upon funds on deposit, and that a third party claim had been filed by a defendant and that a controversy exists as to its validity, bringing the controversy within the scope of the provisions of section 689 of the Code of Civil Procedure as amended.

[4] It is claimed by appellant that this section is inadequate to grant him the re-

lief he seeks for the reason that he cannot in the municipal court attack the alleged fraudulent decree of the probate court wherein Earl Forer had himself appointed guardian of the estate of Louis Forer, an incompetent person. Neither, however, can such a decree be attacked collaterally in this proceeding. Appellant was a stranger to the probate proceedings, and no allegations are alleged which would impair their validity. Every presumption therefore must be indulged to support the validity of the order of the probate court. The motive behind Earl Forer, however improper it may have been, will not make unlawful an otherwise lawful proceeding. Union Labor Hospital Ass'n v. Vance, etc., Co., 158 Cal. 551, 112 P. 886, 33 L.R.A.(N.S.) 1034.

[5] The third cause of action of the amended complaint is for damages arising from a conspiracy between the respondents. We find no allegations in this count of the complaint that a conspiracy was formed, the only allegation being to the effect that two of the defendants, both individually and in their respective capacities, "have acted and are now acting pursuant to a prearranged and preconcerted plan and cause of action" to conceal property and assets and to prevent the execution of a certain judgment. It does not appear that the defendants entered into such a plan, or that such a plan existed, or that any one did anything pursuant thereto. Also, Abe M. Forer is sued only as executor of the estate of Louis Forer, deceased. The only act done by Abe M. Forer as such executor, alleged in the third cause of action, consisted of his claim to an interest in the funds, but it is not alleged that this act is or was fraudulent. Even, however, if such an allegation was made, the fraud would not form a basis of a cause of action against him in his representative capacity. In Toner v. Meussdorffer, 123 Cal. 462, 56 P. 39, it is said: "The action, if it could be maintained at all, is properly brought against defendants in their individual capacity; for in no event could the estate be charged with damages for the fraud of the executors." It is a general rule that an estate cannot be held liable for a tort committed by a trustee, executor, or administrator. 44 A.L.R. 637, citing many California cases. In National, etc., Association v. Aul's Adm'r, 156 Ky. 750, 161 S.W. 1123, the court held that the alleged entry into conspiracy on the part of an administrator was merely a personal wrong on his part.

[6, 7] Inasmuch as Abe M. Forer is sued only in his representative capacity and is alleged to have entered into a conspiracy in his representative capacity, no cause of action can, in view of the foregoing authorities, be stated against him in such capacity. He not being sued herein as an individual, leaves in the conspiracy only defendant Earl Forer, who is sued as an individual, and Earl Forer doing business under the fictitious name and style of the "Estate of Louis Forer by Earl Forer, Guardian." Whether or not Earl Forer is sued herein as an individual or a guardian is uncertain, but nevertheless the fact that Abe M. Forer is attempted to be sued in his representative capacity, which cannot be done, leaves in the purported conspiracy only Earl Forer, and the charge of conspiracy must therefore fail, as it is fundamental that one cannot conspire with himself.

[8-10] Furthermore, in a conspiracy it is the wrong done and the damage suffered, pursuant to a conspiracy rather than the conspiracy itself, which is the cause of action. Bowman v. Wohlke, 166 Cal. 121, 135 P. 37, Ann.Cas.1915B, 1011. Examining the third count, therefore, to determine what, if any, wrong or injury is alleged, we find only the allegation that certain of the defendants "have acted and are now acting * * * to the loss and damages of plaintiff * * *." The acts themselves were not alleged. A complaint which contains nothing more than bare allegations that the defendants entered into a conspiracy to defraud plaintiffs and have committed acts in furtherance thereof, does not state a cause of action unless such facts are shown which, if true, would support the charge. It is not sufficient to charge generalities, presumptions and conclusions Kinney v. Postal Telegraph-Cable Co., 123 Cal.App. 70, 10 P.(2d) 1043; Moropoulos v. Fuller Co., 186 Cal. 679, 200 P. 601.

[11] As to the Bank of America, one of the defendants herein, no cause of action is alleged, as it appears it was not a party to the conspiracy, nor is it alleged to have done any act to the injury of appellant. Furthermore, the third cause of action being for damages arising from a conspiracy grounded in fraud, and therefore an action in law, the superior court had no jurisdiction because the damages claimed are less than the jurisdictional minimum fixed by law.

Finding no error in the order of the superior court sustaining the demurrer of defendants without leave to amend, and dismissing the action, such judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

---

20 Cal.App.2d 372

BAILEY et al. v. PACIFIC GREYHOUND LINES, Inc., et al.

Civ. 1797.

District Court of Appeal, Fourth District, California.

April 15, 1937.

1. Appeal and error 🔑966(1)
Continuance 🔑7

Granting or refusing motion for continuance ordinarily rests in sound discretion of trial court, whose order will not be reversed except for abuse of such discretion.

2. Continuance 🔑26(11)

Court did not abuse discretion in denying plaintiffs' motion for continuance due to absence of witness, where plaintiffs knew several months before trial that witness would not attend, and though she lived more than 100 miles away, so that her attendance could not have been forced by subpœna, failed to take her deposition (Code Civ.Proc. § 1989, as amended by St.1935, p. 942).

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Action by Delia Bailey and William Bailey against the Pacific Greyhound Lines, Incorporated, and others. From a judgment in favor of the named defendant, the plaintiffs appeal.

Affirmed.

F. E. Butler, of Coalinga, and Samuel F. Hollins, of Fresno, for appellants.

Chester O. Hansen, of Fresno, for respondent.

MARKS, Justice.

This is an appeal from a judgment entered after the trial court granted respondent's motion for nonsuit at the close of appellants' case. The sole question involved is that of prejudicial error in refusing a continuance to appellants to enable them to procure the testimony of Alice Wickstrom, a witness in their behalf.

The case was at issue on September 24, 1935. It was set for trial on motion of respondent for January 29, 1936. Notice of time and place of trial was served on appellants on October 16, 1935. On November 19, 1935, appellants were informed by a letter written by Mrs. Wickstrom, who lived near Auburn, Cal., that she could not attend the trial in Fresno on January 29, 1936, because of expected motherhood. On January 22, 1936, appellants served and filed a motion for continuance to permit them to secure the presence of Mrs. Wickstrom at the trial. The motion was supported by the affidavits of Mrs. Bailey and one of her attorneys. On January 24, 1936, appellants served and filed a notice of motion for continuance and an order shortening time. On January 25, the hearing of the motion was continued to January 28. On that day respondent filed the affidavits of Mrs. Wickstrom and its attorney. The motion for continuance was then argued and denied. On January 29, the motion was renewed, argued, and denied. At the close of their case appellants again moved for a continuance. The motion was denied and the motion for nonsuit followed.

After the receipt of Mrs. Wickstrom's letter on November 19, 1935, appellants did nothing until January 11, 1936, when one of their attorneys interviewed Mrs. Wickstrom and found that the statements contained in her letter were true. On January 17, 1936, one of these attorneys, for the first time, informed counsel for respondent of the desire to continue the case and was then informed that a continuance would be opposed. No effort was made to take the deposition of Mrs. Wickstrom even after the last-mentioned conversation.

It is to be observed that Auburn is more than one hundred miles from Fresno and that Mrs. Wickstrom's personal attendance on the trial could not have been forced by subpœna. Section 1989, Code Civ.Proc. (as amended by St.1935, p. 942). Under such circumstances, ordinary prudence should have suggested the taking of her deposition, as reliance on her mere promise to appear at the trial, if made, could not be enforced and if violated might not furnish grounds for a continuance.

[1, 2] Ordinarily, granting or refusing a motion for continuance rests in the sound discretion of the trial court. Its order will not be reversed except for an abuse of such discretion. Tompkins v. Montgomery, 123 Cal. 219, 55 P. 997; McNett v. McNett, 44 Cal.App. 778, 187 P. 447; Blankman v. Parsons, 73 Cal.App. 218, 238 P. 728. Under the facts before us we cannot hold that there was an abuse of discretion in denying the several motions.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

---

20 Cal.App.2d 226

HOWARD et al. v. SECURITY TITLE INS. & GUARANTEE CO.

Civ. 1794.

District Court of Appeal, Fourth District, California.

April 6, 1937.

As Modified April 12, 1937.

Hearing Denied by Supreme Court May 27, 1937.

1. Appeal and error 🔑194(1)

Where no question is raised on appeal as to the form of defendant's plea of the statute of limitations, any possible objection thereto will be considered waived (Code Civ. Proc. § 339, subd. 1, and § 337, subd. 1, as amended by St.1933, p. 2116).

2. Limitation of actions 🔑30

Where escrow instructions in connection with exchange of property referred to a lease on property to be conveyed to plaintiff, and required that escrow agent hold lessor's copy of such lease for plaintiff, action against escrow agent, who delivered the deeds without obtaining such lease, was not an "action upon a contract, obligation, or liability upon an instrument in writing," but rather an action to recover damages for negligence of the escrow agent and subject to the two-year rather than the four-year statute of limitations (Code Civ.Proc. § 339, subd. 1, and § 337, subd. 1, as amended by St. 1933, p. 2116).

[Ed. Note.—For other definitions of "Action on Contract" and "Liability on an Instrument in Writing," see Words & Phrases.]

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Bessie K. Howard and husband against the Security Title Insurance & Guarantee Company. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Russell & Heid, of Tulare, for appellants.

Guy Knupp and William H. B. Haymond, both of Los Angeles, for respondent.

MARKS, Justice.

Plaintiffs brought this action to recover damages. A demurrer to their first amended complaint was sustained without leave to amend and the judgment under attack here was entered against them. The only question presented is the bar of the statute of limitations to the cause of action.

The pertinent allegations of the first amended complaint may be thus summarized: That on November 10, 1932, plaintiffs were owners of real property in the city of Los Angeles, and Harry E. Weaver and Jean C. Weaver, his wife, were owners of real property in Tulare county; that by a written lease dated June 1, 1928, the Weavers had leased their property to R. L. Scott for use as a service station for a term expiring March 1, 1935; that plaintiffs and the Weavers entered into an agreement for the exchange of their properties and opened an escrow with and gave written instructions to defendant to carry out the exchange; the escrow instructions delivered to defendant contained the following: "Lease, if or not recorded, dated 6/1/28, in favor of R. L. Scott, expiring 3/1/35, expiring 3/1/35. You will hold for me lessor's copy of above mentioned Lease duly assigned;" that the parties to the escrow delivered their deeds to defendant, but that the lease was not deposited; that prior to November 10, 1932, the Weavers and Scott had canceled the lease by written agreement, which fact was concealed from plaintiffs; that on November 28, 1932, defendant delivered the deeds to the respective grantees without securing the Scott lease and its assignment to plaintiffs; that upon discovering the true facts plaintiffs rescinded their contract with the Weavers; and that upon their suit therefor a judgment was entered on September 25, 1934, in their favor against the Weavers rescinding the transaction and restoring to the parties their respective properties involved in the exchange. Damages were alleged in the sum of $1,566.74. It is not alleged that defendant signed anything or that there was any other writing in connection with the escrow other than the deeds and the escrow instructions which were signed by plaintiffs and Mr. and Mrs. Weaver.

Plaintiffs' original complaint was filed on August 12, 1935, more than two and less than four years after November 28, 1932, the date upon which defendant closed the escrow.

[1] Plaintiffs maintain that the four-year statute of limitations (subdivision 1, § 337, Code Civ.Proc., as amended by St.1933, p. 2116) applies since the written portion of the escrow instruction is the basis of their suit which makes their action one upon a contract, obligation, or liability founded upon an instrument in writing. Defendant urges that the action is one in tort and is barred by the two-year statute of limitations (subdivision 1, § 339, Code Civ.Proc.). No question is raised as to the form of defendant's plea of the statute of limitations. See Overton v. White (Cal.App.) 64 P.(2d) 758. We will, therefore, consider any possible objection to it as waived.

The provisions of a statute of limitations, in effect in 1850 (St.1850, p. 343), were substantially identical with the provisions of subdivision 1 of section 337 of the Code of Civil Procedure, and were considered in Chipman v. Morrill, 20 Cal. 130, where it was said:

"The statute provides that 'an action upon any contract, obligation, or liability founded upon an instrument of writing,' except in certain designated cases, shall be commenced within four years, and an action upon a contract, obligation, or liability not thus founded, with certain exceptions, shall be commenced within two years. The question is whether the present action is, in the meaning of the statute 'founded upon an instrument of writing.' Our conclusion is, that it is not thus founded; that the statute by the language in question refers to contracts, obligations, or liabilities resting in, or growing out of written instruments, not remotely or ultimately, but immediately; that is, to such contracts, obligations, or liabilities as arise from instruments of writing executed by the parties who are sought to be charged in favor of those who seek to enforce the contracts, obligations, or liabilities. The construction would be the same if the word 'founded' were omitted, and the statute read 'upon any contract, obligation, or liability upon an instrument of writing.'" See, also, Pena v. Vance, 21 Cal. 142; Louvall v. Gridley, 70 Cal. 507, 11 P. 777; Thomas v. Pacific Beach Co., 115 Cal. 136, 46 P. 899; Patterson v. Doe, 130 Cal. 333, 62 P. 569; Oswald v. Pacific Electric Ry. Corporation, 7 Cal.App.(2d) 178, 46 P.(2d) 240.

[2] If we apply the rules thus announced to the instant case, the conclusion follows that this is not an action upon a contract, obligation, or liability upon an instrument in writing, but rather an action to recover damages for negligence of the escrow agent. This conclusion is sustained by the cases of Lattin v. Gillette, 95 Cal. 317, 30 P. 545, 546, 29 Am.St.Rep. 115, and Kellum v. San Mateo County Title Co., 127 Cal.App. 276, 15 P.(2d) 876, which we regard as controlling here. The Lattin Case has been cited with approval and followed many times. See Title Insurance & Trust Co. v. Los Angeles, 61 Cal.App. 232, 214 P. 667; Mitchell v. California-Pacific Title Ins. Co., 79 Cal.App. 45, 248 P. 1035; Medley v. Hill, 104 Cal.App. 309, 285 P. 891; Wilson v. Wallace, 113 Cal.App. 278, 298 P. 86; Kellum v. San Mateo County Title Co., supra; DeGarmo v. Luther T. Mayo, Inc., 4 Cal.App.(2d) 604, 41 P.(2d) 366.

In the Lattin Case it appears that the plaintiff engaged the defendants to search the title to real estate in Los Angeles county and paid them for their services. Defendants reported in writing to plaintiff that title to the land "was vested in Birnbaum free of all incumbrances." Plaintiff bought and paid for the property and was subsequently deprived of title to an undivided one-half interest in the land by judicial decree. He brought an action for damages after the lapse of more than two years. In holding that the action was barred by the two-year statute, the Supreme Court said:

"The written certificate of title given to the plaintiff by the defendants, although an instrument in writing, is not an instrument upon which their liability is founded. In Chipman v. Morrill, 20 Cal. [130] 131, it was held that this provision of the section by its language 'refers to contracts, obligations, or liabilities resting in or growing out of written instruments, not remotely or ultimately, but immediately; that is, to such contracts, obligations, or liabilities as arise from instruments of writing executed by the parties who are sought to be charged, in favor of those who seek to enforce the contracts, obligations, or liabilities.' The contract which is the basis of the plaintiff's cause of action herein does not 'rest in' or 'grow out' of this certificate, nor does the certificate contain any obligation or contract that can be enforced, or which is susceptible of a violation on the part of the defendants, or under which any liability can accrue against them. The obligation assumed by them was that created at the time of their acceptance of the employment by the plaintiff, and antedated the making of the certificate. The certificate is not the evidence of this obligation, but is merely evidence of the act done by them in purported satisfaction of the obligation assumed by them in accepting their employment. Instead of establishing the contract made between them and the plaintiff, it is the evidence relied upon by him to establish the breach of that contract, and necessarily presumes that the contract was complete before it was given, as in the case of an erroneous deed drawn by an attorney, or a defective plat made by a surveyor, or a wrong prescription given by a physician, it is only evidence in support of the averment that the implied contract for the exercise of skill and care was violated, and is not the contract itself. That was created by the oral agreement of employment, and was broken by the giving of the faulty writing."

Plaintiffs rely upon the following California cases: Scott v. Symons, 191 Cal. 441, 216 P. 604; Bank of America Nat. Trust & Sav. Ass'n v. Dennison, 8 Cal.App. (2d) 173, 47 P.(2d) 296; Feisthamel v. Campbell, 55 Cal.App. 774, 205 P. 25; and Gallagher v. California Pacific T. & T. Co., 13 Cal.App.(2d) 482, 57 P.(2d) 195, 197.

In the Scott Case it affirmatively appears that the four-year period of limitation of the action was fixed by section 343 of the Code of Civil Procedure and not by section 337 of that Code.

In the case of Bank of America Nat. Trust & Sav. Ass'n v. Dennison, supra, the plaintiff sought to recover the amount of a deficiency judgment, after foreclosure, from the makers of a secured note and the grantee of the makers who had assumed and agreed to pay the incumbrance. It was held that the four-year limitation applied to both. This case in no manner conflicts with the conclusions we have reached, nor with the rules announced in the cases cited unless it be with that portion which provides that the instrument in writing must be "executed by the parties who are sought to be charged in favor of those who seek to enforce the contracts, obligations, or liabilities." Chipman v. Morrill, supra; Lattin v. Gillette, supra. If we should regard the Bank of America Case as modifying that rule, still we would have no reasons for reversing the judgment in the instant case. In that case there was an instrument in writing, the deed, which placed the direct obligation of payment on the grantee who accepted and claimed under the deed even though she did not sign it. In the instant case, we have no such writing. In the instant case the only obligation assumed by defendant rests on an implied parol agreement to faithfully perform the duties of its agency. The violation of this parol agreement is the foundation of plaintiffs' action and the two-year statute of limitations must apply here.

In the case of Feisthamel v. Campbell, supra, the action was not brought against the escrow agent, but against a defendant who had obtained corporate stock from an escrow after notice of the plaintiff's claim upon it. The case did not turn on any question of a statute of limitations.

The case of Gallagher v. California Pacific T. & T. Co., supra, was one in which the plaintiff recovered damages from the defendant escrow agent for disbursing money from the escrow contrary to written instructions. It appears on the face of the opinion that the escrow agent "undertook in writing to examine and report upon the title to certain real property situated on Sixth street in San Francisco and to pay out money deposited with it by plaintiff in accordance with the terms of a writing, designated as an 'agreement of exchange.'" This fact alone distinguishes the case from the one we are considering.

Judgment affirmed.

I concur: JENNINGS, J.

BARNARD, P. J., deeming himself disqualified, does not participate herein.

20 Cal.App.2d 324

McKEOWN v. NORTHWESTERN PAC. R. CO. et al.

Civ. 10184.

District Court of Appeal, First District, Division 1, California.

April 13, 1937.

Rehearing Denied May 13, 1937.

Hearing Denied by Supreme Court June 10, 1937.

1. Carriers ⚷327

Where passenger places himself so near edge of railroad platform as to be within line of ordinary overhang of train, passenger contributes to resulting injury and, other things being equal, cannot recover.

2. Carriers ⚷287(1)

Railroad company whose electric train had overhang of 13½ to 14½ inches *held* not negligent in that regard, as respects right of mature prospective passenger of intelligence, who knew train was approaching, to recover for injuries sustained when struck while walking near outer edge of 13½-inch third rail cover flush with platform.

3. Carriers ⚷327

Railroad track on which trains are constantly running is itself a warning to any passenger who has reached years of discretion, and who is possessed of ordinary intelligence, that it is not safe to walk on track or near enough to be struck by passing train without exercise of constant vigilance, and failure of such person to exercise such care and watchfulness and to make use of all his senses to avoid danger incident to such situation is "negligence per se."

> [Ed. Note.—For other definitions of "Negligence Per Se," see Words & Phrases.]

4. Carriers ⚷327

Forty-five year old prospective passenger of intelligence who knew electric train was approaching, and who continued to walk along platform 18 inches from outer edge of 13½-inch third rail cover flush with platform, *held* contributorily negligent and not entitled to recover for injuries sustained when struck by train with overhang of 13½ to 14½ inches even though she thought she was safe.

5. Carriers ⚷287(1)

Where forty-five year old woman of intelligence, who was waiting to board electric train and who knew train was approaching, continued to walk along platform 18 inches from outer edge of 13½-inch third rail cover flush with platform, engineer, who sounded signals, unless he knew, or had reason to believe, that woman was not from some cause possessed of ordinary ability to care for herself, had right to presume that she would take ordinary precautions to protect herself from injury.

6. Carriers ⚷340

Last clear chance doctrine *held* inapplicable in action by forty-five year old prospective passenger of intelligence who knew electric train was approaching, and who continued to walk along platform 18 inches from outer edge of 13½-inch third rail cover, for injuries sustained when struck by train with 13½ to 14½-inch overhang, where engineer first saw passenger when train was about 216 feet away, realized her position of danger when train was about 36 feet from her, gave repeated signals, and applied emergency brakes and brought train to a stop about 36 feet beyond point where she was struck.

◆

Appeal from Superior Court, Marin County; Thomas D. Johnston, Judge.

Action by Carrie McKeown against the Northwestern Pacific Railroad Company and others. From a judgment for plaintiff, defendants appeal.

Reversed.

Orrick, Palmer & Dahlquist, of San Francisco, for appellants.

Douglas A. Nye, Ingemar E. Hoberg, and Carlos R. Freitas, all of San Francisco, for respondent.

PER CURIAM.

An action to recover for personal injuries in which a judgment was entered for the plaintiff.

The plaintiff, who was about 45 years of age, had for several years commuted daily from Mill Valley to San Francisco. It was her custom to board defendant railroad company's electric train at its station at Mill Valley and proceed by a connecting boat to San Francisco. The station was the end of the line, and defendant's trains ran from Sausalito to Mill Valley and then returned. At the Mill Valley station, the defendant had provided concrete platforms on both sides and between the tracks. These were raised about 10 inches above the tracks. The trains were operated by power received through a third rail which at this station was situated on the east side of the tracks. There was maintained over the top of this rail and flush with the platform a wooden plank or cover about 13½ inches in width, under which ran the shoe connecting the train with the rail. This cover was painted gray and somewhat resembled the color of the adjoining concrete. The train of the type which caused injury to the plaintiff overhung this cover, the total overhang being estimated to be from 13½ inches to 14½ inches. On the west side of the tracks there was no third rail. On that side the overhang of the train was some 3 or 4 inches. Plaintiff testified that she had previously boarded trains from the west side, but on the morning of the accident, while waiting its arrival from Sausalito, she walked for a distance along the center platform in that direction. When she heard the whistle of the approaching train, she turned and walked back toward the station. She testified that she knew of its approach on the south track, which was on her left as she turned back. She proceeded to the station without looking toward the approaching train. According to her testimony, as she walked along the concrete, the center of her body was about 18 inches from the extreme outer edge of the third rail cover. In this position it is clear that her left arm and shoulder were on a vertical line within but a few inches of the edge of the cover. The engineer saw the plaintiff when the train was approximately 216 feet away. That the whistle was sounded and the bell rung is admitted, but whether the whistle sounded immediately before she was struck or afterwards is disputed, but it is admitted that the bell rang continuously. According to the engineer, when he caught sight of the plaintiff, the train was traveling from 15 to 18 miles an hour. He also testified that as the train approached the plaintiff deviated from her course and moved nearer to the edge of the platform. Another witness standing on the platform corroborated this, but it is denied by plaintiff. The engineer also testified that he realized her danger when about half the length of a car away, and immediately applied the emergency brakes. The train stopped at a point beyond the place where plaintiff was standing. As it passed, it struck the plaintiff's left arm and caused the injuries of which plaintiff complains.

The defendant company, which has appealed, contends that no negligence on its part appears and that the facts show plaintiff to have been guilty of contributory negligence.

The plaintiff conceded that the defendant was required, by an order of the Railroad Commission, to place the cover over the third rail flush with the platform, and the record contains no evidence reasonably supporting the conclusion that it was negligent in the construction or maintenance of its station or the approaches to its tracks.

[1-4] On the issue of contributory negligence the facts of the present case resemble those of Holmes v. South Pacific Coast Ry. Co., 97 Cal. 161, 31 P. 834, 835, where the person injured was walking in dangerous proximity to the defendant's track with his back turned to an approaching train. The court, in affirming a judgment in favor of defendant railroad, said: "The accident occurred in the daytime, and the train could have been seen by deceased in ample time for him to have escaped injury, if he had looked in the direction from which it came, after it was in sight of the station [or had listened for its approach]." There it does not appear that the decedent knew of its approach although warning signals were given; but in the case at bar it is admitted that plaintiff knew the fact and, whether she veered toward the track or continued on her original course, should have known as an ordinarily prudent person that her position was one of hazard. As shown by the many cases cited by defendant where accidents of this character have been considered, it is the uniform rule that where a passenger places himself so near the edge of a railroad platform as to be within the line of the ordinary overhang of a train, he contributes to the injury, and other things being equal, cannot recover. Higgins v. Erie R. Co., 89 N.J. Law, 629, 99 A. 98; Kern v. Kansas City, etc., Ry. Co., 125 Kan. 506, 264 P. 1067; Southern Ry. Co. v. Bailey, 110 Va. 833, 67 S.E. 365, 27 L.R.A.(N.S.) 379; Foreman Trust, etc., Bank v. Chicago, etc., Co. 252 Ill.App. 151; Tanner v. Missouri Pacific Ry. Co., 161 Mo. 497, 61 S.W. 826; Norfolk & Western Ry. Co. v. Hawkes, 102 Va. 452, 46 S.E. 471, 472; Edgerton v. B. & O. Ry. Co., 6 App.D.C. 516; Pond v. Conn. Co., 95 Conn. 437, 111 A. 621; Butler v. United Rys. Co., 293 Mo. 259, 238 S.W. 1077; Louisville & N. R. Co. v. Glascow, 179 Ala. 251, 60 So. 103, 105; Mann v. Boston Elevated Ry. Co., 256

Mass. 236, 152 N.E. 741. While it is apparent that plaintiff thought herself safe, still she was a mature person of intelligence, and the overhang of the train was not such as to show negligence in that regard by the defendant. As was said in one of the cases above cited (Norfolk & W. Ry. Co. v. Hawkes) which involved a like situation, "It makes no difference that the danger was not in the plaintiff's mind. Such thoughtlessness is negligence which cannot be charged to defendant company." As held in Holmes v. South Pacific Coast Ry. Co., supra, "a railroad track, upon which trains are constantly running is itself a warning to any person who has reached years of discretion, and who is possessed of ordinary intelligence, that it is not safe to walk upon it, or near enough to be struck by a passing train, without the exercise of constant vigilance * * * and the failure of such a person * * * to exercise such care and watchfulness, and to make use of all his senses in order to avoid the danger incident to such situation, is negligence per se."

[5, 6] While the present case presents a clear instance of negligence on the part of the injured person, the plaintiff suggests that, although the question was not submitted to the jury by an instruction, the evidence permits the application of the last clear chance doctrine.

The evidence shows that the engineer first saw the plaintiff when the train was approximately 216 feet away, and realized that she was in a position of danger when the train was about a half car length, or 36 feet, from her. He then applied the emergency brakes and brought the train to a stop about 36 feet beyond the point where she was struck. One of the witnesses testified that the train went 72 feet beyond this point, and, according to another, the train was brought to a sudden stop. There was no other testimony on this question. Repeated signals from the approaching train had been given, and the plaintiff knew it was approaching. Unless the engineer knew, or had reason to believe, that she was not from some cause possessed of ordinary ability to care for herself, he had a right to presume that she would take ordinary precautions to protect herself from injury. Green v. Southern Pac. Co., 122 Cal. 563, 55 P. 577. We think the only reasonable conclusion from the undisputed facts is that the engineer used ordinary care to avoid the injury. The last clear chance doctrine was not devised as a last resort to fasten liability on the defendant (Barnett v. Atchison, etc., Ry. Co., 99 Cal.App. 310, 278 P. 443), and to apply it to the facts of the present case would carry it beyond the limits of the decisions as well as of reason.

The judgment is reversed.

KINDRED v. PACIFIC AUTOMOBILE INS. CO. *

Civ. 11379.

District Court of Appeal, Second District, Division 2, California.

April 20, 1937.

Hearing Granted by Supreme Court June 14, 1937.

1. Appeal and error 🔑761

Where brief on appeal contained but two headings, one denominated "preliminary" and other "argument," respondent *held* entitled to dismissal of appeal for failure to comply with court rule requiring each point to be presented separately under an appropriate heading (Rules of the Supreme Court and District Courts of Appeal, rule 8).

2. Appeal and error 🔑757(1)

Brief stating under heading "statement of questions involved," "whether: irregularity in the proceedings prevented plaintiff from having a fair trial; the verdict and judgment is against law; the court erred in refusing to grant plaintiff's motion for a new trial; errors in law occurring at trial and excepted to by plaintiff; the evidence of the defendant is sufficient to permit the court as a matter of law to take the case away from the jury and instruct them to bring in a verdict for the defendant; the verdict and judgment are erroneous and against law," *held* not in compliance with court rule requiring statement of questions involved (Rules of the Supreme Court and District Courts of Appeal, rule 8).

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

---

*For subsequent opinion see 75 P.2d 69.

Suit by Merial Kindred against the Pacific Automobile Insurance Company. From the judgment rendered, plaintiff appeals.

Appeal dismissed.

Will H. Winston, of Long Beach, for appellant.

Finlayson, Bennett & Morrow and Henry L. Knoop, all of Los Angeles, for respondent.

WOOD, Justice.

[1] This matter comes before us on a motion by respondent to dismiss the appeal upon the ground, among others, that plaintiff's opening brief does not comply with that portion of rule VIII of the Rules of the Supreme Court and District Courts of Appeal requiring each point to be presented separately "under an appropriate heading, showing the nature of the question to be presented or the point to be made." There are but two headings or titles in the brief, one denominated "Preliminary" and the other "Argument." The situation is very similar to that of Skipitarey v. Fitts, 128 Cal.App. 191, 17 P.(2d) 159. As therein stated, it is manifest that respondent's motion is well founded.

[2] The brief also fails to comply with that portion of rule VIII which provides that a statement of the question involved shall be set forth on the first page of the brief. Under the heading "Statement of Questions Involved" appellant sets forth: "Whether: Irregularity in the proceedings prevented plaintiff from having a fair trial; The verdict and judgment is against law; The Court erred in refusing to grant plaintiff's Motion for a New Trial; Errors in law occurring at the trial and excepted to by plaintiff; The evidence of the defendant is sufficient to permit the Court as a matter of law to take the case away from the jury and instruct them to bring in a verdict for the defendant; The verdict and judgment are erroneous and against law." It is manifest that the foregoing does not contain a statement of the question involved in the appeal and is not of such assistance to the court as was contemplated upon the adoption of rule VIII. Ferslew v. Andersen, 11 Cal.App.(2d) 400, 53 P.(2d) 768.

The appeal is dismissed.

We concur: CRAIL, P. J.; McCOMB, J.

---

20 Cal.App.2d 316

BOGGS et ux. v. NORTH AMERICAN BOND & MORTGAGE CO. et al.

Civ. 5781.

District Court of Appeal, Third District, California.

April 12, 1937.

1. Mortgages ⚷338

Under moratorium act, which gives court power to make order postponing foreclosure sale only when, after hearing, it finds equitable grounds for such relief, burden of establishing right to such relief rested on petitioners seeking postponement under act, since party who has the affirmative of an issue has burden of proof (St.1935, p. 1210, §§ 5, 6).

2. Mortgages ⚷338

Failure of respondents to deny allegations of petition of parties seeking postponement of sale under moratorium act did not constitute admission of allegations under provisions of Code of Civil Procedure, since proceeding under act is a "special proceeding" and not a "civil action," and provisions of Codes applicable to civil actions are not applicable to proceeding (St.1935, p. 1208; Code Civ.Proc. § 462).

[Ed. Note.—For other definitions of "Civil Action—Case—Suit—etc.," and "Special Proceeding," see Words & Phrases.]

3. Mortgages ⚷338

Petition for postponement of sale under moratorium act *held* dismissible where no evidence was introduced to establish what amount would be necessary to pay current taxes, delinquent taxes, and insurance premiums or to prove reasonable value of income from property, and where petition did not state amount of insurance premiums, current taxes, and delinquent taxes except in general or approximate amounts (St.1935, p. 1210, §§ 5, 6).

4. Action ⚷20

Special proceedings are of statutory origin and do not proceed according to the course of the common law, but give new rights and afford new remedies.

5. Mortgages ⚷338

Trial court's failure to order findings in proceeding for postponement of sale under moratorium act, which does not require findings, *held* not error for failure to comply with statute requiring findings on trial of fact question in civil action, since proceedings under act are "special" and not "civil actions," and are not subject to statutory provisions relating to trial of civil actions, except where such provisions are especially made applicable (St.1935, p. 1210, §§ 5, 6; Code Civ.Proc. § 23; § 22, as amended by St. 1933, p. 1805; § 632, as amended by St.1933, p. 1876).

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Clarence S. Boggs and wife against the North American Bond & Mortgage Company and others. From an order dismissing their petition, plaintiffs appeal.

Affirmed.

See, also, 6 Cal.(2d) 523, 58 P.(2d) 918.

Golden & Kaufman, of Los Angeles, for appellants.

James C. Ingebretsen, of Los Angeles, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the Court.

Appellants were on the 28th day of June, 1935, the owners of a certain lot in the city of Los Angeles, improved with an apartment house consisting of twenty-nine apartments and three stores. This property was subject to a deed of trust securing a note for $55,000 wherein the Guaranty Building & Loan Association was beneficiary. This note and deed of trust had, prior to the commencement of this action, been assigned to California Mutual Building & Loan Association, now in the course of liquidation by the building and loan commissioner.

On March 22, 1935, the building and loan commissioner recorded notice of default. Thereafter on June 28, 1935, appellants filed a petition under the provisions of the Mortgage and Trust Deed Moratorium Act of 1935 (Stats.1935, p. 1208) setting up the foregoing facts, and alleging further that all taxes and insurance had been paid except the second installment of taxes for 1930, for the payment of which appellant had arranged for payment in installments as provided by law. Notice of the filing of this petition was given as required by the provisions of the act. No answer or other pleading was ever filed by any of the respondents herein. At the hearing no witnesses were sworn, nor any testimony produced except two affidavits offered by appellants, which placed the value of the property at approximately $55,000 and two counter affidavits offered by respondents which placed the value of the property at approximately $38,000. Appellants asked permission to file additional affidavits, upon what issues we are not informed, but the request was refused. Thereupon the court denied and dismissed this petition.

From this order appellants have appealed, and as grounds for reversal contend the court erred in denying their petition, claiming that the order of the court is not supported by the evidence, and that the court erred in not filing findings of fact and conclusions of law.

Sections 5 and 6 of the Moratorium Act (page 1210) provide in effect that upon the hearing the court may make its order if it finds equitable grounds for relief, directing that the sale shall not be held until after such date as the court may consider just, but in no event beyond February 1, 1937, or the court may dismiss the proceeding. It is also therein provided that if the court orders the sale postponed, it shall determine the reasonable value of the income from the property, or its rental value and shall require the trustor or mortgagor to pay all or a reasonable part of such income or rental toward the payment of taxes, insurance, interest, or principal at such times as may be determined to be equitable under the circumstances. The court also must make provisions requiring maintenance and repair by the trustor or mortgagor. There is, however, no provision in the act which provides that the petition itself shall be deemed to constitute evidence of the facts or matters therein contained, nor in fact is it required that the petition be verified.

[1] Section 2009 of the Code of Civil Procedure provides in what instances an affidavit may be used to establish a fact in controversy, but this section does not make the use of affidavits applicable to the situation here before us. Inasmuch as the act places upon the court the power to make an order postponing a foreclosure sale only when, after a hearing, it finds equitable grounds for such relief, the burden of establishing the right of such relief obviously rests upon the petitioners under

the familiar principle that he who has the affirmative of an issue has the burden of proof.

[2,3] It is the contention of appellants that respondents having failed to deny the allegations of their petition, such fact must be construed as an admission of the allegations therein contained, and under the provisions of section 462 of the Code of Civil Procedure appellants claim that because of the failure of respondents to controvert or deny the petition, the material allegations therein must be accepted as true. However, this action being a special proceeding rather than a civil action, the provisions of the Codes applicable to civil actions are not here in point. It was required of the court, under section 5 of the act, as a condition to granting the petition for relief, to first ascertain the reasonable value of the income from the property, and by the next section to order petitioners to pay an amount at least sufficient to care for the current taxes, delinquent taxes, and insurance premiums. No evidence was introduced to establish what amount would be necessary to pay these items, nor was any evidence offered to prove the reasonable value of the income from the property. In fact, the petition itself fails to state the amount of the insurance premiums, the current taxes, and taxes delinquent except in general or approximate amounts.

[4,5] It is also the contention of appellants that the court erred in failing to order findings, and in support thereof rely upon the provisions of section 632 of the Code of Civil Procedure, as amended by St.1933, p. 1876, which, however, merely holds that upon the trial of a question of fact in a civil action findings are necessary. Section 22 of the Code of Civil Procedure, as amended by St.1933, p. 1805, defines an action as follows: "An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Section 23 provides that every other remedy is a special procedure. The term "special procedure" is not generally defined by statute, but as pointed out in Bancroft's Code Practice and Remedies, volume 1, page 141, the term does not have a well-established meaning and includes all civil remedies in courts of justice which are not ordinary actions, or in other words, any proceeding in a court which was not under the common law and equity practice, either an action at law or a suit in chancery. Special proceedings being of statutory origin do not proceed according to the course of the common law, but give new rights and afford new remedies. Yuba County v. North America, etc., Mining Co., 12 Cal.App. 223, 107 P. 139.

That a proceeding under the Mortgage Moratorium Act (supra) is a special proceeding was determined in the case of Boggs v. North American Bond & Mortgage Company et al., 6 Cal.(2d) 523, 58 P.(2d) 918, 919, wherein the court said: "Although under section 5 of the Moratorium act the determination of the court upon a petition for postponement of sale is denominated an 'order,' it is nevertheless a final judgment in a special proceeding within the meaning of subdivision 1, § 963, Code of Civil Procedure." Section 632 of the Code of Civil Procedure, while upon its face relates to the trial of any action of fact by the court, has been held to apply only where the trial has been had in a civil action and is not applicable to a special proceeding. Lyons v. Marcher, 119 Cal. 382, 51 P. 559, and cases cited in 24 Cal.Jur. p. 931.

It was not error therefore for the trial court to fail to make or file findings of fact, because findings are not specifically required by the act, and because proceedings under the Moratorium Act (supra) are special in nature and not subject to the provision of the Code of Civil Procedure relating to the trial of civil actions, except where such provisions are especially made applicable, and, furthermore, the court did not err in denying the petition for relief, because petitioners failed to introduce any evidence from which the court was bound to grant the relief prayed for.

For these reasons, the order appealed from must be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

20 Cal.App.2d 409

DONATO v. LOPOPOLO et al.

Civ. 1832.

District Court of Appeal, Fourth District, California.

April 16, 1937.

1. **Automobles ⚷244(33)**

Evidence *held* to sustain finding that plaintiff's motortruck was equipped with requisite headlights and that they were illuminated at time of accident (St.1935, p. 201, §§ 618, 619).

2. **Automobiles ⚷244(24)**

Evidence *held* to sustain finding that son was driving father's automobile with father's consent as against contention that younger son was driving automobile without father's consent and against his express command.

3. **Trial ⚷143**

Conflicts in evidence are within sole province of trier of facts for determination.

4. **Appeal and error ⚷1011(1)**

Appellate court must affirm judgment regardless of conflicts in evidence when judgment is supported by substantial and material evidence.

◆

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Action by George Donato against John Lopopolo and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Ray W. Hays and A. A. George, both of Fresno, for appellants.

John D. Chinello and Rae B. Carter, both of Fresno, for respondent.

MARKS, Justice.

Plaintiff brought this action to recover damages suffered in a motor vehicle collision. He recovered judgment for $5,000 and this appeal followed.

The collision occurred at about 8 o'clock p. m. on December 27, 1935, in the intersection of two public streets of the city of Fresno. The plaintiff was driving a light truck and it is alleged that Jack Lopopolo was driving a sedan belonging to John Lopopolo, his father, with the owner's consent.

Defendants present two grounds for reversal of the judgment: First, that the evidence shows plaintiff guilty of contributory negligence as a matter of law; and, second, that it shows that the sedan was being driven, not by Jack Lopopolo, but by Dan Lopopolo, his younger brother, who was driving the car without his father's express or implied consent and against his express command.

[1] The accusation of contributory negligence is brought against plaintiff for the reason that several witnesses for defendants gave testimony supporting the conclusions that the truck of plaintiff was not equipped with headlights and that they were not illuminated at the time of the accident as required by sections 618 and 619 of the Vehicle Code (St.1935, p. 201). In contradiction of this evidence there is testimony by plaintiff and other witnesses supporting the contrary conclusions that the truck was equipped with the requisite headlights and that they were illuminated at the time of the accident.

[2] Defendants' argument that Dan and not Jack Lopopolo was driving the sedan discloses a most unusual situation. The deposition of Jack Lopopolo was taken and placed in evidence by plaintiff as a part of his case. In his deposition Jack Lopopolo testified that he was the driver of the sedan. This was corroborated by another witness testifying for plaintiff. At the trial Jack and Dan Lopopolo both testified that Dan, not Jack, was the driver of the car.

This case presents the too familiar circumstance of the appellants maintaining that the evidence does not support the verdict and judgment when in fact the evidence is merely conflicting and the verdict and judgment are supported by material and substantial evidence.

[3, 4] It seems that in altogether too many appeals we must repeat with monotonous regularity the familiar doctrine that we are not concerned with mere conflicts in the evidence; that such conflicts are within the sole province of the trier of fact for determination; that regardless of evidentiary conflicts we must affirm a judgment when, as here, it is supported by substantial and material evidence.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

20 Cal.App.2d 283

GOODWIN et al. v. ROBINSON et al.

Civ. 1795.

District Court of Appeal, Fourth District, California.

April 8, 1937.

1. Corporations ⚷629

In stockholders' action against directors for failure to turn over corporate assets which allegedly came into directors' hands at time of dissolution of corporation, evidence *held* to authorize finding that corporation had no assets at time of dissolution, since burden was on stockholder to show that assets existed at time of dissolution, and burden was not met by showing existence of assets at previous time.

2. Witnesses ⚷397

Proof that a witness had made a statement contradictory to testimony given in instant proceeding may be considered only as affecting credibility of witness.

3. Appeal and error ⚷994(3)

Question of credibility of witness and weight of impeaching evidence are for determination of trial court only, not for the reviewing court.

◆

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Action by Carrie E. Goodwin and Amanda Goodwin against Ralph Robinson and Emmett M. Robinson. From a judgment for defendant, plaintiffs appeal.

Affirmed.

J. Maxwell Peyser, of San Francisco, for appellants.

Ralph Robinson, of Fresno, in pro per.

JENNINGS, Justice.

Plaintiffs, as stockholders in the United States Silver Fox Farms, Inc., a corporation, which was incorporated in the State of Delaware, brought this action on behalf of themselves and all other stockholders in said corporation against the defendants as directors and officers of said corporation on February 20, 1934. The complaint, which was entitled "Complaint for Damages, for Fraud, Deceit and Conversion," alleged that in the month of August, 1928, the above-mentioned corporation was dissolved in accordance with the laws of Delaware; that defendants were then directors of the corporation, and upon dissolution of said corporation said defendants as directors took possession of all assets of the corporation for the benefit of the stockholders and for the purpose of disposing of and conveying the corporate assets to and among the stockholders; that all liabilities of the corporation were discharged; that demand was made by plaintiffs upon defendants that the latter distribute the corporate assets among the stockholders but that defendants refused so to do and continued to hold and retain such assets for their own use and benefit and rendered no accounting to the stockholders. It was alleged that the assets of the corporation consisted of real and personal property having a market value of $114,309.34. The prayer of the pleading demanded: First, that defendants be required to account for all the assets; second, that a money judgment be rendered against them for such amount as should be determined to be due upon such accounting with interest thereon; third, for the appointment of a receiver to take possession of the corporation assets with power to sell the same and distribute the proceeds among the stockholders of said corporation.

Service of process in the action was not made upon the defendant Emmett M. Robinson, and the defendant Ralph Robinson alone appeared and filed an answer to the complaint.

The cause was tried before the court without a jury, and at the conclusion of the trial the court found that at the time the above-named corporation was dissolved there were no corporate assets and that neither the defendants as directors of said corporation nor the defendant Ralph Robinson as a director thereof took possession of any property or assets of the corporation. From its findings the court drew the legal conclusion that plaintiffs were not entitled to any relief against the defendant Ralph Robinson, and entered judgment accordingly. From this judgment plaintiffs appeal.

The sole contention here advanced by appellants is that the finding that there were no corporate assets when the above-mentioned corporation was dissolved is lacking in evidentiary support.

The evidence produced by appellants whereby they endeavored to establish the existence of assets at the time of dissolution comprised certain documents and the testimony of three witnesses. The documentary evidence consisted of a consolidated annual report for the year 1928 of four different corporations among which the above-mentioned corporation was one and two annual reports of said corporation covering the years 1927 and 1928, which were filed in the office of the secretary of the State of Colorado. The three witnesses to whom reference has been made were the respondent who was called as a witness by appellants under section 2055 of the Code of Civil Procedure, Clarence W. Callender, and J. Maxwell Peyser.

The annual report of the corporation for the year 1927, which was attested by the appellant as secretary of the corporation and filed with the secretary of the State of Colorado on February 21, 1927, stated that the total corporate assets located in said state amounted to $136,533.63 and the total liabilities amounted to $3,816.83. The annual report for the year 1928, likewise attested by appellant as secretary and filed with the secretary of the State of Colorado on February 28, 1928, showed total corporate assets of $114,309.34 and total liabilities of $9,312.86. The consolidated annual report of the four corporations, including the United States Silver Fox Farms, Inc., contained a consolidated balance sheet of the four corporations as of the date of December 31, 1928. On this balance sheet the total assets of the above-mentioned corporation were stated to amount to $194,201.55 and the liabilities exclusive of capital and surplus which amounted to $145,231.66 were stated to be $48,969.89. Attached to the aforesaid balance sheet and forming a part of the report was a communication addressed "To the Stockholders" and signed with the name of E. M. Robinson, president. This communication began with a reference to the consolidated balance sheet "for your companies as of December 31st, 1928." The next paragraph expressed the pleasure of "your directors" in reporting that complete control of the four corporations had been embodied "by stock ownership" in the United States Silver Fox Farms, Consolidated. This paragraph contained the following statement: "The United States Silver Fox Farms, Inc., has been legally dissolved and its assets taken over by the Consolidated Company."

The witness Clarence W. Callender testified that he was the official receiver of the United States Silver Fox Farms, Consolidated, having been appoined to that position by the United States District Court for the District of Nevada on July 8, 1932; that as such receiver he had made an examination of the records with respect to the assets of the subsidiary corporations which formed a part of the corporation of which he was the receiver; and that he had been unable to discover any assets which belonged to any of such subsidiary corporations. The witness also testified that he had seen certified copies of the annual reports of the corporation in which appellants were stockholders which were filed with the secretary of the State of Colorado, and that no part of the assets of said corporation as shown by said reports had ever come into his possession as receiver of the Consolidated Corporation. The witness J. Maxwell Peyser testified that Callender was appointed receiver of the United States Silver Fox Farms, Consolidated, in July, 1932, by the United States District Court in Nevada, and that thereafter steps were taken to uncover any assets that belonged to this corporation, but that the efforts were unavailing and no assets were recovered. This witness further testified that an investigation of the affairs of the corporation disclosed no property of any kind that was owned by said corporation and that it had no assets. The respondent called as a witness by appellants under section 2055 of the Code of Civil Procedure testified that all assets of the United States Silver Fox Farms, Inc., were transferred to the United States Silver Fox Farms, Consolidated, prior to the dissolution of the former corporation and that in return therefor the transferring corporation received shares of stock issued by the Consolidated Corporation. The witness further testified that certain real property in Colorado owned by the United States Silver Fox Farms, Inc., was sold and the proceeds were turned over to the Consolidated Corporation, and that the bank accounts and personal property of the former corporation consisting of office furniture and foxes were transferred to the latter corporation prior to the dissolution of the United States Silver Fox Farms, Inc. It may properly be noted that during the taking of the testimony of this witness he was shown a transcript of testimony which he gave on April 10, 1933, in some proceeding which apparently was brought in the United States District Court for the Southern district of California wherein he stated that the United States Silver Fox

Farms, Consolidated, never received any stock or property or assets of which he had any knowledge from any of the subsidiary corporations and in particular that so far as he knew the assets of the United States Silver Fox Farms, Inc., were never taken over by the United States Silver Fox Farms, Consolidated.

It is apparently the contention of appellants that having shown that the corporation in which they were stockholders owned assets amounting to more than a hundred thousand dollars prior to the dissolution of said corporation in August, 1928, the burden of proof then shifted to respondent as a director of said corporation to make satisfactory showing of what became of such assets, and that this burden of proof was not sustained by his testimony which was itself conflicting with respect to the material fact of whether or not the assets of the corporation had been transferred prior to dissolution.

[1] With this contention we are compelled to disagree. Appellants sought by this action to fasten a liability upon respondent as a director of a defunct corporation. The basis of the liability sought to be imposed was that respondent became a trustee of whatever assets the corporation owned at the time of dissolution for the benefit of the stockholders. Obviously it was a necessary link in the chain of evidence whereby the liability should be established that it should be made to appear to the satisfaction of the trial court that there were in fact assets which were the property of the corporation at the time of dissolution. The responsibility of determining whether or not appellants had established the necessary fact that there were corporate assets when dissolution occurred rested with the trial court. That tribunal evidently concluded that appellants had not proved this essential element for it made a finding expressly negativing the fact.

It may further be noted in this connection that the witness Peyser testified positively that no property or assets belonging to the United States Silver Fox Farms, Consolidated, were uncovered after a receiver was appointed for this corporation in July, 1932. The stock of this corporation which was issued to the United States Silver Fox Farms, Inc., in return for assets of the latter corporation had evidently become valueless at the time the present action was instituted in 1934. Examination of the record indicates that this suit was not brought for the purpose of forcing an accounting with respect to the stock of the Consolidated Corporation, admittedly valueless, but to compel an accounting with respect to assets of the United States Silver Fox Farms, Inc., which it was claimed had not been transferred prior to the dissolution of the last-mentioned corporation.

[2, 3] The effect of the impeaching evidence which indicated that the witness Robinson, respondent herein, had testified in another proceeding that the corporate assets had not been transferred prior to dissolution of the corporation was not to establish the truth of the existence of corporate assets at the time of dissolution. Proof that the witness had made a statement respecting this fact which was contradictory to the testimony which he gave in the present proceeding was entitled to be considered only as evidence affecting the credibility of the witness. 27 Cal.Jur. p. 169; Mattson v. Maryland Casualty Co., 100 Cal.App. 96, 279 P. 1045. The question of the weight of the impeaching evidence was one that was within the province of the trial court. Weissbaum v. Eibeshutz, 211 Cal. 170, 174, 294 P. 396. The question of the credibility of the witness whose testimony given during the trial of this action was sought to be impeached in the manner described was one that was confided exclusively to the determination of the trier of facts. 27 Cal.Jur., p. 182; Secondo v. Secondo, 218 Cal. 453, 23 P.(2d) 752; Bitsekas v. Parechanian, 67 Cal.App. 148, 226 P. 974; Biurrun v. Elizalde, 75 Cal. App. 44, 242 P. 109; Turner v. Whittel, 2 Cal.App.(2d) 585, 38 P.(2d) 835; Cardoza v. West American Com. Ins. Co., 6 Cal. App.(2d) 500, 44 P.(2d) 668; Bates v. Escondido Union H. S. Dist., 9 Cal.App.(2d) 43, 48 P.(2d) 728. It is not the function of a reviewing court to determine the proper weight to be given to evidence or the credibility of witnesses.

Application of these principles to the single question raised on this appeal precludes reversal of the judgment.

The judgment is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

20 Cal.App.2d 405

CURRAN v. GIOMETTI.

Civ. 1820.

District Court of Appeal, Fourth District, California.

April 16, 1937.

1. Appeal and error ⚿529(1)

Judgment appealed from is necessary part of record on appeal.

2. Appeal and error ⚿102

Order sustaining demurrer is not appealable (Code Civ.Proc. § 963, as amended by St.1933, p. 2472).

3. Appeal and error ⚿635(2)

Appeal from case in which final judgment may have been rendered would be dismissed where record did not contain judgment (Code Civ.Proc. § 950; § 670, as amended by St.1933, p. 1883; § 953a, as amended by St.1935, p. 1960).

◆

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action brought in the justice court by Frank Curran against E. Giometti, who filed a counterclaim or cross-complaint. A judge of the Superior Court sustained a demurrer to the cross-complaint, and the defendant appeals.

Appeal dismissed.

L. B. Fowler, of Madera, for appellant.

F. W. Docker and Laurence B. Myers, both of Fresno, for respondent.

MARKS, Justice.

Plaintiff brought this action in the justice's court of the third township, county of Fresno, California, on May 27, 1935, to recover $250 from defendant. On June 18, 1935, defendant filed an answer and counterclaim or cross-complaint in the same court seeking recovery of $250 from plaintiff, to which plaintiff demurred both generally and specially. The record shows that on January 14, 1936, a judge of the superior court of Fresno county sustained with leave to amend a demurrer "to the second amended counterclaim and cross-complaint of the defendant." This pleading is not in the record. A third amended cross-complaint was filed on February 18, 1936, wherein defendant sought recovery from plaintiff of $15,250. On April 25, 1936, a judge of the superior court sustained a demurrer to this pleading without leave to amend. On June 17, 1936, defendant gave, under the alternative method, the following notice of appeal: "Notice is hereby given that the defendant, E. Giometti, hereby appeals to the District Court of Appeal of the State of California, Fourth Appellate District, from that certain judgment made and entered in the above entitled court, on the 25th day of April, 1936, in favor of the plaintiff and against the defendant sustaining the demurrer of the plaintiff to the third amended counterclaim and cross complaint of the defendant, and the defendant appeals from the whole of said judgment."

[1] The record does not contain any judgment roll. Sections 670 (as amended by St.1933, p. 1883), 950, 953a (as amended by St.1935, p. 1960), Code Civ. Proc. There is no judgment in the record. The judgment appealed from is a necessary part of the record on appeal. 2 Cal.Jur. 517.

[2] While the notice of appeal states that the appeal is taken from a judgment, the particular reference in the notice is to the order sustaining the demurrer. As there is no judgment in the record, and this order is particularly referred to in the notice of appeal, we take it that defendant is endeavoring to have us review this order sustaining the demurrer. Such an order is not appealable. Section 963, Code Civ. Proc. (as amended by St. 1933, p. 2472).

[3] If, as we believe, the appeal is from the order sustaining the demurrer, we must dismiss the appeal as taken from a nonappealable order. If there was a final judgment rendered in the case defendant has failed to present a proper record upon which we can review the judgment and we can dismiss the appeal for that reason. Section 954, Code Civ. Proc.

The appeal is dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

MITCHELL v. DILBECK.*

Civ. S. C. 42.

District Court of Appeal, Second District, Division 1, California.

April 10, 1937.

Hearing Granted by Supreme Court June 3, 1937.

1. Contracts ⚿113(3)

Contract to pay mutual benefit association's secretary-treasurer stated sum monthly out of premiums collected from members transferring to life insurance company for his interest in association's revenues, if four directors thereof resigned in favor of persons selected by purchaser, *held* invalid as contra bonos mores and contrary to public policy.

2. Contracts ⚿138(3)

Defendant in action for balance due under contract contrary to public policy will not be awarded sum claimed in cross-complaint for money received by plaintiff for defendant's use and benefit, but court will leave parties as it finds them.

◆

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by T. W. Mitchell, after whose death Pearl F. Mitchell, as community administratrix of the estate of herself and deceased, was substituted as plaintiff, against W. D. Dilbeck, who filed a cross-complaint. From a judgment for substituted plaintiff, defendant appeals.

Reversed and remanded, with instructions.

Sherman & Sherman and Austin Sherman, all of Los Angeles, for appellant.

Richard F. Bailey, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

In this case defendant appeals from a judgment by which he is required to pay respondent the sum of $13,275.77, found by the court to be the balance due upon an agreement between them. It is contended that certain findings are contrary to, or find no support in, the evidence; therefore, that the judgment based on such findings should be reversed.

Both parties to this action had been engaged for many years in the insurance business when they entered into the written agreement upon which this action is based. It reads, so far as pertinent to this discussion, as follows:

"State of Texas, County of Hill.

"T. W. Mitchell, first party, and W. D. Dilbeck, second party, make the following agreement:

"1. First party agrees to and does hereby sell to the second party all of his right, title and interest to all of the monies, assessments, dues and other benefits owned by him as Secretary-Treasurer of the Home Benefit Association, of Hillsboro, Texas.

"2. Second party agrees to pay as consideration for the above property, $5.00 per thousand of insurance in force at this date payable as follows: $2,955.00 cash representing $1.00 per thousand of insurance, the receipt of which cash is hereby acknowledged; $11,820.00 representing $4.00 per thousand of insurance, said $11,-$820.00 to be paid out of 50% of all premiums collected from members of the Home Benefit Association who transfer to the Equitable Mutual Life Insurance Company, Dallas, Texas, said 50% of said premiums to belong to first party until said amount is fully paid. * * * It is further agreed by second party that the payments out of premiums shall not be less than $1,000.00 per month, beginning with thirty days from this date and second party hereby personally guarantees that said payments of *of* said premiums shall be at least $1,000. per month, said guarantee to be in full force and effect and recoverable upon, regardless the amount of premiums collected or the length of time for which collected and said agreement and guarantee that first party shall receive said $1,000.00 per month shall be and is continuous until the full amount of the consideration out of premium has been paid. * * *

"3. Second party in consideration hereof agrees to carry out and perform the proposals which are substantially set forth in the attached paper marked 'proposals of W. D. Dilbeck', which proposals are made a part hereof just as tho written herein. * * *

"*Proposals of W. D. Dilbeck:*

"Satisfactory arrangements to be made with T. W. Mitchell, as Secretary of the Home Benefit Association, as to remun*iation* and working arrangements.

"Four members of the Board of Directors of the Home Benefit Association to resign in favor of four directors to be selected by Mr. Dilbeck. * * *"

---

*For subsequent opinion see 74 P.2d 233.

For approximately fifteen years prior to the date of this agreement, November 28, 1932, respondent had been secretary-treasurer of Home Benefit Association of Hillsboro, Tex., and as such officer had derived a substantial income from fees or commissions allowed him as "secretary's expense" on death assessments paid by the members of the association. The schedule of rates, expenses, and benefits were all set up in the by-laws of the organization, which, together with the constitution and certificate of authority, were approved by the board of insurance commissioners of Texas after an act passed in 1929 (as amended, tit. 78, art. 4875a—1 et seq. Vernon's Ann.Rev.Civ. Stats.) brought under control of the board local mutual aid associations which had been operating for some years previously. (See article 4875a—23.)

One of the by-laws (art. III, § 3) of the Home Benefit Association provided, inter alia, as follows: "The Secretary-Treasurer shall be T. W. Mitchell, and he shall remain in office until he shall die, resign or be removed from office in the manner for some one or more of the causes specified in Article 2, Section 4 of the By-Laws of this Association. * * *

"It is agreed and understood that the property rights of the office of the Secretary-Treasurer are and shall be both legally and equitably vested in the said T. W. Mitchell, and he is and shall be entitled to all the fees, emoluments, and perquisites thereof prescribed by the Constitution and By-Laws of this Association, and any amendments thereto which may hereafter be adopted. In the event charges are filed against the said T. W. Mitchell, to remove him from office he shall have the right, after such charges are filed and even after removal from office, to transfer and assign the equipment and property of said office and the fees, perquisites and emoluments thereof prescribed by the Constitution and By-Laws of this Association and any amendments thereto, which may hereafter be adopted."

Appellant contends: "It would be a vicious set-up to permit officers of mutual benefit associations to build by-laws whereby one of the officers (Secretary-Treasurer) should hold office for life, or during good behavior, and further building a by-law whereby he should be indefeasibly vested with the property right to all revenues thereafter to be derived for the running expenses of the association, and to further build a by-law that, even though he should be convicted of a criminal offense for malfeasance in office, he would still own, in his own right, the future accumulations coming into the Expense Fund of the association."

[1] Respondent answers this contention by asserting that the by-laws of this Texas company were approved by the board of insurance commissioners of that state and therefore are legal and valid; consequently a contract drawn, with these conditions present in the minds of the parties, must stand. However, conceding for the purpose of argument the correctness of respondent's position on this point, the judgment in our opinion should be reversed on the ground that the contract is contra bonos mores, in that it contemplates dealing with corporate officers for personal gain. The case of Forbes v. McDonald, 54 Cal. 98, seems in point. There contention arose among five directors of a mining corporation. Forbes was one of the five, and the other four were at odds, two against two. One group agreed to pay a certain bill due Forbes by signing a note therefor in consideration of Forbes' resigning and aiding them in electing a successor. Suit was brought upon this note, the defense being based on want of consideration and illegality of consideration. The opinion states (pages 99, 100): "It does not appear to us to be at all doubtful, that if the whole or a part of the consideration be that a trustee resign his trust, the consideration is illegal. It is contra bonos mores. Trustees of corporations owe duties to others besides themselves; they have been placed in a position of trust by the stockholders, and to those stockholders they must be faithful. It is a violation of that trust for them to be bought out of office. They may resign when they please, but they must not make profit or benefit to themselves in the matter of such resignation."

Matching these facts with those of the present case, it appears that at a meeting of the directors of the Home Benefit Association, held on November 28, 1932, the same day the contract was signed by the parties, the plaintiff tendered his resignation as secretary. He testified: "I resigned and he (Dilbeck) asked me to serve on as much as three or four months until the members were transferred, as many members as could be transferred." It appears also that the plaintiff arranged for four other directors of his board to resign to be replaced by men chosen by Mr. Dilbeck. The plaintiff testified:

"Q. Did you tell him (Dilbeck) that the members of the board of directors of the Home Benefit Association would resign at your request in favor of directors to be appointed by him? A. I told him I thought they would, yes, sir.

"Q. Did you instruct some of those directors to resign in favor of nominees of W. D. Dilbeck? A. I did.

"Q. And *was that part of the consideration* for Mr. Dilbeck agreeing to pay you this money? A. He did. It *was.* (Italics ours.)

Respondent argues that since the proposal was made by Mr. Dilbeck that "four members of the board of directors of the Home Benefit Association should resign in favor of four directors to be selected by Mr. Dilbeck," it was incumbent upon Dilbeck and not upon the respondent to perform this part of the contract. It must be apparent, however, that the four directors who did resign would not have taken that action at Mr. Dilbeck's request alone; in fact, the respondent testified that if he had not received the down payment upon the contract and relied upon Dilbeck's agreement to pay $1,000 monthly thereafter, he would not have had the directors resign, nor would he have resigned himself. These circumstances, as well as others that appear in a review of the testimony, lead us to the conclusion that the contract was contrary to public policy, under a doctrine that has been adopted in practically all the states of the Union, many authorities being collected in 12 A.L.R. 1071.

[2] The defendant in this case filed a cross-complaint seeking recovery of the sum of $3,183 "for and on account of money had and received by cross-defendant for the use and benefit of cross-complainant." However, since both parties voluntarily undertook a transaction which in our view was contrary to public policy, we favor the rule, usually given effect in such cases, which leaves the parties as it finds them. 13 Cor.Jur. 493; Ripperdan v. Weldy, 149 Cal. 667, 676, 87 P. 276.

The judgment is reversed and the cause remanded to the superior court with instructions to enter judgment in this action in favor of appellant, W. D. Dilbeck, and against him on his cross-complaint.

We concur: HOUSER, P. J.; YORK, J.

---

20 Cal.App.2d 279

TRAVIS v. BIXLER VAPOR DRY CLEANING CO. et al.

Civ. 1808.

District Court of Appeal, Fourth District, California.

April 8, 1937.

1. Bankruptcy 🔑391(3⅜)

On evidence disclosing that personalty was duly attached under writ issued in action on note instituted in December, that undertaking to release attachment was given, and property redelivered to defendant, that defendant was adjudged bankrupt in following March, and that defendant admitted due execution and nonpayment of note, plaintiff *held* entitled to entry of qualified judgment against defendant with perpetual stay of execution against defendant's property, so as to permit plaintiff to proceed to collect from bondsmen (Bankr.Act, § 67f, as amended, 11 U.S.C.A. § 107(f).

2. Bankruptcy 🔑198

Bankruptcy Act providing that bond given to dissolve lien created by the levy of attachment on insolvent's property within four months prior to filing of bankruptcy petition is void, confers no right on bankrupt to assert invalidity of attachment lien, but vests that right solely in bankruptcy trustee (Bankr.Act, § 67f, as amended, 11 U.S.C.A. § 107(f).

3. Bankruptcy 🔑199

Bankruptcy Act providing that bond given to dissolve lien created by levy of attachment on insolvent's property within four months prior to filing of bankruptcy petition is void applies only in case bankrupt was insolvent when lien was acquired (Bankr.Act, § 67f, as amended, 11 U.S.C.A. § 107(f).

4. Bankruptcy 🔑199

Proof of insolvency at time of bankruptcy adjudication in March did not constitute evidence of insolvency when attachment was levied in preceding December, and did not render attachment void (Bankr.Act, § 67f, as amended, 11 U.S.C.A. § 107(f).

◆

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by W. C. Travis against the Bixler Vapor Dry Cleaning Company, a copartnership composed of L. B. Bixler and L. B.

Bixler. From an adverse judgment, plaintiff appeals.

Reversed.

W. O. Watters and Fred J. Rogers, both of Fresno, for appellant.

Lindsay & Gearhart, of Fresno (Richard Aten, of Fresno, of counsel), for respondents.

MARKS, Justice.

This is an appeal from a judgment rendered in favor of defendants in an action on a promissory note.

Action was filed on the note on December 6, 1934. A writ of attachment was issued and personal property was duly attached. An undertaking to release attachment was given and the property redelivered to defendants. On March 4, 1935, L. B. Bixler, doing business as Bixler Vapor Dry Cleaning Company, was adjudged a bankrupt. Defendants admit due execution and nonpayment of the promissory note. They defended the action solely upon the ground of the bankruptcy occurring within four months from the levy of the writ. The trustee in bankruptcy was not made a party to the action nor has he appeared in it.

[1] At the trial of the case, no facts being controverted, counsel for plaintiff moved the trial court for a qualified judgment against defendants with a perpetual stay of execution against their properties. Under such circumstances, it has been held that the entry of such a judgment is the right of a plaintiff so that he may proceed to collect from the bondsmen. Tormey v. Miller, 31 Cal.App. 469, 160 P. 858; Higgins v. Brainard, 214 Cal. 647, 8 P.(2d) 135. See, also, Pue v. Wheeler, 78 Mont. 516, 255 P. 1043; Wheeler v. Pue, 275 U.S. 483, 48 S. Ct. 19, 72 L.Ed. 385.

To escape the effect of these decisions, respondents point to an amendment to the Bankruptcy Act made by Congress in 1934 whereby there was interpolated into subdivision f of section 107 (title 11 U.S.C.A.) the provision that "any bond which may be given to dissolve any such lien so created" by levy of an attachment on the property of an insolvent within four months prior to the time of filing a petition in bankruptcy against him, "shall be deemed null and void in case he is adjudged a bankrupt." It seems evident that the general effect of the section and the interpretation put upon it by the courts was not changed by the amendment, except in so far as its scope was enlarged to include the invalidity of bonds given to release attachments, which was not theretofore included within its provisions.

[2] It seems to be thoroughly established by numerous decisions of the federal courts that the section confers no right on the bankrupt to assert the invalidity of an attachment lien, but vests that right solely in the trustee of the bankrupt estate. Connell v. Walker, 291 U.S. 1, 54 S.Ct. 257, 78 L. Ed. 613; W. F. Pigg & Son, Inc., v. United States (C.C.A.) 81 F.(2d) 334. These cases further hold that the bankrupt cannot take advantage of the provisions of this subdivision of the Bankruptcy Act as it was not enacted for his benefit but for the benefit of the trustee.

[3] The trial court did not find that respondents were insolvent at the time the attachment was levied. The record is barren of any evidence supporting such a finding had one been made. As was said in the case of In re Batiz (D.C.) 3 F.Supp. 93, 94:

> "If the bankrupt was insolvent when the levy under the attachment was made, the lien was void; if he was then solvent, the lien was valid. * * * In the instant case it was therefore the task of the trustee to show convincingly that the bankrupt was in fact insolvent when the attachment was placed on his goods some three weeks prior to the bankruptcy, and that the respondent's denial of such insolvency was no more than a sham. In the absence of such proof there was no jurisdiction to order the respondent to turn over the money collected under the attachment. The trustee's allegation of insolvency having been controverted by the respondent, it was error to issue the summary order without even requiring proof as to the financial condition of the bankrupt when the lien of the attachment fastened on his property."

Liberty National Bank v. Bear, 265 U.S. 365, 44 S.Ct. 499, 501, 68 L.Ed. 1057; Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 44 S.Ct. 396, 68 L.Ed. 770; Gratiot County State Bank v. Johnson, 249 U.S. 246, 39 S.Ct. 263, 63 L.Ed. 587.

[4] Respondents seek to escape the effect of this rule by urging that proof of insolvency in March, 1935, was evidence of insolvency when the attachment was levied in the preceding December. They cite Charlesworth v. Levy Meat Co. (C.C.A.) 73 F.(2d) 953, and In re Elmira Steel Co. (D.C.) 109 F. 456, in support of this argument. There is language in each decision supporting the theory they advance, but the facts in each

case would support the conclusion of insolvency for a considerable period before the petitions were filed which makes the statements upon which respondents rely unnecessary to support the conclusions reached in those cases.

This question has been squarely before the federal courts in cases where the argument advanced by respondents has been repudiated. In Liberty National Bank v. Bear, supra, in speaking of this section of the Bankruptcy Act, it was said:

"It applies only to liens obtained in legal proceedings against a person who was 'insolvent' when the lien was acquired. If the debtor was then solvent the lien is not invalidated although it was obtained within four months prior to the filing of the petition in bankruptcy. Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 44 S.Ct. 396, 68 L.Ed. 770. To invalidate the lien the person challenging it must show that the debtor was insolvent when it was obtained. Stone-Ordean-Wells Co. v. Mark, 227 F. 975, 978, 142 C.C.A. 433; Martin v. Oliver, 260 F. 89, 93, 171 C.C.A. 125; Simpson v. Van Etten (C.C.) 108 F. 199, 201; Keystone Brewing Co. v. Schermer, 241 Pa. 361, 365, 88 A. 657; Jackson v. Valley Tie Co., 108 Va. 714, 718, 62 S.E. 964; Newberry Shoe Co. v. Collier, 111 Va. 288, 290, 68 S.E. 974; Severin v. Robinson, 27 Ind.App. 55, 61, 60 N.E. 966. And see In re Richards, 96 F. 935, 37 C.C.A. 634; In re Chappell (D.C.) 113 F. 545; In re Community Stores (D.C.) 282 F. 328. Such insolvency must be both alleged and proved. Stone-Ordean-Wells Co. v. Mark, supra, [227 F. 975] page 978. * * * And, generally, an adjudication in bankruptcy in no way determines whether or not the debtor was insolvent at the time a lien was obtained through legal proceedings against him; there being no presumption arising from the adjudication that he was insolvent for any period before the petition in bankruptcy was filed. Keystone Brewing Co. v. Schermer, supra [241 Pa. 361], page 365, 88 A. 657; Jackson v. Valley Tie Co., supra, [108 Va. 714], page 719, 62 S.E. 964; Newberry Shoe Co. v. Collier, supra [111 Va. 288], page 291, 68 S.E. 974." See, also, J. S. & J. F. String, Inc., v. Birkhahn (C.C.A.) 30 F.(2d) 492.

Respondents urge that the bond given on release of the attachment is a forthcoming bond to which the rules here announced do not apply. In support of this argument they cite the case of Nicolai-Neppach Co. v. Smith (Or.) 58 P.(2d) 1016, 107 A.L.R. 1124. This case cannot be considered controlling in California as the contrary rule has been announced in the case of Rosenthal v. Perkins, 123 Cal. 240, 55 P. 804.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

---

20 Cal.App.2d 303

STEVENSON et al. v. ALTA BATES, Inc., et al.

Civ. 10238.

District Court of Appeal, First District, Division 2, California.

April 12, 1937.

Hearing Denied by Supreme Court June 10, 1937.

1. Appeal and error 🔑1170(7)

In action against hospital and nurse for negligence, permitting question on redirect examination of plaintiff's attending physician in the nature of cross-examination and impeachment as to whether he had plaintiff's consent to disclose anything to defendants' lawyer *held* not error resulting in miscarriage of justice, within Constitution, though it was not as claimed authorized by statute, and though instruction quoting provisions of statute as to testimony by physician or surgeon was not sufficiently specific to eliminate the error (Code Civ. Proc. § 1881, subd. 4; Gen.Laws 1931, Act 4807, § 14; Const. art. 6, § 4½).

2. Witnesses 🔑380(5)

In action against hospital and nurse for negligence in permitting patient to fall, it was not error to overrule objection to question asked plaintiff's physician on redirect examination, after he had testified on cross-examination that he approved of manner in which the nurses handled the case, whether he had not stated to a certain person that the nurses let the patient fall down, and were inexcusably careless, as there are exceptions to the rule that one may not impeach or cross-examine his own witness, and the sufficiency of the showing is addressed to the court's discretion.

3. Appeal and error 🔑971(6)

Ruling of trial court as to sufficiency of showing of hostility or surprise to permit cross-examination or impeachment of one's own witness will not be disturbed, except on a showing of abuse of discretion.

4. Hospitals 🔑8

In action against hospital and nurse for negligence in permitting patient to fall while teaching her to walk after a stroke of apoplexy with resulting paralysis, defendants were not entitled to an instruction that negligence could be proved only by competent expert evidence.

5. Hospitals 🔑8

Evidence of negligence of hospital and nurse in permitting patient to fall and sustain injuries while learning to walk after a stroke of apoplexy *held* to sustain verdict for the patient.

6. Hospitals 🔑8

In action against hospital and nurse for negligence in permitting patient to fall, verdict for plaintiff was implied finding against defendants' contention that fracture was spontaneous and not caused by the fall.

7. Appeal and error 🔑1004(1)

Court of review will not hold verdict for personal injuries excessive where it is not shown to be obviously so disproportionate to the injury proved as to justify the conclusion that it was not the result of the cool, dispassionate discretion of the jury.

◆

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Action by T. E. Stevenson and another against Alta Bates, Inc., and another. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Weinmann, Quayle & Berry, of Oakland, for appellants.

Elliott Johnson and W. I. Follett, both of Oakland, for respondents.

STURTEVANT, Justice.

This is an action to recover damages for personal injuries. The plaintiff Mrs. T. E. Stevenson suffered certain injuries while a patient in the Alta Bates Hospital and thereafter she and her husband commenced this action against the hospital and Miss Ruby Pike, one of the nurses assigned to her case. Mrs. Stevenson was at the time about fifty-six years of age and on August 20, 1934, she suffered a stroke of apoplexy. She was taken to the Alta Bates Hospital for treatment under the care of her own physician, Dr. D. Scott Fox. As a result of the attack, Mrs. Stevenson was paralyzed on the left side. The left leg and the left arm were for the time being wholly paralyzed. However, her case gradually improved and in the month of December, 1934, or the month of January, 1935, her physician undertook to teach her to walk. Miss Pike and Mrs. Swendson were assigned as nurses to carry out the instructions of the patient's doctor. On the 30th day of January, 1935, while the teaching was being conducted, Mrs. Stevenson fell and for injuries sustained in the fall she commenced this action against the hospital and the nurses above mentioned. Afterwards the action was dismissed as to Mrs. Swendson. The jury returned a verdict in favor of the plaintiffs against the other defendants in the sum of $8,000. The defendants made a motion for a new trial based on the statutory grounds, including among others, that the verdict was excessive. The trial court made an order that the motion would be denied if the plaintiffs agreed to accept $5,000 instead of $8,000, otherwise that the motion would be granted. The plaintiffs filed a remission of $3,000 and thereafter the defendants appealed.

[1] On the trial the plaintiffs called Dr. Fox as a witness and from him elicited evidence to the effect that he was and had been for fifteen years a physician and surgeon practicing his profession in Berkeley and was called by Mrs. Stevenson to treat her in August, 1935. He was then asked numerous questions and testified as to the condition of Mrs. Stevenson when he first called on her and the nature of the attack from which she was suffering. Having elicited those facts, counsel for the plaintiffs passed the witness for cross-examination. The cross-examination proceeded as follows: Counsel for the defendants at first addressed themselves to the subject-matter contained in the direct examination which we have endeavored to set forth above. Counsel then asked several questions apparently for the purpose of showing that the break of the left femur was what is termed as a spontaneous break and that it was not referable to anything that happened on January 30, 1935. Continuing counsel then propounded many questions regarding the method of treating one who has suffered from a cerebral hemorrhage and who has been paralyzed. Dr. Fox testified that the first step was to provide a period of rest so that the tissues can restore themselves as much as nature can restore them, and to obviate the possibility of increasing the hemorrhage. After that period of rest in bed, the program is to

get the patient up and start using the paralyzed member again. The procedure is very much the same as would be used in the case of a small child first learning to walk. Throughout the cross-examination no objection was made by the plaintiffs material to any point that is made on this appeal.

On redirect examination, in reply to questions propounded by the plaintiffs, Dr. Fox stated that after the fall he had consulted with the authorities of Alta Bates Hospital and that one of its attorneys had been in his office. Then the following proceedings occurred:

"Mr. Johnson: Did you have Mrs. Stevenson's consent to disclose anything to the lawyer?

"Mr. Berry: I object upon the ground that this is cross-examination of his own witness. * * * It is impeachment of his own witness.

"Mr. Johnson: Yes, it is.

"Mr. Berry: There is no law against nor any impropriety concerning interviewing any witness in any case. * * * The law on that, if your Honor please, is to the effect that when a patient files his suit for damages such act is a waiver of the confidential relationship * * * I object on the ground this is impeaching his own witness.

"The Court: Well, he admits that. Well, you may answer the question. A. I had no permission."

In their briefs the defendants repeat the contentions made in the trial court and claim that the trial court erred for the several reasons assigned in their objections. As appears from the record, it is admitted the question was in the nature of cross-examining and impeaching one's own witness. The defendants assert, therefore, the ruling was prejudicial error. That much of the contention of the defendants may not be sustained. The authorities are not in accord. But, in Commonwealth v. Reeves, 267 Pa. 361, 110 A. 158, on page 159, the Supreme Court of Pennsylvania had this to say: "The rule that the party calling a witness is not permitted to ask leading questions and is bound by his testimony is liberally construed in modern practice. Gantt v. Cox & Sons Co., 199 Pa. 208, 48 A. 992. It apparently proceeds upon the theory, as stated by text-writers, that a rigid adherence to the practice in ordinary cases would be mala fides to the tribunal, and the weight of authority is in favor of the rule that, where a party is surprised in the testimony of a witness by his unexpectedly turning hostile, counsel may exercise the right of cross-examination of the witness, or impeach his testimony by other witnesses. Such exceptions have been recognized in Pennsylvania and are permitted to prevent a failure of justice. Cowden v. Reynolds, 12 Serg. & R. 281; 1 Greenleaf on Evidence, § 444; Bank v. Davis, 6 Watts & S. 285; McNerney v. Reading City, 150 Pa. 611, 25 A. 57; Commonwealth v. Wickett, 20 Pa. Super. 350. Whether such practice will be permitted is within the sound discretion of the court, and its action will not be reviewed by this court unless there is an abuse of that discretion." The doctrine as stated by that court has been declared by many courts. See the Modern Law of Evidence, Chamberlayne, vol. 5, § 3744 and notes; State v. Wolfe, 109 W.Va. 590, 156 S.E. 56, 74 A.L.R. 1039 and notes. The question as to a showing of surprise rests in the sound discretion of the trial court. The statement of counsel that he has been taken by surprise has been accepted. Tacoma Ry. & Power Co. v. Hays (C.C.A.) 110 F. 496; Zipperlen v. Southern Pacific Co., 7 Cal.App. 206, 218, 93 P. 1049; People v. Marsiglia, 52 Cal.App. 385, 387, 198 P. 1007. The questions were allowed without making any showing. Schonfeld v. United States (C.C.A.) 277 F. 934; Thomasson v. State, 80 Ark. 364, 97 S.W. 297; Commonwealth v. Delfino, 259 Pa. 272, 102 A. 949; Southworth v. State, 52 Tex.Cr.R. 532, 109 S.W. 133. In criminal cases the district attorney usually has in court the depositions taken before the magistrate or the evidence taken before the grand jury. Testimony given in court at variance with the depositions, is, of course, some showing. Commonwealth v. Spardute, 278 Pa. 37, 122 A. 161; State v. Waldrop, 73 S.C. 60, 52 S.E. 793. In other cases refusal of permission to make a showing, or denial of privilege to ask impeaching questions after showing duly made, were upheld as being within the discretion of the trial court. Hickory v. United States, 151 U.S. 303, 14 S.Ct. 334, 38 L.Ed. 170; Appeal of Carpenter, 74 Conn. 431, 51 A. 126. However, the question as propounded implied an impropriety on the part of Dr. Fox in discussing the case with the defendants without permission of his patient. The plaintiffs contend that section 14 of Act 4807, Deering's General Laws 1931, authorized the question objected to. We find nothing in that section that gives the plaintiffs any support. The defendants contend that when the plaintiffs commenced this action they thereby consented that Dr. Fox might testify in the action (Code Civ.Proc. § 1881, subd. 4), and that such consent implied that the defendants might interview him before using him as a witness. Plaintiffs do not reply to that contention, but they call to our attention the fact that the trial court gave an instruction, acting upon the request of the defendants, which quoted the provisions of the statute just cited. Thereupon plaintiffs assert the error, if any, was cured. We cannot follow them. The instruction was not so specific as to eliminate the error. But, after an examination of the entire cause, this court is not of the opinion that the error complained of has resulted in a miscarriage of justice. Const. of Calif. art. 6, § 4½.

[2, 3] After numerous other questions had been propounded to Dr. Fox, the plaintiffs adverted to the doctor's testimony to the effect that he approved the manner in which Mrs. Swendson and Miss Pike handled the case. Then their counsel asked the doctor if, on the same day that the accident happened, he did not have a conversation with the plaintiff, Captain Stevenson, and did not state to the captain, "The nurses let your wife fall down and it was inexcusably careless." The defendants objected that the question was an attempt on the part of the plaintiffs to impeach their own witness, that it was cross-examination of their own witness, that no foundation had been laid showing hostility or surprise, and that it was grossly improper. The court overruled the objection and the witness answered, "I don't recall." As shown by the authorities cited above, there are exceptions to the rule and it is too broad to state that one may not impeach his own witness or that he may not cross-examine his own witness. They also show that the foundation showing hostility or surprise is addressed to the sound discretion of the trial court and the ruling of the latter will not be disturbed except on a showing of abuse. Later Captain Stevenson was called by the plaintiffs and he was asked what statement Dr. Fox had made to him. No objection to the question was made and Captain Stevenson stated that he had the conversation and Dr. Fox said, "He didn't see how they let her do it, or words to that effect, he don't see how they let her go down." It is clear that nothing is before us except the mere asking of the question propounded to Dr. Fox. The authorities agree that was not error. Melhuish v. Collier, 15 Ad. & El.N.S. 878, 117 Eng.Rep. 694.

[4] The defendants complain because the trial court refused an instruction which they had requested and which was to the effect that the negligence or nonnegligence of the defendants could be proved only by the testimony of competent expert evidence. Patterson v. Marcus, 203 Cal. 550, 265 P. 222. The plaintiffs do not question that rule but contend it applies only to such facts as are peculiarly within the knowledge of such professional experts and not to facts which may be ascertained by the ordinary use of the senses of a nonexpert. Barham v. Widing, 210 Cal. 206, 214, 291 P. 173. That contention, with reference to the facts of the instant case, we think is well founded.

[5] The defendants also claim there was no factual support for the verdict, however, we are unable to reach that conclusion. On January 30, 1935, Mrs. Stevenson had so far recovered that with assistance she could walk. With the assistance of one person and her cane she could stand. Indeed, with the assistance of one person and her cane she could walk short distances. In the morning of that day at about 9:30, Mrs. Swendson and Miss Pike had taken their patient to the sun room. They had stepped out of the elevator and were in the room. As they entered Mrs. Stevenson carried a substantial cane in her right hand. Mrs. Swendson was walking at her right side firmly holding her right arm. Miss Pike carried a blanket and was walking on Mrs. Stevenson's left side holding the patient's left arm which was resting in Miss Pike's right hand. Having entered the sun room, Miss Pike released her hand and stepped forward to prepare the chair in which the patient was to be seated. Although there was testimony that on other occasions, before releasing her hold on the patient, Miss Pike made statements to the effect that she was about to do so, on this particular occasion there was evidence that she made no statement regarding her intention of releasing her hold on the patient. There was evidence that immediately after Miss Pike so released her hand that Mrs. Stevenson began to totter or fall. Under these circumstances, we think it may not be said, as a matter of law, that there was no evidence of negligence and no basis on which the jury might have inferred negligence.

[6] The defendants' last point is that the verdict is excessive. In that connection they call to our attention that they introduced substantial evidence to the effect that Mrs. Stevenson's broken bone was not caused by the above-mentioned fall, but that it was a spontaneous fracture. True is is that they introduced such evidence and it is also true that the trial court instructed the jury on that issue. But the verdict of the jury is an implied finding against the defendants. The latter do not claim there was no conflict in the evidence. Therefore this court may not disturb the finding of the jury. After the fall, the broken bone was carefully treated and in due time it duly knitted. That normal healing was a fact on which the jury was entitled to, and we may assume did, base an inference that the break was not spontaneous.

[7] The defendants do not cite any portions of the record showing that the amount of the verdict, as modified, was obviously so disproportionate to the injury proved as to justify the conclusion that the verdict was not the result of the cool, dispassionate discretion of the jury. In the absence of that showing, a court of review will not hold a verdict excessive. Darling v. Pacific Electric Ry. Co., 197 Cal. 702, 715, 242 Pa. 703.

The judgment is affirmed.

We concur: NOURSE, P. J., SPENCE, J.

NATIONAL UNIVERSITY LIBRARY
3 1786 10046 8781

NATIONAL UNIVERSITY
LIBRARY SAN DIEGO

NON CIRCULATING